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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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AN
ANALYTICAL DIGEST

OF THE CASES PUBLISHED IN THE

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LAW JOURNAL REPORTS

AND

OTHER REPORTS

IN THE

COURTS OF COMMON LAW AND EQUITY,

And in Bankruptcy,

IN THE HOUSE OF LORDS, THE PRIVY COUNCIL,

THE ECCLESIASTICAL COURTS,

AND

AT NISI PRIUS,

FROM MICHAELMAS TERM 1850 TO TRINITY TERM 1855

INCLUSIVE.

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AND

GEORGE STEVENS ALLNUTT, Esq.

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Beav.	Beavan's Reports	Chancery.
Car. & K.	Carrington and Kirwan's Reports	{ Nisi Prius, Crown Cases, and Crown Cases re- served.
Com. B. Rep.	Common Bench Reports	Common Pleas.
Dears. C.C.	Dearsley's Crown Cases	Crown Cases reserved.
De Gex, M. & G.	{ De Gex, Macnaghten and Gordon's Re- ports	{ Chancery and Bankruptcy.
De Gex & S.	De Gex and Smale's Reports	Chancery.
Den. C.C.	Denison's Crown Cases	Crown Cases reserved.
Drew.	Drewry's Reports	Chancery.
E. & B.	Ellis and Blackburn's Reports	Queen's Bench.
Exch. Rep.	Exchequer Reports	Exchequer.
Hare	Hare's Reports	Chancery.
H.L. Cas.	House of Lords' Cases	House of Lords.
Kay	Kay's Reports	Chancery.
Kay & J.	Kay and Johnson's Reports	Chancery.
L. M. & P. P.C.	{ Lowndes, Maxwell and Pollock's Practice Cases	{ Queen's Bench, Common Pleas and Exchequer.
Law J. Dig.	Law Journal Digest.	
Law J. Rep. (N.S.) Chanc.	Law Journal Reports, New Series	Chancery.
Law J. Rep. (N.S.) Bankr.	_____	Bankruptcy.
Law J. Rep. (N.S.) Q.B.	_____	Queen's Bench.
Law J. Rep. (N.S.) C.P.	_____	Common Pleas.
Law J. Rep. (N.S.) Exch.	_____	Exchequer.
Law J. Rep. (N.S.) M.C.	_____	{ Magis- trates' Cases. } Queen's Bench, Common Pleas and Exchequer.
Law J. Stat.	Law Journal Statutes	Abridgment of Statutes.
Mac. & G.	Macnaghten and Gordon's Reports	Chancery.
Macq. H.L. Cas.	{ Macqueen's House of Lords' Cases (Scotch Appeals)	{ House of Lords.
Moore's In. App.	Moore's Indian Appeals	Privy Council.
Moore's P.C.	Moore's Privy Council Cases	Privy Council.
Q.B. Rep.	Queen's Bench Reports	Queen's Bench.
Rob. Ec. Rep.	Robertson's Ecclesiastical Reports	Ecclesiastical.
Sim. N.S.	Simon's Reports, New Series	Chancery.
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TABLE OF TITLES.

ABATEMENT.

OF ACTION.

- By Death of Parties*, 1
- By Death of Parties between Verdict and Judgment*, 1
- By Marriage*, 1
- By Bankruptcy and Insolvency*, 1

PLEAS IN.

- Nonjoinder and Misjoinder of Parties*, 1

ABDUCTION, 1

ACCORD AND SATISFACTION.

- WHAT AMOUNTS TO GENERALLY, 2
- EXECUTORY ACCORDS—PERFORMANCE, 2
- BY A STRANGER, 3
- PLEADINGS, 4

ACCOUNT.

- ACTION OF ACCOUNT, 4
- WHEN AN ACCOUNT WILL BE DECREED IN EQUITY.
 - In general*, 4
 - To clear an Estate*, 5
 - Destruction of Accounts*, 5

ACCOUNT STATED.

- WHAT AMOUNTS TO, 5
- BARON AND FEME, 6
- EXECUTORS, 6
- PLEADING.
 - Form of Count*, 7
 - General Issue*, 7

ACCOUNTANT GENERAL, 7

ACKNOWLEDGMENT.—See BARON AND FEME

—LIMITATIONS, STATUTE OF.

ACTION.

WHEN MAINTAINABLE.

- Irish and Scotch Judgments*, 7
- Foreign Judgments*, 8
- Colonial Judgments*, 8
- County Court Judgments*, 9
- Disobedience to Judge's Orders*, 9
- Former Recovery*, 9
- Another Suit pending*, 10
- Notwithstanding Statutable Remedy*, 10
- Suspension of Right of Action*, 11
- Malicious Acts and Legal Procedure*, 11
- Against Public Officer for Personal Injury*, 12
- Breach of Agreement to refer*, 12
- Debentures*, 12

CIRCUIITY OF ACTION, 12

NOTICE OF ACTION.

- To Judges and Officers of Inferior Courts*, 12
- To Magistrates*, 13
- To Revenue Officers*, 13
- Under Public Health Act*, 14
- Under Malicious Trespass Act*, 14
- Form and Service*, 14

FORM OF ACTION.

- Assumpsit or Case*, 14
- Assumpsit or Trespass*, 15
- Case or Covenant*, 15
- Case or Trespass*, 15

ACCUMULATION.—See THELLUSSON ACT.

ADMINISTRATION.—See EXECUTOR AND ADMINISTRATOR.

ADMINISTRATION OF ESTATE IN CHANCERY.

- WHAT DEBTS MAY BE CLAIMED, 15
- INTEREST ON DEBTS, 15
- MARSHALLING DEBTS, 15
- WHAT ARE LEGAL ASSETS, 16
- MARSHALLING ASSETS, 16
- PRACTICE, 17

ADMIRALTY, COURT OF, 17

- See Stat. 17 & 18 Vict. c. 78.—PROHIBITION
- SHIP AND SHIPPING.

ADVANCEMENT, 17

ADVOWSON, 17

AFFIDAVITS.—See PRACTICE, IN EQUITY.

- FORM OF, GENERALLY, 18
- ENTITLING, 18
- DEPONENT'S NAME AND ADDITION, 18
- SEVERAL DEPONENTS, 18
- ILLITERATE PERSONS, 18
- INTERLINEATIONS AND ERASURES, 18
- BEFORE WHOM SWORN.
 - In general*, 18
 - Abroad*, 18
- JURAT, 18
- FILING AND TAKING OFF THE FILE, 19
- WHEN RECEIVABLE, 19
- EXHIBITS, 19

ALDERMEN OF LONDON.—See JUSTICE OF THE PEACE.

ALE AND BEERHOUSES.

- LICENCE.
 - False Certificate to obtain*, 19
 - Removal of, by Certiorari*, 19
- KEEPING OPEN AT IMPROPER HOURS, 19
- GAMING, 20
- PENALTIES, TO WHOM PAYABLE, 20

ALIEN.

- WHO ARE ALIENS, 20
- PLEA OF ALIEN ENEMY, 20

AMBASSADOR, 20

AMENDMENT.

- MISJOINDER OF DEFENDANTS, 21
- PARTICULARS IN PLAINT IN COUNTY COURT, 21
- PLEADINGS FRAMED TO EMBARRASS, 21
- DECLARATIONS, 21

- RECORDS AFTER PLEA OF NUL TIEL RECORD, 21
 ENTRY OF VERDICTS AND JUDGMENTS, 21
 AFTER PAYMENT INTO COURT AND ACCEPT-
 ANCE BY PLAINTIFF, 21
 AT NISI PRIUS.
In general, 22
In Cases of Variance under 3 & 4 Will. 4.
c. 42, 22
 AFTER TRIAL AND BY THE COURT, 23
 ON TERMS, 23
 TO SAVE THE STATUTE OF LIMITATIONS, 23
 MANDAMUS, 23
 INDICTMENTS, 24
- ANIMALS.
 INFECTIOUS DISORDERS, 24
 DANGEROUS ANIMALS, 24
- ANNUITY.
 INDEMNITY.
When necessary, 25
Form and Requisites of the Memorial, 25
 WHEN ASSIGNABLE, 25
 PAYMENT, 25
 SETTING ASIDE, 25
 RIGHTS AND LIABILITIES OF THE ANNUITANT,
 25
- APOTHECARY.—See SURGEON AND APO-
 THECARY.
- APPEAL.—See BASTARDY—HIGHWAY—INFE-
 RIOR COURT—PARLIAMENT—POOR—SES-
 SIONS.
- APPEARANCE.—By Counsel and Attorney,
 see BARRISTER—And see PRACTICE.
- APPOINTMENT.—See POWER.
- APPORTIONMENT.
 UNDER STATS. 11 GEO. 2. C. 19. AND 4 & 5
 WILL. 4. C. 22
Tenant for Life, 26
Annuity, 26
Rents, 27
Salary for Services, 27
 OTHER CASES, 27
- APPRENTICE.
 CONTRACT OF APPRENTICESHIP, 27
 PARISH APPRENTICE.
Allowance by Justices, 27
Form of Indenture, 28
- ARBITRATION.
 AGREEMENTS TO REFER; EFFECT OF, 28
 SUBMISSION.
By Bankrupts, 29
Under Power of Attorney, 29
By Married Women, 29
Of Indictments, 29
By Compulsory Order of the Court or a Judge,
 29
Making the Submission a Rule of Court, 29
 ARBITRATOR.
Power and Duty generally, 30
Evidence and Witnesses, 31
Power over Costs, 31
- AWARD.
Form and Validity in general, 31
Partial Validity, 32
When sufficiently final and certain, 32
When sufficiently final and certain as to Costs, 33
Sufficiency of finding on several Issues, 33
- EXECUTION OF AWARD BY TWO OR MORE ARBI-
 TRATORS, 34
 ENLARGEMENT OF TIME FOR MAKING AWARD.
By the Arbitrator, 34
By the Court, 34
 REMITTING AWARD FOR AMENDMENT, 35
 SETTING ASIDE AWARD, 35
 REMEDIES FOR ENFORCING PERFORMANCE OF
 AWARD.
Action, 36
Signing Judgment, 36
Attachment, 36
Rule and Execution, 37
- COSTS.
In general, 37
Arbitrator's Charges, 37
Taxation of, 38
- ARREST.
 AFFIDAVIT OF CAUSE OF ACTION, 38
 UNDER ABSCONDING DEBTORS ARREST ACT, 38
 PRIVILEGE FROM, 38
 DISCHARGE FROM, 39
- ARSON, 39
- ARTICLES OF THE PEACE, 39
- ASSIGNMENT.
 PROPERTY ASSIGNABLE, 40
 WHAT AMOUNTS TO AN ASSIGNMENT, 41
 CONSTRUCTION OF, 41
- ASSIZES, 41
- ASSUMPSIT.
 WHEN MAINTAINABLE, 41
 CONSIDERATION TO SUPPORT THE PROMISE.
Sufficiency of, in general, 42
Forbearance, 43
Substitution of Separate for Joint Liability,
 43
- ATTACHMENT.
 FOR CONTEMPT OF PROCESS AND ORDERS, 43
 PRACTICE, AS TO AFFIDAVITS AND RULES, 44
 FOREIGN ATTACHMENT, 44
 OF DEBTS BY JUDGE'S ORDER, 45
- ATTAINDER, 45
- ATTORNEY AND SOLICITOR.
 ARTICLED CLERK.
Service under Articles, 46
Premium and Enrolment of Articles, 46
 ADMISSION AND RE-ADMISSION, 46
 CHANGE OF NAME ON THE ROLL, 46
 CERTIFICATE.
Renewal, 47
Effect of acting without, 47
 RIGHTS AND PRIVILEGES, 47
 DUTIES AND LIABILITIES.
In general, 47
Summary Jurisdiction over.
At Law.
Attachment, 48
Striking off the Roll, 48
In Equity.
Orders to pay over Money, 48
Striking off the Roll, 48
To conduct Suit to its Termination, 48
Cure of Client's Papers, 49
Negligence, 49
On Undertakings, 49
Expenses of executing Process, 50

- RETAINER AND AUTHORITY TO INSTITUTE PROCEEDINGS, 50
- CHANGE OF, 50
- DEALINGS WITH CLIENT, 50
- BILL OF COSTS.
- Delivery of*, 52
- Heading and Contents of*, 52
- Taxation of*.
- In general*, 53
- What Bills are taxable*, 55
- Order of course for*, under 6 & 7 Vict. c. 73, 55
- Upon special Circumstances after Expiration of a Year*, 56
- Upon special Circumstances after Payment*, 56
- Upon Terms*, 58
- Filing Certificates of Taxation*, 58
- Costs of Taxation*, 58
- Practice*, 58
- LIEN FOR COSTS, 58
- AUTREFOIS ACQUIT.—See PLEADING, IN CRIMINAL CASES.
- AUCTION AND AUCTIONEER.—See LICENCE—SALE.
- BAIL.
- DEPOSIT OF MONEY IN LIEU OF BAIL, 60
- BAIL IN ERROR, 60
- ON REMOVAL OF CAUSES BY HABEAS CORPUS, 60
- ON REVERSAL OF OUTLAWRY, 60
- IN CRIMINAL CASES, 60
- BAILMENT.—See FRIENDLY AND BENEFIT SOCIETIES.
- BANK OF ENGLAND.—Privileges of, see FRIENDLY AND BENEFIT SOCIETIES.
- BANKERS AND BANKING COMPANY.
- JOINT-STOCK BANKING COMPANY.
- Powers of Directors and Constitution of Deed of Settlement*, 61
- Liability of Members of the Company*.
- Husband for Wife's Shares*, 61
- Shares not transferred according to the Deed of Settlement*, 62
- Deceased Partner*, 62
- To Proceedings in Bankruptcy*, 62
- Liability of Executors for Calls*, 62
- Scire Facias*, 62
- Public Officer—Pleas in Actions by*, 63
- BANKERS.
- Powers, Liability, and Duty of*, 63
- Failure of*, 63
- BANKRUPTCY.
- JURISDICTION OF THE COURT OF BANKRUPTCY AND COMMISSIONERS, 64
- PERSONS LIABLE TO BE BANKRUPT, 64
- ACTION OF BANKRUPTCY.
- Fraudulent Execution*, 65
- Fraudulent Transfer*, 65
- Trader Debtor Summons*, 66
- PETITIONING CREDITOR.
- Who may be*, 67
- What Debts will support the Petition*, 67
- Proof of Debt, in Actions*, 68
- ADJUDICATION.
- Petition for*, 68
- Time for contesting*, 68
- Defective Proceedings*, 68
- Annuling*, 68
- PROOF OF DEBT.
- Annuity*, 69
- Covenant*, 69
- Promissory Note*, 70
- Judgment*, 70
- Award*, 70
- Calls*, 70
- Costs*, 70
- Contingent Debts and Liabilities*, 71
- By Partner*, 71
- By Savings Bank*, 71
- By Surety*, 72
- By Servant*, 72
- Priority*, 72
- Amount proveable*, 72
- Effect of*, 72
- MORTGAGES AND LIEN, 72
- ASSIGNEES.
- Official Assignee*, 73
- Removal of*, 74
- Rights and Liabilities*, 74
- What Property passes to*.
- In general*, 74
- Order and Disposition and reputed Ownership*, 75
- Actions and Suits*.
- When maintainable*, 77
- Damages*, 77
- Pleading and Evidence*, 77
- Allowance of Costs*, 77
- TRANSACTIONS PROTECTED BY STATUTE, 78
- WARRANTS OF ATTORNEY, JUDGES' ORDERS, AND EXECUTIONS, 78
- OF THE BANKRUPT.
- Surrender*, 79
- Examination*, 79
- Allowance to*, 79
- Arrest and Discharge*, 79
- ARRANGEMENT WITH CREDITORS.
- Under the Control of the Court*, 80
- By Deed*, 80
- CERTIFICATE OF CONFORMITY.
- Grant of, in general*, 81
- Opposing*, 82
- Form of*, 83
- Concealment of Property and withholding Information*, 83
- Gaming*, 83
- Conduct of Bankrupt as a Trader*, 83
- Effect of, as a Discharge*, 85
- Reference back by Court of Appeal*, 85
- Conditional Certificate*, 85
- PRACTICE IN GENERAL, 85
- INSPECTION OF DOCUMENTS, 85
- SOLICITOR, 85
- MESSENGER AND OTHER OFFICERS, 85
- COSTS IN, 85
- DIVIDENDS, 86
- BARON AND FEME.
- HUSBAND.
- Rights of, in Wife's Property*, 87
- Right to Custody of Wife*, 88
- Liability for Wife's Funeral and Necessaries*, 88
- Liability for Wife's Interest in Shares*, 88
- Liability for Wife's fraudulent Misrepresentations*, 88

- Property, and Settlement thereof*, 88
WIFE.
Rights and Privileges, 88
Property, and Settlement thereof, 88
Consent, 92
SEPARATE ESTATE.
Power over and Disposition of, 92
Liability in respect of, 93
SEPARATION DEEDS, 93
ACTIONS AND SUITS.
Actions, when maintainable alone or jointly, 94
Suits, 94
Pleadings and Evidence, 95
BARRISTER, 96
BASTARDY.
PROOF OF ILLEGITIMACY, 96
ORDER OF AFFILIATION.
Jurisdiction to make the Order.
On Soldiers, 97
On Application of Married Woman, 97
Service of Summons, 97
Form and Sufficiency of the Order, 97
Enforcing the Order, 98
NOTICE OF APPEAL, 98
NOTICE OF RECOGNIZANCE, 98
BEER AND BEERHOUSE.—See **ALE AND BEERHOUSES.**
BENEFIT BUILDING SOCIETIES.—See **FRIENDLY AND BENEFIT SOCIETIES.**
BETTING HOUSES.—See **GAMING.**
BIGAMY, 98
BILL OF EXCEPTIONS.—See **PRACTICE.**
BILLS OF EXCHANGE AND PROMISSORY NOTES.
FORM AND OPERATION.
Acknowledgment only, 99
Certainty as to when and to whom payable, 99
Imperfect Instrument—no Drawer, 99
Joint or several, 100
Bill or Note, 100
STAMP.
On re-issue, 100
Foreign or Inland, 100
ALTERATION.
When material, 100
Operating as a Discharge of Liability, 100
ACCEPTANCE.
What amounts to, 101
In blank, 101
Payable at Banker's, 101
Revocation or Cancellation.—See **DISCHARGE FROM LIABILITY ON.**
Evidence of, 101
TRANSFER.
In general, 102
Indorsement in blank, 102
Restricted Indorsement, 102
Without Indorsement, 102
Delivery for Special Purpose, 102
After Maturity, 102
ACCOMMODATION BILLS, 102
DISCHARGE FROM LIABILITY ON.
By Payment, 103
By cancelling Acceptance, 103
By giving Time, 104
RETIRING BILLS, 104
CONSIDERATION, 104
PAYMENT, 105
PROTEST FOR NON-PAYMENT, 106
NOTICE OF DISHONOUR.
Form and Requisites, 106
By Party having no Knowledge of the Dishonour, 106
At what Place, 106
Within what Time, 106
Waiver, 106
ACTIONS AND SUITS.
When Bill or Note lost or destroyed, 107
Rate of Interest recoverable, 107
Parties, 107
Staying Proceedings, 107
Pleadings, 107
Evidence to vary Terms of Bill, 108
SALE OF BILLS, 108
CHEQUES AND LETTERS OF CREDIT, 108
BILLS OF SALE, 109
BOND.
CONSTRUCTION AND OPERATION.
Joint and several Bond, 110
Merger of Simple Contract Debt, 110
Forfeiture, 110
LIABILITY OF OBLIGOR.
On Collector's Bond, 111
On Indemnity Bond, 111
When affected or discharged by Change of Circumstances or Parties, 111
When discharged by Payment, 113
Discharge of, by Operation of the Statute of Limitations, 114
RELEASE, 115
ACTION ON.
Payment into Court, 115
Pleas, 115
Signing Judgment for want of Plea, 115
BOUNDARIES.—See **COMMISSION TO ASCERTAIN BOUNDARIES.**
BRIDGE.
LIABILITY OF COUNTY TO REPAIR, 116
BUILDING ACT.—See **METROPOLITAN BUILDING ACT.**
BUILDING SOCIETY.—See **FRIENDLY AND BENEFIT SOCIETIES.**
BURIAL.
RIGHT OF BURIAL, 116
BURIAL FEES, 116
RATE FOR ENLARGING BURIAL GROUND, 117
CAB.—See **HACKNEY CARRIAGE.**
CANAL AND CANAL COMPANY.
RIGHTS AND LIABILITIES OF THE COMPANY, 117
COMPENSATION FOR DAMAGE, 118
CAPIAS.—See **ARREST—EXECUTION—SHERIFF.**
CARRIER.
COMMON CARRIERS.
Who are, 119
Beyond the Realm, 119
DUTY AND LIABILITY OF CARRIERS.
As regards Passengers, 119
In general, 119
Personal Injury, 119
As regards Passengers' Luggage, 120

- In respect of the Conveyance of Goods, &c.*
In general, 121
Under Notice or Special Contract, 121
Declaration of Nature and Value, 123
 CHARGES FOR CARRIAGE OF GOODS, 123
 ACTIONS, 126
 DAMAGES RECOVERABLE, 126
- CASE.—See ACTION—ANIMALS—DISTRESS—
 FALSE REPRESENTATION—HACKNEY CAR-
 RIAGE—MASTER AND SERVANT—MINE—
 NEGLIGENCE—NUISANCE—PATENT—SHE-
 RIFF—SLANDER.
- CEMETERY.—See BURIAL.
- CERTIORARI.
 WHEN IT LIES.
For Removal of Causes from Inferior Courts,
 126
For Removal of Indictments, 127
Though taken away by Statute, 127
For Removal of Convictions and Depositions, 127
 SERVICE OF NOTICE, 128
 RETURN OF WRIT, 128
 PROCEDENDO, 129
- CHARITY.
 COMMISSIONERS, 129
 CHARITABLE TRUSTS ACT, 129
 SUPERSTITIOUS USES, 129
 CONSTRUCTION OF INSTRUMENT CREATING IT,
 131
 DEVISE AND BEQUEST TO—VALIDITY OF, 131
 ADMINISTRATION.
Scheme, 132
Trustees.
Controul over, 133
Appointment of New Trustees, 134
Estates, 135
 JURISDICTION OVER.
Of the Court of Chancery.
In general, 136
Under 8 & 9 Vict. c. 70, 136
On Petition, 136
Of the Visitor, 136
 PLEADING AND PRACTICE, 137
 COSTS, 137
- CHEQUE.—See BILLS AND NOTES.
- CHILDREN.—See ABDUCTION—CONCEALMENT
 OF BIRTH—INFANT—Statute 16 & 17 Vict.
 c. 30. as to assaults upon children.
- CHURCH.
 CHURCHYARD AND CONSECRATED GROUND, 138
 PEWS, 138
- CHURCHWARDENS AND OVERSEERS.
 ELECTION AND APPOINTMENT, 139
 DUTIES AND LIABILITIES, 139
- CLERGY.
 DISCIPLINE, 140
 NON-RESIDENCE, 140
 TRADING, 141
 DILAPIDATIONS, 141
 BENEFICES.
Union of, 141
Charging, 142
 CURATE, 143
- CLERK OF THE PEACE.—See SESSIONS.
- CLUB AND CLUBHOUSES, 143
 Digest, 1850—1855.
- COALS, 143
- COIN, 144
- COLONY.—See Stats. 15 & 16 Vict. c. 39—18
 & 19 Vict. cc. 54, 55, 56, 91. And see *The*
Bank of Australasia v. Nias, title ACTION,
 When maintainable, *Colonial Judgments*, 8.
- COMMISSION TO ASCERTAIN BOUN-
 DARIES, 144
- COMMITMENT.—See INFERIOR COURT—IN-
 SOLVENT—JUSTICE OF PEACE.
- COMMON.
 CLAIM TO, AND RIGHTS OF COMMONERS, 145
 ENCROACHMENTS, 145
- COMPANY.
 1.—RAILWAY AND OTHER INCOR-
 PORATED COMPANIES, 147
 2.—JOINT-STOCK COMPANIES, 169
 3.—DISSOLUTION AND WINDING UP
 OF COMPANIES, 173
 4.—EXECUTION AGAINST SHARE-
 HOLDERS, 191
 1.—RAILWAY AND OTHER INCORPO-
 RATED COMPANIES.
 STATUTES, CONSTRUCTION OF, 147
 CHARTER OF INCORPORATION, 148
 REGISTRATION OF, [see *post*, 3.—When and to
 what Companies the Winding-up Acts will be
 applied, *Railway Companies*, 175]
 SHARES.
Register of Shareholders, 149
Transfer.
In general, 149
Compelling Registration of, 150
Forfeiture, 150
 DIVIDENDS, 150
 CALLS.
Form and Validity, in general, 150
Who liable, in general, 151
Infants, 151
Trustees, 151
Power to make, 152
Actions for.
Limitation of Time for suing, 152
Declaration, 152
 POWERS, DUTIES AND LIABILITIES OF COM-
 PANIES.
As to Shareholders generally, 152
As to other Persons generally, 153
Appropriation of Funds, 153
Compliance with deposited Plans, 154
Making and completing the Line, 154
Making and maintaining Bye-laws, 156
On opening the Line, 157
Covenant to compensate for Lands, 157
Making and enforcing Bye-laws, 157
Distraining Uncertificated Engines, 158
Amalgamation, 158
Acts of Servants, 159
Contracts generally, 160
Traffic and Toll Agreements, 163
Leasing and working Contracts, 165
 POWERS, DUTIES AND LIABILITIES OF
 DIRECTORS, 166
 LIABILITY OF PROVISIONAL COMMITTEE-MEN.
For Deposit, 167
Upon Insufficiency of Funds, 168

For Contribution, 168
 BORROWING POWERS, 168
 2.—JOINT-STOCK COMPANIES.

REGISTRATION.

When necessary, 169
Provisional Registration, 170
Complete Registration, 170
Deed of Settlement, 170
Certificate of, 170

DIRECTORS.

Power to contract, 170
Rights and Liabilities, 171

SHARES.

Certificate of Proprietorship, 171
Sale of, 172
Transfer of, 172

INVESTMENT OF MONEY PAID INTO COURT, 172

APPROPRIATION OF FUNDS, 172

DIVIDENDS, 173

3.—DISSOLUTION AND WINDING UP OF COMPANIES.

WHEN AND TO WHAT COMPANIES THE WINDING UP ACTS WILL BE APPLIED.

In general, 173
Railway Companies, 173
Clubs, 174
Loan Societies, 174
Pending Suit for winding up, 174

ORDER FOR WINDING UP.

On whose Petition made, 174
Effect of, 174

INTERIM MANAGER, 174

OFFICIAL MANAGER, 174

FUNDS.

Misapplication of, 175
Distribution of, 175

COMPROMISE, 175

ACTIONS AND SUITS AGAINST THE COMPANY OR CONTRIBUTORIES, 176

CLAIMS.

In general, 176
Advances by Directors, 177
Solicitors' Bills, 177
Salaries, 177
Costs of obtaining Act of Parliament, 177
Policies, 177
Advertisements, 178
When barred by Statute of Limitations, 178

CONTRIBUTORIES.

Who may be.
Directors, 178
Provisional Committee-men, 178
Devises, 180
Trustees, 180
Executors, 181
Bankrupts, 182
Allottee of Shares, 182
Persons accepting Shares, 183
Former Holder of Shares, 183
Adventurer who had relinquished his Shares, 183
Where Shares have been forfeited, 183
Transferor under invalid Transfer of Shares, 184
Transferee of Shares, 184
Where Object of Company altered, 185
Extent of Liability of.
In general, 185

Debts and Losses before Transfer, 186
Borrowed Money and Advances, 187
Guarantee to return Deposit, 187
Costs of Winding up, 188

Rights of, 188

CALLS, 188

ACTIONS, 188

PRACTICE.

Winding up in Chambers, 189
Advertisement of Petition, 189
Rehearing, 189
Appeal, 189
Order to stay Proceedings, 189
Discharging the Order, 190
Form of Master's Certificate, 190
Reviewing Master's Report, 190
Proof of Debt, 191
Service of Notice, 191
Costs of Witnesses, 191

4.—EXECUTION AGAINST SHARE-HOLDERS.

RAILWAY AND OTHER INCORPORATED COMPANIES, 191

JOINT-STOCK COMPANIES, 192

LIMITED LIABILITY COMPANIES, 192

COMPANIES CLAUSES ACT, 192

COMPENSATION.—See LANDS CLAUSES CONSOLIDATION ACT—MASTER AND SERVANT—NEGLIGENCE.

CONCEALING THE BIRTH OF DEAD CHILDREN, 192

CONFLICT OF LAWS, 192

CONSIGNEE, 193

CONSPIRACY.

THE OFFENCE, 193

INDICTMENT, 193

CONSUL.—Power to administer oaths and do notarial acts, see 18 & 19 Vict. c. 42.

CONTRACT.

WHAT AMOUNTS TO A CONTRACT, 194

WHEN VALID OR ILLEGAL.

In general, 195

As being contrary to Statute or Public Policy, 196

In Restraint of Trade or Residence, 196

CONSTRUCTION OF CONTRACTS.

In general, 197

Joint or several, 198

As to the Description of Article contracted for, 198

As to particular Words.

"Say not less than," 198

"About," 198

When Performance dependent on certain Events, 198

Breach before Performance, 198

Condition precedent, 199

To procure Employment, 199

To execute Railway Works, 199

RESCISSION AND ABANDONMENT, 200

CONTRACTOR.—See MASTER AND SERVANT.

CONTRIBUTORY.—See COMPANY.

CONVENTIONS BETWEEN NATIONS, 200

CONVERSION.

WHAT AMOUNTS TO A CONVERSION, 201

- EXTENT OF ITS OPERATION, 201
 MONEY TREATED AS REAL ESTATE.
 Consols, 201
 Trust Monies, 201
 ELECTION, WHAT AMOUNTS TO, 202
 CONVICTION.—See JUSTICE OF THE PEACE—SESSIONS.
 COPYHOLD.
 CUSTOM.
 Free Bench, 202
 Heriot Custom, 202
 SURRENDER AND ADMITTANCE.
 Sufficiency and Legality of the Surrender, 203
 Trustees, 203
 By Way of Recovery, 204
 Mandamus to admit, 204
 Devise by unadmitted Surrenderer, 204
 FEES AND FINES, 204
 FORFEITURE, 204
 ENFRANCHISEMENT—COSTS OF PETITION FOR INVESTMENT, 205
 COPYRIGHT.
 BOOKS AND OTHER PUBLICATIONS.
 Title to the Copyright, 205
 Actions and Suits for Infringement of Copyright.
 When maintainable, 206
 Undertaking as to Damages, 207
 DRAMATIC AND MUSICAL PIECES, 207
 PRINTS AND ENGRAVINGS, 207
 DESIGNS, 207
 ENTRY ON REGISTER AT STATIONERS' HALL, 208
 ASSIGNMENT OF, 208
 CORONER.—Compensation to, see COUNTY.
 CORPORATION.—See COMPANY—MUNICIPAL CORPORATION.
 COSTS, AT LAW.
 IN GENERAL.
 By and against the Crown, 209
 Concurrent Proceedings at Law and in Equity, 209
 Motions and Rules.
 Generally, 209
 Rule making Judge's Order a Rule of Court, 209
 Meaning of Words "On Payment of Costs" in Judge's Order, 209
 Appeal from County Court, 209
 Actions by Paupers, 210
 "Full Costs" under 17 Car. 2. c. 17, 210
 Special Case without Pleadings, 210
 Demurrer, 210
 PLAINTIFF'S RIGHT TO.
 Certificate.
 To deprive Plaintiff of Costs, 210
 To give Plaintiff his Costs, 210
 Recovery by Verdict of less than 40s., 210
 Operation of the County Court Acts and other Inferior Courts, 211
 In general, 211
 Where Title in Question, 211
 Balance of Account [see Amount recovered, 212]
 Judgment by Default, 211
 Several Plaintiffs and Defendants [see Concurrent Jurisdiction—Residence and Place of Business, 211]
 Concurrent Jurisdiction—Residence and Place of Business, 211
 Officers of the Court, 212
 Tender and Payment into Court [see Amount recovered, 212]
 Amount recovered, 212
 Judge's Order for Costs.
 In what Cases, 213
 Whether discretionary or imperative on Judge to grant, 213
 Application for, 213
 Appeal from Judge's Decision, 214
 Suggestion on the Roll.
 When necessary, 214
 Affidavit; necessary Averments, 214
 DEFENDANT'S RIGHT TO.
 For not proceeding to Trial, 214
 On Discontinuance, 214
 Feigned Issue, 215
 SECURITY FOR COSTS.
 Application for, 215
 Discharge of Order for, 215
 Residence Abroad, 215
 Foreigners, 215
 Insolvents, 215
 Felons under Sentence, 215
 TAXATION OF COSTS.
 Notice of Taxation, 215
 Scale of Taxation, 215
 Costs in the Cause, 216
 Several Issues, 216
 Several Defendants, 217
 Two Plaintiffs suing by one Attorney, 217
 Evidence occasioned by Negligence, 217
 Search for Documents, 217
 Notice of Action, and to admit, 217
 Witnesses, 217
 COSTS, IN EQUITY.
 IN GENERAL, 218
 PETITION, 219
 RE-HEARING AND APPEAL, 219
 MOTIONS, 220
 CASE SENT TO A COURT OF LAW, 220
 ADMINISTRATION SUITS, 220
 CREDITORS' SUITS, 200
 TRUSTEES AND EXECUTORS, 220
 HEIR-AT-LAW, 221
 NEXT FRIEND, 221
 SETTING OFF, 221
 UPON WHAT FUND CHARGEABLE, 221
 TAXATION OF COSTS.
 Practice as to, in general, 222
 What Charges are allowed, 222
 Solicitors' Bills, 222
 RATE OF—PAUPER SUITS, 222
 SECURITY FOR COSTS, 222
 COSTS, IN CRIMINAL CASES.
 COSTS OF PROSECUTION FOR ASSAULT, 223
 CRIMINAL INFORMATION, 223
 TAXATION, 223
 AFTER REMOVAL BY CERTIORARI, 223
 PRACTICE, 224
 COUNSEL.—See BARRISTER—COSTS.
 COUNTY.—DIVISION OF COUNTIES INTO DISTRICTS, 224
 COUNTY COURT.—See COSTS—INFERIOR COURT.

COVENANT.

- COVENANTS BY IMPLICATION, 224
- VOLUNTARY COVENANTS, 225
- DEPENDENT OR INDEPENDENT COVENANTS, 227
- COVENANTS RUNNING WITH THE LAND, 227
- DISCHARGE OF COVENANTS, 227
- CONSTRUCTION OF COVENANTS, 227
 - In general*, 227
 - In Restraint of Trade*, 228
 - Auxiliary Covenant*, 228
 - As to Notice*, 229
- ACTIONS AND SUITS, 229

CRIMINAL LAW.—See the various titles of offences. Also titles COSTS, IN CRIMINAL CASES — INDICTMENT — JUSTICES OF THE PEACE—PLEADING—PRACTICE—SESSIONS.

CROWN.

- Rights of*, 229

CROWN CASES RESERVED, 229

CURTESY, 229

CUSTOM AND PRESCRIPTION, 230

CUSTOM OF LONDON, 230

CUSTOMS.—See REVENUE.

DAMAGES.

- FOR WHAT RECOVERABLE.
 - In general*, 230
 - Loss of Time and Profits*, 230
 - Mental Suffering*, 230
 - Legal and actual Injury*, 230
- SUBSTANTIAL OR NOMINAL, 231
- CRITERION AND MEASURE OF, 231
- DUTY OF JUDGE TO DIRECT JURY AS TO.—See CARRIER, Damages recoverable, 126—PRACTICE, New Trial.
- PLEADING.
 - Plea in Reduction of Damages*, 231
 - Plea to the Damages only*, 231

DEATH, 232

DEBENTURES, 232

DEBT, ACTION OF, 233

DEBTOR AND CREDITOR.

- OF THE CREDITOR.
 - Rights in general*, 233
 - Suspension of Right to sue*, 234
 - Substitution of Separate for Joint Liability*, 234

ASSIGNMENT OF DEBTS, 234

DISCHARGE OF DEBTS, 233

COMPOSITION DEEDS.

- When and how far binding*, 235
- What passes under*, 236
- What Creditors entitled to the Benefit of*, 236
- Order of Payment of Debts*, 237
- Judgment Creditor*, 237
- Favouring particular Creditors, and special Provisions*, 237

PROCEEDINGS UNDER THE ARRANGEMENT ACT, 7 & 8 VICT. c. 70, 238

DEED.

- EXECUTION, 238
- VALIDITY.
 - As against the Crown*, 238
 - Evidence to impeach*, 239
 - Fraudulent Conveyance*, 239
 - Voluntary Conveyance*, 240

- Erasure and Alteration*, 240
- Confirmation of voidable Deed*, 240

CONSTRUCTION AND OPERATION.

- In general*, 240
- Date of Execution*, 241
- What Property passes*, 241
- Merger*, 241
- Recitals*, 241
- Habendum*, 241
- Schedules*, 242

REGISTRATION.—See JUDGMENT.

REVOCATION, 242

SETTING ASIDE AND REFORMING FOR MISTAKE, 243

DETINUE.

WHEN MAINTAINABLE, 243.

IN WHAT COURT, 244

PAYMENT INTO COURT IN, 244

PLEADING, 244

EXECUTION, 244

DEVISE.

CONSTRUCTION OF, IN GENERAL.

- General Limitations of Estates*, 244
- Condition precedent or subsequent*, 246
- Period of Vesting*, 247
- Meaning of Words*.
 - "Issue," 247
 - "Children," 247
 - "Posthumous Child," 247
 - "Survivors," 248
 - "Male Heir," 248
 - "Lawful Heir," 248
 - "Living at Death," 248
 - "Estate," 248
 - "Accruing Share and Interest," 248
 - "By Way of Jointure," 249
- Who take as Devisees*, 249

WHAT PROPERTY PASSES BY THE DEVISE.

- In general*, 249
- Trust Estate*, 251
- Leaseholds*, 251
- Legal Estate in Mortgage*, 251
- Tithes*, 252
- Money to be laid out on Estate*, 252
- Chose in Action*, 252
- Arrears of Interest*, 252
- After-acquired Property*, 252

PARTICULAR LIMITATIONS.

- Legal or Equitable*, 253
- Trust or Beneficial*, 253
- Joint Tenancy or Tenancy in Common*, 254
- Fee Simple*, 254
- Estate Tail*, 256
- Estate for Life*, 257
- Vested or Contingent Estate*, 258
- Absolute Gift of Personality*, 260
- Estate per Autre Vie*, 260
- Executory Devise*, 260

RIGHT OF PRE-EMPTION, 261

CHARGES, 261

DEVISE FOR PAYMENT OF DEBTS, 262

TRUST FOR SALE, 263

VOID DEVISE.

- Remoteness*, 264
- Lapse*, 265

DISEASES PREVENTION, 265

DISENTAILING DEED, 265

DISTRESS.

- WHO MAY DISTRAIN, 266
- WHAT GOODS ARE DISTRAINABLE, AND FOR WHAT THEY MAY BE DISTRAINED, 266
- GOODS FRAUDULENTLY REMOVED, 266
- SUSPENSION OF RIGHT TO DISTRAIN, 267
- WHEN THE DISTRESS OPERATES AS A DISCHARGE, 267
- NOTICE AND ABANDONMENT OF DISTRESS, 267
- WRONGFUL AND EXCESSIVE DISTRESS, 268
- POUND BREACH, 268

DIVORCE, 268**DOMICIL, 269****DONATIO MORTIS CAUSA, 270****DOWER.**

- ELECTION, 271
- WHEN BARRED, 271
- PRIORITY, 272
- PROCEEDINGS FOR, 272

EASEMENT.

- WHAT IS AN EASEMENT, 272
- HOW THE RIGHT MAY BE ACQUIRED, 272
- PLEADING AND EVIDENCE, 273

EAST INDIA COMPANY, 273**ECCLESIASTICAL COURT, 273****ECCLESIASTICAL LAW.—See BURIAL—CLERGY—CHURCH—CHURCHWARDENS AND OVERSEERS.****EJECTMENT.****WHEN MAINTAINABLE.**

- Lessor's Title.*
 - In general,* 274
 - Must be a Legal Title,* 274
 - Tenants in Common,* 275
 - Assigns,* 275
 - Notice to quit and Demand of Possession,* 275
 - Satisfied Terms,* 275
- PRACTICE AND PROCEDURE.**
- Appearance and Defence,* 275
 - Service,* 276
 - Particulars of Premises,* 276
 - Lease or Agreement under 1 Geo. 4. c. 87,* 276
 - Judgment,* 276
 - Execution—Writ of Restitution,* 276

MESNE PROFITS, 276**PLEADING, 277****COSTS, 277****ELEGIT, 277****EMBEZZLEMENT.**

- THE OFFENCE, IN GENERAL, 277
- RECEIPT BY SERVANT FOR AND ON ACCOUNT OF HIS MASTER, 278
- VENUE, 278
- EVIDENCE, 278

ERROR.

- WHERE IT LIES, 279
 - QUASHING AND SETTING ASIDE, 279
- PRACTICE AND PROCEDURE.**
- In general,* 279
 - Error to the House of Lords,* 279
 - Special Case,* 279
 - Bill of Exceptions,* 280
 - COSTS, 280

ESCHEAT, 280**ESTOPPEL, 280****EVIDENCE.****GENERAL POINTS.**

- Evidence made admissible by Consent,* 283
 - Judicial Notice,* 283
 - Admissibility of Unstamped Documents,* 283
 - Admissibility of Particulars,* 284
 - Proof of Handwriting,* 284
 - Admissibility of Conduct,* 284
 - Contradiction of Witness,* 284
 - Proof of Deed by Admission of Party executing,* 284
 - Recitals in Acts of Parliament,* 284
- RECORDS AND JUDICIAL DOCUMENTS, 284**
- PUBLIC DOCUMENTS, 285**
- PRIVATE WRITINGS.**

- Entries of Deceased Persons,* 285
- Survey and Presentment of Jury,* 286
- Deeds,* 286
- Agreements,* 286
- Maps,* 286
- Accounts,* 286
- Letters,* 287
- Bills of Costs,* 287

SECONDARY EVIDENCE.

- In general,* 287
- Notice to produce,* 288
- Search,* 288

PAROL EVIDENCE, 288**HEARSAY EVIDENCE AND DECLARATIONS, 289****PRIVILEGED COMMUNICATIONS, 289****PRESUMPTIVE EVIDENCE, 290****ADMISSIONS.**

- By Pleading,* 291
- Under Notice to admit,* 291
- By Conduct of Party,* 291

CONFESSIONS, 291**DEPOSITIONS.**

- Caption,* 292
- Examination of Witness on,* 292
- Admissibility of, in Absence of Witness,* 292

PRIOR CONVICTIONS, 292**PRACTICE, IN EQUITY, 292****EXCHANGE, 294****EXECUTION.**

- ON A SUNDAY AND COLLUSIVELY, 295
- WHERE THE SUM RECOVERED DOES NOT EXCEED 20*l.*, 295
- UPON RULES AND ORDERS, 295
- WHERE JUDGMENT REGISTERED, 295
- WHAT PROPERTY MAY BE TAKEN, 295
- ELEGIT, 295
- SETTING ASIDE, 295

EXECUTOR AND ADMINISTRATOR.**GRANT OF ADMINISTRATION.**

- By what Jurisdiction,* 296
 - Operation of; Title by Relation,* 296
- RIGHTS, DUTIES AND DISABILITIES.**
- Indemnity against Covenants,* 296
 - Setting off Debts due to the Deceased,* 296
 - Carrying on Trade,* 296
 - Selling and pledging Estate,* 297
 - Right of Action, when suspended,* 298

LIABILITIES.

- For Testator's Debts,* 298
- As to Policies,* 298
- As to Shares in Public Companies,* 298

- As to Value of Testator's Property*, 299
For Default in selling Estate, 299
For Sums improperly dealt with, 299
For Interest, 299
To Costs, 299
To Co-executors in respect of Assets, 300
- ASSETS.
- What constitute*, 300
Admission of, 300
Administration of, 300
- EXECUTOR DE SON TORT, 301
- ACTIONS AND SUITS BY AND AGAINST.
- What Actions maintainable*, 301
When maintainable, 301
Devastavit, 302
Pleas, 302
Set-off, 302
Practice, 302
- EXTENT, 302
- FACTOR.—See PRINCIPAL AND AGENT.
- FACTORY, 303
- FALSE IMPRISONMENT.
- ACTION FOR; EVIDENCE AND DAMAGES, 303
 JUSTIFICATION OF THE IMPRISONMENT.
Defence of Possession, 303
To preserve the Peace, 304
Suspicion of Felony, 305
- FALSE PRETENCES.
- WHAT CONSTITUTES THE OFFENCE, 305
 INDICTMENT FOR, 306
 EVIDENCE, 306
- FALSE REPRESENTATIONS.—See FRAUD AND MISREPRESENTATION.
- FAMILY COMPROMISE, 307
- FEIGNED ISSUE, 307
- FIERI FACIAS.—See EXECUTION.
- FINE AND RECOVERY.
- VALIDITY OF, IN GENERAL, 307
 PARTIES' NAMES, 307
 DISPENSATION WITH HUSBAND'S CON-
 CURRENCE, 307
 ENLARGING TIME FOR RETURNING THE COM-
 MISSION, 307
 CERTIFICATE, 307
 AFFIDAVIT, 308
- FISH AND FISHERY, 308
- FIXTURES.—See LANDLORD AND TENANT—
TROVER.
- FOREIGN JUDGMENT, 308
- FOREIGN LAW, 308
- FOREIGN PRINCE, 309
- FORFEITURE.—See LEASE.
- FORGERY, AND UTTERING FORGED
INSTRUMENTS.
- BILLS AND NOTES, 309
 WARRANTS, ORDERS AND REQUESTS, 310
 TRANSFERS OF SHARES, 310
 UTTERING, 310
- FORMEDON.—See LIMITATIONS, STATUTE OF.
- FRAUD AND MISREPRESENTATION.
- ACTION FOR, 310
 RELIEF AGAINST, IN EQUITY, 311
- FRAUDS, STATUTE OF.
- OPERATION OF THE STATUTE, 313
 CONTRACTS REQUIRED TO BE IN WRITING.
Concerning an Interest in Land, 313
For Leases—Surrender by Operation of Law,
 314
To answer for Debt, &c. of Another, 314
Part Performance, 314
- WHAT A SUFFICIENT NOTE OR MEMORANDUM
IN WRITING, 315
- ACCEPTANCE AND RECEIPT, 316
- PLEAS, 317
- FRIENDLY AND BENEFIT SOCIETIES.
- ILLEGAL SOCIETIES, 317
 RIGHTS AND POWERS OF THE TRUSTEES, 317
 RULES AND REGULATIONS, 317
 LOANS AND ADVANCES, 318
 JURISDICTION OF JUSTICES, 318
 ARBITRATION, 319
 QUALIFICATION OF MEMBER TO VOTE FOR
 MEMBER OF PARLIAMENT, 320
 DUTIES AND LIABILITIES OF OFFICERS, 320
 DISSOLUTION OF, 321
- GAME, 321
- GAMING.
- WHAT IS, 321
 WAGERING CONTRACTS, 322
 SECURITIES, 322
 RACING, 322
 ACTION FOR MONEY LOST BY GAMING, 322
- GAS.—See LARCENY—LIMITATIONS, STATUTE OF.
- GOODS SOLD AND DELIVERED.—See
SALE.
- GRAMMAR SCHOOL.—See SCHOOL.
- GRANT.—See WATERCOURSE—WAY.
- GUARANTIE.
- CONSTRUCTION OF, 323
 CONSIDERATION—STATEMENT OF, AND EVIDENCE
 TO EXPLAIN, 323
 LIABILITY ON.
Extent of, 323
Discharge of, 324
- GUARDIAN.—See INFANT—PARENT AND
CHILD.
- HABEAS CORPUS.
- WHEN AND BY WHOM GRANTED, 324
 APPLICATION FOR AND RETURN TO THE WRIT,
 324
- HACKNEY CARRIAGE, 325
- HARBOUR, 325
- HEALTH.—See title PUBLIC HEALTH.
- HIGHWAY.
- WHAT IS A HIGHWAY, 326
 DEDICATION, 326
 SURVEYOR, 326
 LIABILITY TO REPAIR.
In general, 326
Order of Justices to indict, 327
Indictment, 327
Evidence of, 327
Costs, 328
 OBSTRUCTION OF, 328
 DIVERTING AND STOPPING UP, 328

HUSBAND AND WIFE.—See BARON AND FEME.

IMPRISONMENT.—See ARREST—FALSE IMPRISONMENT—INSOLVENT—PRISONER.

INCLOSURE.

CONSTRUCTION OF ACTS, 329

ALLOTMENT.

To the Lord of the Manor, 329

To Commoners, 329

In Lieu of Fife, 330

AWARD OF COMMISSIONER, 330

INCUMBERED ESTATES ACT, 330

INDECENT EXPOSURE, 330

INDEMNITY, 330

INDIA.—See EAST INDIA COMPANY.

INDICTMENT.

INDICTABLE OFFENCE, 331

VENUE, 331

JOINDER OF OFFENCES, 331

REFERENCE TO FORMER COUNT, 332

PARTIES' NAMES—IDEM SONANS, 332

INFANT.

MAINTENANCE, 332

ADVANCEMENT, 332

SALE AND DISPOSITION OF PROPERTY, 333

LIABILITY.

Contracts, 333

Torts, 333

GUARDIAN.

Appointment of, 333

Payments and Allowance to, 334

Liability of, 334

CUSTODY OF, 334

WARD OF COURT, 334

ACTIONS, 335

INFERIOR COURT.

COUNTY COURTS.

Jurisdiction, in general, 336

Judges.

Liabilities, 336

Rights, Powers, and Duties, 337

Bailiffs, 337

Causes of Action within the Jurisdiction.

In general, 337

Residence of Parties, 338

Abandonment of Excess, 338

Where Title to Lands or Hereditaments comes in question, 338

Bills of Exchange, 339

Arbitrations, 340

Legacies, 340

Though Cause of Action not arise in the District, 340

Interpleader Summons, 340

Recovery of Possession of Tenements, 341

Practice.

Form of Complaint, 341

Particulars, 342

Jury, 342

Nonsuit, 343

New Trial, 343

Judgment Summons and Commitment for

Non-payment of Debt, 343

Appeal from.

In what Cases it lies, 344

Statement of Case and Practice thereon, 345

Costs on, 345

BOROUGH COURTS, 346

COURT BARON, 346

STANNARIES, 347

REMOVAL OF CAUSES, 347

INFORMATION, 347

INJUNCTION.

SPECIAL INJUNCTION.

When granted or decreed.

In general, 347

To protect a Legal Right, 350

Trade Marks, 350

Nuisances, 350

When refused or dissolved, 351

TO RESTRAIN PROCEEDINGS AT LAW.

Before Verdict, 354

To stay Judgment or Execution, 354

BREACH OF, 354

PRACTICE.

Application for Injunction, 355

Dissolving the Injunction, 355

Amendment of Bill, 355

Costs, 355

INNKEEPER, 356

INQUISITION.—See FALSE IMPRISONMENT.

INQUIRY, WRIT OF, 356

INSOLVENT.

PROTECTION FROM PROCESS.

Petition, 356

Final Order, Effect of.

In general, 357

Where Debts are omitted or erroneously stated in the Schedule, 357

Fraudulent Conveyances, 357

Bills of Sale, 357

DISCHARGE.

Construction and Operation of Statutes, 357

When entitled to, 358

Effect of upon the vesting Order, 358

Operation of.

In general, 359

As regards Debts in Schedule, 359

Bills of Exchange, 359

On other Property, 359

Agreement to withdraw Opposition to Discharge, 359

Pleadings and Evidence, 359

Warrant of Attorney to Official Assignee, 360

ASSIGNEES.

Liability of, 360

Powers and Rights of, over Debtor's Property, 361

Actions by and against, 361

RIGHT OF INSOLVENT TO SUE, 361

RIGHTS OF SCHEDULED CREDITORS, 361

INSPECTION.—See EVIDENCE—PRODUCTION AND INSPECTION OF DOCUMENTS.

INSURANCE.

INSURANCE ON LIVES.

Nature of the Contract, 361

By one Office in Another, 362

Absence of Interest, 362

Misrepresentations and untrue Answers, 363

Variation of Policy from Agreement, 363

Right to the Policy, 363

- Assignment of the Policy*, 363
Forfeiture of the Policy, 364
- INSURANCE AGAINST FIRE.
The Contract, Construction of, 364
Insurable Interest, 364
Alteration of the Risk, 364
Who entitled to Benefit of the Insurance, 365
- INSURANCE AGAINST ACCIDENTS, 365
- INSURANCE AGAINST LOSS FROM WANT OF INTEGRITY, 365
- INTEREST.
 WHEN RECOVERABLE GENERALLY, 365
 DEMAND OF, 365
 RATE OF, 365
 INDORSEMENT OF CLAIM FOR ON WRIT OF SUMMONS, 366
- INTERPLEADER ISSUE, 366
- INTERPLEADER SUIT, 366
- ISLE OF MAN, 367
- JEWS.—See OATH.
- JOINT-STOCK COMPANY.—See BANKERS AND BANKING COMPANY—COMPANY—MINE.
- JUDGE—DISQUALIFICATION ON GROUND OF INTEREST, 367
- JUDGMENT.
 FOR WANT OF A PLEA, 368
 FOR NOT PROCEEDING TO TRIAL.
As in Case of Nonsuit.
Since the Common Law Procedure Act, 368
Before Issue joined, 368
After Peremptory Undertaking to try, 368
In other Cases, 368
After Notice to try, 369
- AFTER VERDICT.
Signing and entering up, 369
Nunc pro Tunc, 369
Arrest of, 370
Non obstante Verdicto, 370
- REVIVAL OF, 370
- RELEASE OF, 370
- CHARGE ON LANDS, UNDER 1 & 2 VICT. c. 110.
Upon what Property charged, 370
Entry of Satisfaction, 370
Registration of, 370
Priority of, 371
- PROCEEDINGS UPON, IN EQUITY, 371
- RIGHTS OF JUDGMENT CREDITORS, 372
- JURISDICTION.
 OF COURTS, 372
 OF JUDGES, 373
- JURY.
 COMMON JURIES.
Summoning, 373
Qualification, 373
- SPECIAL JURIES.
Obtaining, 373
Nominating and reducing, 374
Obtained for Delay, 374
Certificate for, 374
Other Matters, 374
- CHALLENGE, 374
- DISCHARGE, 375
- IN COUNTY COURTS, 375
- JUSTICE OF THE PEACE.
 QUALIFICATION, 375
- JURISDICTION AND DUTY.
Generally, 375
Informations, Summonses and Warrants, 377
In Cases of Breach of the Peace, 377
Where Justices are interested, 377
- RULE REQUIRING JUSTICES TO ACT, 378
- ORDERS, 378
- CONVICTIONS AND COMMITMENTS, 379
- JUVENILE OFFENDERS, 381
- LABOURER.—See MASTER AND SERVANT.
- LANCASTER, 381
- LANDLORD AND TENANT.
 OF THE TENANCY.
From Year to Year, 381
At Will, 382
Determination.
Surrender, 382
Notice to quit, 383
Forfeiture, for insufficient Distress, 383
- CONTRACTS BETWEEN.
For Repairs, 383
Relating to Husbandry, 386
For Quiet Enjoyment, 387
To give up Possession, 387
- OF THE RENT.
Contracts, 387
Payment, 388
Apportionment, 388
Arrears, 388
Action for, 388
- TENANT'S POWER TO DISPUTE LANDLORD'S TITLE, 388
- ATTORNMNT, 388
- LANDS CLAUSES CONSOLIDATION ACT.
 PURCHASE BY AGREEMENT, 389
- COMPULSORY POWERS OF PURCHASE.
When they may be exercised, 389
What is an Exercise of, 390
Taking part of a Manufactory, 390
- NOTICE TO TAKE LANDS, 391
- ASSESSMENT OF COMPENSATION.
By Arbitration.
In what Cases, 392
Appointment of Arbitrator, 392
Declaration by Arbitrator and Umpire, 392
Form and Validity of the Award, 392
Costs of Arbitration, 393
Taking up the Award, 393
By a Jury.
Warrant to summon Jury, 393
Qualification of Jury, 394
For what Compensation may be assessed, 394
Costs of the Inquiry, 396
- ENTRY ON LANDS, 396
- APPLICATION OF COMPENSATION.
In Discharge of Incumbrances, 397
Purchase of other Lands, 397
Where Land is in Lease, 398
Payment of small Sums to Parties, 398
Investment of Compensation, 398
Costs of Deposit and Investment of Compensation, 399
- CONVEYANCE OF COPYHOLD LANDS, 400
- LAND-TAX.
 WHAT PROPERTY MAY BE ASSESSED TO THE LAND-TAX, 401

- MODE OF ASSESSING PARISHES AND PLACES
WITHIN DIVISIONS, 401
- REDEMPTION OF, 401
- LARCENY.**
WHAT CONSTITUTES THE OFFENCE.
As regards the taking.
In general, 402
Ownership, 403
Lost Property, 403
Presumption from Possession, 403
Husband and Wife, 404
Determination of Bailment, 404
As regards the Thing taken, 404
FROM A COUNTING HOUSE, 404
BY CLERKS AND SERVANTS, 404
BY POST OFFICE SERVANTS, 404
FROM THE PERSON, 405
INDICTMENT, 405
EVIDENCE, 405
- LEASE.**
CONTRACTS FOR LEASES, 405
LEASE OR AGREEMENT, 406
FOR LIVES, 406
OPTION OF TAKING, 406
COUNTERPART, 406
CONSTRUCTION AND OPERATION.
Premises, Fixtures, &c., 406
Covenants, 407
By Way of Estoppel, 407
Non-Execution by Lessor, 407
ASSIGNMENT, 407
SURRENDER, 408
FORFEITURE, 408
RENEWAL, 408
REFORMING, 409
- LEGACY.**
CONSTRUCTION OF.
In general, 410
Gift by Implication, 410
Meaning of Words, 411
WHO TAKE AS LEGATEES.
Generally, 411
Description of Legatee, 411
Gift to a Class.
When and how ascertained, 413
Distribution per Capita or per Stirpes, 413
Next-of-Kin, 414
Representatives, 415
Family, 415
Offspring, 415
Issue, 415
Children, 416
Illegitimate Children, 416
WHAT PROPERTY PASSES.
In general, 417
Monies, 418
Dividends, 418
WHAT INTEREST VESTS.
Absolute, 418
For Life, 419
Joint Tenancy, 420
Trust or Beneficial, 420
Separate Use, 421
ON WHAT PROPERTY CHARGEABLE, 421
VESTED OR CONTINGENT.
In general, 422
Period of Vesting, 423
DIGEST, 1850—1855.
- SPECIFIC AND DEMONSTRATIVE, 428
CUMULATIVE OR SUBSTITUTIONAL, 428
CONDITIONAL, 429
SURVIVORSHIP, 430
PAYMENT OF, 430
INVESTMENT, 431
ABATEMENT, 431
ADEMPTION AND SATISFACTION, 431
REMISSION OF DEBT, 432
ASSENT OF EXECUTOR, 432
FORFEITURE, 433
VOID, 433
REVOKED, 434
LAPSED, 434
RESIDUE, 435
INTEREST ON, 435
ANNUITY, 435
RECOVERY OF LEGACY, 438
RIGHTS AND LIABILITIES OF THE LEGATEE,
438
LEGACY DUTY, 439
- LIBEL.**
PUBLICATION.
Generally, 442
In Newspapers, 442
Reports of Judicial Proceedings, 442
Privileged Communications, 442
Justification of, 442
ACTION FOR.
Pleadings, 443
Evidence of Authorship, 443
SCIRE FACIAS ON RECOGNIZANCES, 443
INFORMATION FOR, 443
- LICENCE,** 444
- LIEN,** 444
- LIGHT,** 444
- LIMITATIONS, STATUTE OF.**
WHEN AVAILABLE.
In general, 445
In Actions and Suits relating to Real Property
under 3 & 4 Will. 4. c. 27, 445
In Actions on Specialties under 3 & 4 Will. 4.
c. 42, 448
Local and Personal Statutes under 5 & 6 Vict.
c. 97, 448
COMPUTATION OF TIME, 448
HOW THE STATUTE MAY BE BARRED.
Promise or Acknowledgment, 449
Part Payment, 451
PLEADING AND EVIDENCE, 453
- LOTTERY,** 454
- LUNATIC.**
CONTRACTS AND CONVEYANCES, 454
PROPERTY OF, 454
ALLOWANCE OUT OF ESTATE OF, 455
MAINTENANCE.
Application of Property for, 455
Justices' Orders for Maintenance and Settle-
ment.
Under 8 & 9 Vict. c. 126, 455
Costs and Expenses, 456
Prior Order unappealed against, 457
Appeal against, 457
COMMITTEE, 457
CUSTODY AND CONTRoul, 458

- COMMISSION.
Leave to attend Execution of, 458
Superseding, 458
Costs of, 458
PRACTICE, 459
COUNTY ASYLUM, 459
- MALICE.
MALICIOUS PROSECUTION, 460
MALICIOUS LEGAL PROCEEDINGS, 460
- MANDAMUS.
WHEN IT LIES.
In general, 461
To Quarter Sessions, 462
To Inferior Courts, 462
To the Lords of the Treasury, 462
To Public Companies and Commissioners, 462
WRIT OF.
Service, 462
Pleadings, 462
COSTS, 463
- MANSLAUGHTER, 464
- MARKET.—See RATE; Poor-rate.
- MARRIAGE.
VALIDITY OF, 464
CONTRACT, 464
SETTLEMENT, 464
PROOF OF, 465
BREACH OF PROMISE OF, 465
- MASTER AND SERVANT.
CONTRACT OF HIRING.
Construction of, in general, 465
Validity of, 466
Yearly Hiring, 466
Determination of, 466
Wages contrary to the Truck Act, 466
RIGHTS OF MASTER AND SERVANT, 466
LIABILITY OF THE MASTER.
For Acts of Servants, 467
For Acts of Contractors, 468
For Injuries to Servants, 469
JURISDICTION OF JUSTICES.
Over Servants absenting themselves or neglecting their Work, 469
To enforce Payment of Wages, 470
- MERGER, 470
- METROPOLITAN BUILDING ACT, 471
- METROPOLITAN PAVING ACT, 471
- METROPOLITAN POLICE MAGISTRATES.
See JUSTICE OF THE PEACE.
- MINE.
GRANT, 471
LEASE, 472
COMPANY.
Powers, Duties and Liabilities, in general, 472
Liability for Injuries in Working Mines, 473
COST-BOOK SYSTEM, 474
SHARES, SALE AND TRANSFER OF, 474
INSPECTION OF, 474
- MISDEMEANOUR, 474
- MONEY COUNTS.
MONEY PAID, 474
MONEY LENT, 475
MONEY HAD AND RECEIVED, 475
- MORTGAGE.
CONSTITUTION AND EXTENT OF, 476
EQUITABLE MORTGAGE, 478
STATUTORY MORTGAGE, 479
MORTGAGOR AND MORTGAGEE — RELATIVE POSITION OF, 479
RIGHTS OF THE MORTGAGOR, 480
RIGHTS OF THE MORTGAGEE AND OTHERS CLAIMING UNDER HIM, 480
POSSESSION OF MORTGAGEE, 481
LOST TITLE DEEDS, 481
PRIORITY, 482
TACKING, 483
LIABILITY TO DEBTS, 483
POWER OF SALE, 484
ASSIGNMENT, 484
RIGHT TO REDEEM, 484
REDEMPTION AND RECONVEYANCE, 484
FORECLOSURE, 485
RECEIVER, 487
ACCOUNTS, 488
INTEREST, 488
COSTS, 488
PRACTICE, 489
- MORTMAIN, 489
- MUNICIPAL CORPORATION.
CHARTER OF INCORPORATION, 492
QUALIFICATION OF MEMBERS, 493
ELECTION OF MEMBERS.
Aldermen and Councillors, 494
Voting Papers, 494
BURGESS ROLL.
Who to be on, 495
Revising, 495
Signing, 495
APPOINTMENT, SALARY, AND DUTIES OF OFFICERS, 496
COMPENSATION TO OFFICERS, 497
TOWN CLERK, 497
BYE-LAWS, 497
BOROUGH FUND, 497
- MURDER, 498
- MUTINY, 498
- NEGLIGENCE, 498
- NEWSPAPER.—See STAMP.
- NEW TRIAL.—See PRACTICE.
- NIGHT POACHING, 499
- NOTICE.—See ACTION—EVIDENCE—LANDLORD AND TENANT—PRACTICE.
- NUISANCE.
ACTION FOR, 499
ABATEMENT OF, 500
OUTLAWRY, 500
OATH, 500
PARENT AND CHILD, 501
- PARLIAMENT.
1.—RIGHTS AND PRIVILEGES OF MEMBERS, 503
2.—PRACTICE OF, 503
3.—REGISTRATION OF VOTERS.
QUALIFICATION.
Personal Disqualification, 503
Conveyances to multiply Votes, 503
In Cities and Boroughs, 503
In Counties, 504

NOTICE OF CLAIM, 505
 NOTICE OF OBJECTION, 505
 PRACTICE.

Signing Case, 505
Delivery of Paper Books, 505
Hearing, 505

4.—BRIBERY, 505

PARTIES TO ACTIONS.

PLAINTIFFS, 506
 DEFENDANTS, 507

PARTIES TO SUITS.

NECESSARY OR PROPER PARTIES.

Generally, 507
Administration Suits, 509
Creditors' Suits, 509
Mortgage Suits, 510

JOINDER OF, 510

OBJECTIONS AS TO, 511

PARTITION, 511

PARTNERS.

PARTNERSHIP.

Constitution and Effect of
In general, 512

Participation of Profits, 513

Dissolution of.

What amounts to, 513

Notice to dissolve, 513

Cause of dissolution, 513

Agreement to dissolve, 513

Construction and Validity of Contracts creating
it, 513

Change of Firm, 514

Effect of Death of Partner, 515

Accounts, 515

RIGHTS AND LIABILITIES, 516

POWERS AND DISABILITIES, 517

ACTIONS AND SUITS, 517

PATENT.

WHEN VALID OR VOID.

Novelty in the Invention, 518

New Combination, 519

Entering Caveat against, 519

Error in Enrolment, 519

SPECIFICATION.

Validity and Construction of, 519

Enrolment and Disclaimer, 520

EXTENSION OF LETTERS PATENT, 520

REPEALING LETTERS PATENT, 522

ASSIGNMENT AND LICENCE TO USE, 523

INFRINGEMENT.

What amounts to, 523

Injunction and Account, 523

Action for.

Pleas, 524

Particulars of Breaches and Objections, 525

Inspection of Machinery, 525

PAUPER.—See COSTS, PRACTICE.

PAVING.—See METROPOLITAN PAVING ACT
 —WAY.

PAWNBROKER, 525

PAYMENT.

WHAT AMOUNTS TO, 526

PLEA OF PAYMENT.

When necessary, 526

Distributive Plea, 526

Proof of, 526

OF MONEY INTO COURT, 527

PERJURY AND FALSE DECLARATIONS.

THE OFFENCE OF PERJURY, 528

INDICTMENT FOR, 528

COSTS OF PROSECUTOR, 528

EVIDENCE, 528

FALSE DECLARATIONS, 529

PLEADING, AT LAW.

IN GENERAL.

Entitling, 529

Immaterial Statements, 529

Certainty, 529

Conditions Precedent, 529

Profert and Oyer, 530

Colour, 530

Videlicet, 530

DECLARATIONS.

Commencement and Conclusion, 530

Common Forms, 531

Joinder of Counts, 531

Exceptions and Conditions, 531

In Inferior Courts, 531

PLEAS AND SUBSEQUENT PLEADINGS.

Pleas amounting to the General Issue, 531

General Issue by Statute, 532

De Injurid, 532

Traverses.

General, 533

Special, 533

Nul Tiel Record, 533

EQUITABLE DEFENCES, 534

PLEADING, IN EQUITY.

BILL.

Statements and Charges in, 534

Multifariousness, 534

Of Revivor, 534

DEMURRER, 534

ANSWER, 537

PLEA, 538

PLEADING, IN CRIMINAL CASES, 539

POISON, 539

POLICE OFFICER.

APPOINTMENT, 539

POWER AND DUTY, 539

SUPERANNUATION, 540

POOR.

POOR LAW COMMISSIONERS—POWERS AND
 ORDERS OF, 540

GUARDIANS.

Contracts by, 542

Authority to Solicitor to sue, 542

Clerk to, 542

Expenses of Re-investment, under 5 & 6 Will. 4.
c. 69, 542

AUDITORS, 543

OVERSEERS AND COLLECTORS, 543

RELIEF, 544

SETTLEMENT.

By Birth and Parentage.

Bastards, 544

Children under Sixteen, 544

Irish and Scotch Children, 544

By renting a Tenement or paying Rates and
Taxes, 544

- By Estate*, 545
- By serving an Office*, 546
- By Apprenticeship*, 546
- Five Years' Residence*, 546
- Relief*, 548
- Effect of prior Order of Removal*, 548
- ORDER OF REMOVAL.
 - Illegal Removal by Parish Officers*, 548
 - Appeal against the Order.*
 - When it lies*, 549
 - At what Sessions*, 549
 - Notice of Appeal*, 549
 - Grounds of Appeal*, 549
 - Notice of Abandonment*, 549
 - Evidence*, 550
 - Costs*, 550
- POWER.
 - CONSTRUCTION OF POWERS IN GENERAL, 550
 - EXECUTION OF, GENERALLY.
 - Form of Execution and Attestation*, 552
 - Order of informal Execution*, 552
 - POWER OF APPOINTMENT.
 - Construction of*, 553
 - Execution of*, 553
 - Revocation and Relinquishment of*, 558
 - TO GRANT LEASES, 559
 - OF SALE, 560
- PRACTICE, AT LAW.
 - RULES AND ORDERS FOR REGULATING, 560
 - PROCESS.
 - Writ of Summons.*
 - Duration and Renewal of the Writ*, 561
 - Special Indorsement of Particulars of Claim*, 561
 - Service of.*
 - On Public Bodies*, 561
 - On Lunatics*, 562
 - On Prisoners*, 562
 - When Defendant without the Jurisdiction*, 562
 - Writ of Distringas or Order in lieu of*, 562
- APPEARANCE, 562
- PARTICULARS.
 - Where there are Special Counts*, 563
 - Giving Credits in*, 563
 - Delivery of, with Declaration*, 563
 - Further and better Particulars*, 563
- DECLARATION.
 - Time within which Plaintiffs must declare*, 563
 - Notice to declare*, 563
 - Rule for Time to declare*, 563
- PLEA.
 - Time to plead*, 564
 - Issuable Pleas*, 564
 - Several Pleas*, 564
 - Framed to embarrass*, 564
 - Puis Darrein Continuance*, 565
 - Withdrawing Plea*, 565
- PLEADING AND DEMURRING TOGETHER, 565
- DEMURRER, 565
- SUGGESTION OF NEW MATTER, 565
- TRIAL.
 - Notice of Trial.*
 - After Injunction*, 565
 - Short Notice*, 565
 - Issue, Nisi Prius Record, and Entry of Causes*, 566
 - View and Inspection*, 566
 - By Proviso*, 566
- Proceedings at the Trial.*
 - Conduct of the Cause*, 566
 - Right to begin*, 566
 - Addressing the Jury*, 566
 - Withdrawing the Record*, 566
 - Adjourning or Postponing*, 566
 - Verdict and Nonsuit*, 566
- NEW TRIAL, 567
- SPECIAL CASES, 568
- IRREGULARITY, 568
- STAYING AND SETTING ASIDE PROCEEDINGS, 568
- MASTERS OF THE COURTS, 569
- CONSOLIDATION OF ACTIONS, 569
- DISCONTINUANCE, 569
- NOTICE TO PROCEED, 569
- ENTRY OF SATISFACTION ON THE ROLL, 569
- MOTIONS AND RULES, 569
- JUDGES' ORDERS, 570
- INTERROGATORIES, 571
- SETTING OFF COSTS, 571
- PRACTICE, IN EQUITY.
 - BILLS.
 - In general*, 572
 - Of Discovery*, 572
 - Of Revivor*, 573
 - Supplemental and of Review*, 573
 - Service of Copy of*, 573
 - Amendment of*, 573
 - Taking pro Confesso*, 574
 - Dismissal of*, 575
 - CLAIMS, 576
 - SUIT BY SUMMONS, 578
 - PROCESS, 578
 - CONTEMPT, 578
 - APPEARANCE, 579
 - ANSWERS.
 - In general*, 579
 - Supplemental*, 580
 - DISCLAIMER, 580
 - DEMURRER, 580
 - REPLICATION, 581
 - TRAVERSING NOTE, 581
 - PETITIONS, 581
 - MOTIONS.
 - In general*, 581
 - Notice of Motion*, 581
 - For Decree*, 582
 - PRODUCTION OF DOCUMENTS.
 - General Points*, 582
 - Privileged Documents*, 584
 - Original Will*, 585
 - INTERROGATORIES, 585
 - AFFIDAVITS, 585
 - SPECIAL EXAMINERS, 586
 - EXAMINATION OF WITNESSES, 587
 - EXAMINATION OF PARTIES, 588
 - EVIDENCE BEFORE THE MASTER, 589
 - CONDUCT OF SUIT, 589
 - ATTENDING PROCEEDINGS, 589
 - STAYING PROCEEDINGS, 589
 - SUPPLEMENTAL STATEMENT, 590
 - SETTING DOWN AND HEARING CAUSE, 590
 - INTERLOCUTORY APPLICATIONS, 590
 - ASSISTANCE OF COMMON LAW JUDGE, 590
 - ORDERS AND DECREES.
 - In general*, 590
 - Order to revive*, 591
 - Supplemental Order*, 592.

- ISSUE AND CASE SENT TO LAW, 592
 REFERENCES.
 Generally, and Proceedings, 593
 To Chambers, 594
 Adjournment from Chambers, 594
 Report, 594
 EXCEPTIONS.
 Answers, 595
 Reports and Certificates, 595
 Scandal and Impertinence, 595
 SALES AND PURCHASES UNDER DIRECTION OF THE COURT.
 Conduct of Sale, 595
 Opening Biddings, 595
 Purchaser, 595
 Conveyancing Counsel, 595
 PAYMENT INTO COURT, 596
 PAYMENT OUT OF COURT, 597
 RECEIVER, 598
 INFANTS' SUITS, 599
 GUARDIAN AD LITEM, 600
 NEXT FRIEND, 600
 PAUPER, 601
 CREDITORS' SUITS, 601
 SPECIAL CASE, 601
 JURISDICTION OF THE COURT, 601
 REHEARING, 602
 APPEAL, 602
 ENROLMENT OF DECREE, 603
 RECTIFYING PROCEEDINGS, 603
 ABATEMENT, 603
 REPRESENTATION OF DECEASED DEFENDANT, 603
 INVESTMENT, 604
 TRANSFER OF STOCK, 604
 INCOME PENDENTE LITE, 604
 UNDERTAKING, 604
 COPIES OF PLEADINGS, 605
 IMPERTINENCE, 605
 IRREGULARITY, 605
 ATTACHMENT, 605
 SEQUESTRATION, 605
 PRACTICE, IN CRIMINAL CASES, 605
 PRE-EMPTION, 606
 PRESCRIPTION.—See CUSTOM AND PRESCRIPTION—EASEMENT—LIGHT.
 PRESUMPTION, 606
 PRINCIPAL AND AGENT.
 OF THE AGENCY IN GENERAL, 606
 RIGHTS AND LIABILITIES OF THE PRINCIPAL.
 In general, 606
 On Contracts of the Agent, 607
 RIGHTS, DUTIES AND LIABILITIES OF THE AGENT.
 As regards his Principal, in general, 608
 Right to Commission, 608
 Duty to account, 608
 As regards third Persons, 609
 POWER AND AUTHORITY OF THE AGENT, 610
 PRINCIPAL AND SURETY, 611
 PRISONER, 614
 PRODUCTION AND INSPECTION OF DOCUMENTS.
 IN GENERAL, 614
 IRRESPECTIVE OF THE STATUTE, 616
 UNDER THE STATUTE, 616
 PROHIBITION, 618
 PUBLIC ENTERTAINMENTS, 619
 PUBLIC HEALTH, 619
 QUO WARRANTO, 620
 RAILWAY, 620
 RAMSGATE HARBOUR DUTIES, 626
 RAPE, 626
 RATE.
 POOR RATE.
 Validity of, 626
 Persons and Property rateable.
 In general, 627
 Exemption under 6 & 7 Vict. c. 36, 631
 Rateable Value and Principle of Assessment, 633
 Appeal against, 637
 CHURCH RATE, 637
 COUNTY RATE, 637
 BOROUGH RATE, 638
 HIGHWAY RATE, 638
 LIGHTING, WATCHING AND PAVING RATES, 639
 SEWERS RATE, 640
 DISTRESS FOR RATES, 640
 RECEIVING STOLEN GOODS, 640
 RELEASE, 641
 RENTS, 642
 REPLEVIN, 642
 REVENUE.
 INCOME TAX, 643
 CUSTOMS, 643
 ROBBERY, 644
 SALE, 644
 SCIRE FACIAS, 645
 SEDUCTION, 645
 SEQUESTRATION, 645
 SESSIONS.
 APPEAL.
 Right of, 646
 Notice of, 646
 Practice on, 646
 ORDERS.
 Erroneous Procedure, 646
 Enforcing, 646
 SET-OFF, 647
 SETTLEMENT.
 GENERALLY, 648
 CONSTRUCTION OF, 648
 COVENANT TO SETTLE, 652
 SETTLEMENT BY THE COURT OF CHANCERY, 654
 PORTIONS, 654
 JOINTURE, 655
 RECTIFYING, 655
 SEWERS, 655
 SHERIFF.
 RIGHT TO FEES, 656
 DUTIES AND LIABILITIES.
 Escape, 656
 Return, 656
 Extortion, 656
 Acts of Bailiff, 656
 Receipts of Fines at Sessions, 657

- Landlord's Rent*, 657
Possession for Unreasonable Time, 657
- SHIP AND SHIPPING.
 CHARTER-PARTY, 657
 INSURANCE, 660
 BILL OF LADING, 663
 CARGO, SALE OF, 663
 OWNERS, 665
 MASTER, 666
 PILOT AND PILOT ACT, 667
 SEAMEN, 667
 PASSENGERS ACT, 668
 REGISTRY, 668
 SALE AND TRANSFER, 669
 FREIGHT, 669
 DEMURRAGE, 672
 HARBOUR AND OTHER DUES, 672
 LIEN AND MORTGAGE, 672
 COLLISION AND DAMAGE, 673
- SHOOTING AT THIEVES, 674
- SIMONY, 674
- SLANDER.
 WHEN ACTIONABLE, 674
 WHEN DAMAGE MUST BE PROVED, 674
 PRIVILEGED COMMUNICATIONS, 675
 EVIDENCE, 675
- SOLDIERS, ENLISTMENT OF, 675
- SPECIFIC PERFORMANCE.
 WHEN DECREED, 675
 WHEN REFUSED, 678
 PRACTICE IN SUIT FOR, 682
- STAMP.
 AGREEMENTS, 683
 BONDS, 684
 CONVEYANCES, 684
 DEEDS, 685
 MORTGAGES, 685
 SETTLEMENTS, 685
 RECEIPTS, 686
 ORDER FOR PAYMENT OUT OF PARTICULAR FUND, 686
 NEWSPAPERS, 686
 DENOTING STAMP, 686
- STATUTE, CONSTRUCTION AND OPERATION OF, 686
- STOCK.
 ACTION FOR RE-DELIVERY OF STOCK, 687
 EFFECT OF CHARGING ORDER, 688
 STOCK-JOBING ACT, 688
- STOPPAGE IN TRANSITU, 688
- SUBPENA.—See WITNESS.
- SUIT AT LAW AND IN EQUITY, 689
- SUITORS' FEE FUND, 689
- SURGEON AND APOTHECARY, 689
- TENANT FOR LIFE, 689
- THELLUSSON ACT, 690
- TITHES.
 MODUS, EXEMPTION AND COMPOSITION, 691
 COMMUTATION ACTS.
Award, 692
Rent-charge, 693
Merger, 693
 STATUTE OF LIMITATIONS, 693
- TORQUAY MARKET ACT, 694
- TREES, 694
- TRESPASS.
 WHEN MAINTAINABLE, 694
 PLEADINGS, 695
 DAMAGES, 696
- TROVER.
 WHEN MAINTAINABLE, 696
 CONVERSION, 697
 PLEADINGS AND EVIDENCE, 698
- TRUST AND TRUSTEE.
 TRUST.
Constitution, 698
Construction, 699
Breach of, 700
 TRUSTEE.
Appointment of, 703
Removal and Change, 704
Liability and Disability, 704
Powers, Rights and Duties, 707
Investment by, 708
Disclaimer, 710
Release of, 710
 TRUSTEES' RELIEF ACT.
Construction of, 710
Practice under, 710
 CESTUI QUE TRUST, 711
 TRUSTEE AND MORTGAGEE ACTS.
Construction of, 711
Practice under, 713
- TURNPIKE, 714
- UNDUE INFLUENCE, 716
- UNIVERSITY, 717
- USE AND OCCUPATION, 717
- USURY, 717
- VENDOR AND PURCHASER.
 CONTRACTS AND CONDITIONS OF SALE, 719
 TITLE, 725
 WARRANTY, 727
 LIEN OF VENDOR, 727
 PURCHASER.
Rights and Protection of, 728
Liabilities and Duties, 728
Conveyance to, 729
 INTEREST ON PURCHASE-MONEY, 729
 COSTS, 731
- VENUE, 731
- VESTRY, 732
- VOLUNTARY CONVEYANCE AND SETTLEMENT, 732
- WARRANT AND ORDER, 734
- WARRANT OF ATTORNEY, 734
- WARRANTY, 735
- WASTE, 735
- WATCHING AND LIGHTING, 736
- WATER AND WATERCOURSE, 736
- WATERMEN, 737
- WAY, 738
- WEIGHTS AND MEASURES, 739

WILL.

CONSTRUCTION OF WILLS.

General Points, 740*Power to appoint Trustees*, 754*Conversion of Perishable Property*, 754*Misdescription and Ambiguity, Evidence to explain*, 756

VALIDITY.

Attestation, 756*Alteration and Interlineation*, 756

ESTABLISHING, 757

PUBLICATION AND REPUBLICATION, 757

REVOCATION AND CANCELLATION, 757

SPOILIATION, 758

CODICIL, 758

ELECTION UNDER, 759

WITNESS.

COMPETENCY, 760

PRIVILEGE, 760

COMMISSION AND ORDER TO EXAMINE, 760

INTERROGATORIES, 761

DISOBEYING SUBPENA, 761

EXPENSES, 761

WORK AND LABOUR, 762

WRIT OF TRIAL, 762

WRIT, DE CORONATORE ELIGENDO, 762

WRIT, NE EXEAT REGNO, 762





AN
ANALYTICAL DIGEST
OF THE
CASES REPORTED AND PUBLISHED
FROM TRINITY TERM 1850 to MICHAELMAS TERM 1855,
AND CONTAINED IN
THE LAW JOURNAL REPORTS,
And other Contemporary Reports ;
WITH
REFERENCES TO STATUTES AND RULES OF COURT WITHIN THE SAME PERIOD.

ABATEMENT.

[See ALIEN—NUISANCE.]

(A) OF ACTION.

- (a) *By Death of Parties.*
- (b) *By Death of Parties between Verdict and Judgment.*
- (c) *By Marriage.*
- (d) *By Bankruptcy and Insolvency.*

(B) PLEAS IN.

- (a) *Nonjoinder and Misjoinder of Parties.*

(A) OF ACTION.

- (a) *By Death of Parties.*

[See 15 & 16 Vict. c. 76. ss. 40, 135, 136, 137, 138, 139, 140.]

- (b) *By Death of Parties between Verdict and Judgment.*

[See 15 & 16 Vict. c. 76. s. 139.]

The Court will not depart from a general rule of practice in order to do substantial justice in a particular case. The Court gives a party leave to enter judgment *nunc pro tunc* after the expiration of two terms, only when the delay has been the act of the Court itself. Therefore, where the executrix of a plaintiff (who had died after verdict) was unable to get probate of the will on account of a *caveat* entered in the Ecclesiastical Court by the defendant for the purpose of delay, this Court, though reluctantly, refused to give leave to enter judgment *nunc pro tunc*.

Digest, 1850—1855.

after the expiration of two terms. *Freeman v. Tranch*, or *Tranah*, 21 Law J. Rep. (N.S.) C.P. 214; 12 Com. B. Rep. 406.

- (c) *By Marriage.*

[See 15 & 16 Vict. c. 76. s. 141.]

- (d) *By Bankruptcy and Insolvency of Plaintiff.*

[See 15 & 16 Vict. c. 76. s. 142.]

(B) PLEAS IN.

- (a) *Nonjoinder and Misjoinder of Parties.*

[See 15 & 16 Vict. c. 76. ss. 34—40.]

ABDUCTION.

A girl under sixteen having been persuaded by the prisoner to leave her father's house, and go away with him without her father's consent, in pursuance of the arrangement between them, left her home alone and went to a place appointed. There the prisoner met her. They then went away together to a distant place, not intending to return:—Held, that there was a "taking" of the girl by the prisoner within the meaning of the statute 9 Geo. 4. c. 31. s. 20. when he met her at the appointed place, and went away with her; and that there was then a taking of her out of the possession of her father, as until the prisoner took her, she had not absolutely renounced her father's protection, but would presumably have returned home had she failed to meet the prisoner. *Regina v. Manktelow*, or *Mankletow*, 22 Law J. Rep. (N.S.) M.C. 115; 1 Dears. C.C.R. 159.

ACCORD AND SATISFACTION.

- (A) WHAT AMOUNTS TO GENERALLY.
- (B) EXECUTORY ACCORDS—PERFORMANCE.
- (C) BY A STRANGER.
- (D) PLEADINGS.

(A) WHAT AMOUNTS TO GENERALLY.

In assumpsit, the first count stated that A and B were tenants of certain chambers to one C at a certain rent, payable quarterly, and that, in consideration that A and B would underlet the chambers to D at a certain rent, payable quarterly, D promised A and B that he would pay the said rent to C, and that if he did not do so he would indemnify A and B in respect thereof and pay the same to them; and the breach assigned was non-payment by D of the rent due from A and B to C. Plea, that before the rent came due from A and B to C it had been agreed between A, for and on behalf of himself and B, with his authority, and D, that D should deliver up the possession of the chambers to A, and that in consideration thereof D should be discharged from further liability for rent, and that D did accordingly deliver up possession to A which he, on behalf of himself and B accepted:—Held, that this set up a good defence by way of executed contract. *Smith v. Lovell*, 20 Law J. Rep. (N.S.) C.P. 37; 10 Com. B. Rep. 6.

The indorsee of a bill of exchange is entitled to proceed, in an action against the acceptor, for the recovery of costs, though, pending the action, payment in full satisfaction of the amount of the bill with interest, and all monies due thereon, be made by another party to the bill and accepted by the plaintiff. Where, therefore, to a declaration against the acceptor of a bill of exchange for 49*l.* 16*s.* indorsed by W T to the plaintiff, the defendant pleaded, first, *non accepit*; secondly (*quasi darrein continuance*), that, after the pleading the first plea, W T had paid to the plaintiff, then being the holder of the bill, and the plaintiff had accepted 60*l.*, being the full amount of the bill, and all interest due thereon, in full satisfaction and discharge of the said bill, and of all monies due and payable on account and in respect thereof:—Held, on demurrer, that the plea was no bar to the further continuance of the action. *Goodwin v. Cremer*, 22 Law J. Rep. (N.S.) Q.B. 30.

To a declaration in covenant on a bond, the defendant pleaded that after the making of the bond, and before any of the breaches of covenant alleged, M and others as his sureties executed and delivered to the plaintiffs another bond (to the same effect as that declared upon) in full satisfaction and discharge of the bond in the declaration mentioned, and of all covenants, &c. therein contained, and that the plaintiffs then accepted the said other bond in full satisfaction and discharge of the bond in the declaration mentioned and of all covenants, &c.:—Held, on demurrer to this plea, that it was not good either by way of accord and satisfaction, or of release. *Berwick-upon-Tweed (Mayor, &c.) v. Oswald*; *Same v. Renton*; and *Same v. Dobie*, 22 Law J. Rep. (N.S.) Q.B. 129; 1 E. & B. 295.

In an action upon a covenant to pay upon a contingency, an accord executed before the contin-

gency happened, is a bad plea. *Healey v. Spence*, 22 Law J. Rep. (N.S.) Exch. 249; 8 Exch. Rep. 668.

To a declaration for work and labour, the defendant pleaded that, after the cause of action, and before suit, the plaintiff levied a plaint against the defendant in a county court for 50*l.*: that defendant being then and at the time of the accruing of the cause of action for which the plaint was levied, an infant, gave notice that he should defend himself against the plaint on that ground, and that before trial in the county court, the plaintiff and defendant agreed that the defendant should pay the plaintiff's costs and 30*l.*, and that the plaintiff should accept the 30*l.*, and the performance by the defendant of the agreement in satisfaction as well of the cause of action for which the plaint was levied as of all other causes of action which the plaintiff then had against the defendant. Averment of payment of 30*l.* and costs before suit, and acceptance by the plaintiff in pursuance of the agreement:—Held (affirming the judgment below, 23 Law J. Rep. (N.S.) C.P. 41; 14 Com. B. Rep. 118), that assuming the plaintiff's claim to be for a liquidated demand, and that the defendant was not an infant, the plea shewed a good satisfaction; as the defendant, besides paying the smaller sum, abandoned his defence of infancy in the county court, which the plaintiff otherwise would have had to litigate. *Cooper v. Parker*, (in error) 24 Law J. Rep. (N.S.) C.P. 68; 15 Com. B. Rep. 822.

(B) EXECUTORY ACCORDS—PERFORMANCE.

A declaration in assumpsit, after stating that before and at the time of the making of the promise thereafter mentioned, an action on the case and an action of trespass at the suit of the plaintiffs against the defendant, were pending in the Court of Queen's Bench, alleged that it was agreed between the plaintiffs and the defendant that the said actions should be settled and all proceedings therein stayed, and that the defendant should pay to the plaintiffs 40*l.* in respect of the costs of the said actions and 236*l.* 9*s.* in part of damages, and the plaintiffs should receive from certain persons named the sum of 263*l.* 11*s.*, or in case of their default, then that the defendant should make good that sum also, in which case the defendant was to be entitled to do certain other things stated; that although the plaintiffs had always performed the said agreement on their part, and confiding in the said promise of the defendant, did upon the making of the same, wholly cease to prosecute the said actions and each of them, and had thence continually hitherto stayed all proceedings therein; and although a reasonable time for the defendant to pay the said sums of 40*l.* and 236*l.* 9*s.* had elapsed before the commencement of the suit, yet, &c.:—Held, on motion in arrest of judgment, that there appeared a good consideration to support the defendant's promise, and that performance on the part of the plaintiffs was sufficiently averred. *Crouther v. Farrer*, 20 Law J. Rep. (N.S.) Q.B. 298; 15 Q.B. Rep. 677.

A plea to the further maintenance of an action on the case stated, that it was agreed between the plaintiffs and the defendants that the defendants should do certain things, and that the action and causes of action included in the same should be settled, satisfied, discharged and terminated by the arrangement and agreement before mentioned. The plea then averred performance by the defendants of

some of the things, and readiness and willingness to perform the others:—Held, that the plea was bad, as it did not distinctly aver satisfaction or that the plaintiffs accepted the agreement in satisfaction and discharge of the causes of action. *Hall v. Flockton*, (in error), 20 Law J. Rep. (N.S.) Q.B. 208; 16 Q.B. Rep. 1039.

A declaration stated a submission to arbitration under seal and an award, whereby the defendant was ordered to pay to the plaintiff 5,000*l.* by four instalments, the first of which was to be paid on the 1st of January and the last on the 1st of July 1851, and alleged as a breach the non-payment of 500*l.* parcel of the 5,000*l.* Plea, that after a breach of the award by non-payment of the first instalment, and before any further instalment had become due, it was agreed between the plaintiff and defendant that the plaintiff should accept in satisfaction and discharge of the sum awarded, and of all causes of action in respect thereof, and of the said breach, 4,000*l.* to be paid in four instalments, the third of which, 1,250*l.*, was to be paid on the 14th of April 1851, and the last on the 14th of June 1851; and that the plaintiff accepted the said agreement and performance thereof in satisfaction and discharge of the said sum awarded to him, and of all causes of action, &c.; and that the defendant paid the first and second of such instalments on the days agreed upon, and paid 1,250*l.* on the 14th of April 1851, which the plaintiff then accepted in satisfaction and discharge of the third instalment, and paid the residue on the 14th of June; and that the plaintiff accepted the said sum of 4,000*l.* and the payment thereof by the said instalments on the several days on which they were paid, in pursuance of the said agreement. Issue thereon. The submission, award and agreement were proved as alleged in the declaration and plea. The defendant paid the first and second instalments on the days specified in the agreement; but the third instalment of 1,250*l.* was not paid until the 19th of April, when the plaintiff refused to receive it except on account of the 5,000*l.* due under the award, assigning as his reason not that the payment was made on the wrong day, but that the defendant would not sign a letter which the plaintiff had no right to require. The last instalment was duly paid on the 14th of June. The jury found that the plea was proved:—Held, that the action being brought, not upon the submission, but upon the award, the plea could be sustained without shewing an agreement under seal; that the non-payment of the first instalment due under the award was a breach of the whole contract to perform the award, and that the plea was, therefore, a good answer to the action by way of accord and satisfaction, the agreement being for payment of a smaller sum at an earlier day; and that the payment of the third instalment on the 19th of April, having been accepted by the plaintiff as payment on the 14th, was a performance of the agreement. *Smith v. Trowsdale*, 23 Law J. Rep. (N.S.) Q.B. 107; 3 E. & B. 83.

Several matters in difference existing between the plaintiff and defendants, some of which were the subject of an action, it was agreed between them that in consideration that the defendants would consent to refer to arbitration the matters of the action, the plaintiff would accept such agreement in satisfaction of all damages sustained by him in respect of the other matters:—Held, that the agreement and

its performance was a good bar to an action in respect to the last-mentioned matters. *Williams v. London Commercial Exchange Co.*, 10 Exch. Rep. 569.

A declaration stated, that the defendant agreed to deliver to the plaintiffs 600 loads of Dantzic timber, and although the defendant delivered, and the plaintiffs accepted, 143 loads of other timber as and for so much of the timber to be delivered, yet the defendant did not deliver the residue. Plea, that after the right of action, and before the suit, it was mutually agreed that the defendant should deliver certain timber, part of the cargo of the ship J, in the place of a like quantity by the contract to be delivered, and that the defendant should make up the balance by delivery of such quantity of suitable timber out of certain other ships; and that such delivery of the two parcels of timber should be accepted and received by the plaintiffs in full satisfaction and discharge of all causes of action upon the contract in the declaration. Averment, that in part performance of the agreement in the plea the defendant delivered, and the plaintiffs accepted, 143 loads of timber from the ship J, in satisfaction of the causes of action as to that quantity in the contract; and that afterwards, and before suit, he duly tendered to the plaintiffs such quantity of suitable timber out of other ships to make up the residue in the contract mentioned, which the plaintiffs refused to accept; and the defendant was thenceforth ready and willing to deliver to the plaintiffs the last-mentioned timber:—Held, that the plea was bad, as it did not shew an accord and satisfaction of the whole cause of action; and that it could not be taken distributively (under section 75. of the Common Law Procedure Act, 1852) as an answer to any part. *Gabriel v. Dresser*, 24 Law J. Rep. (N.S.) C.P. 81; 15 Com. B. Rep. 622.

(C) BY A STRANGER.

To an action of debt on simple contract, the defendant pleaded that after the accruing of the debts and causes of action, and before suit, the plaintiff drew a bill on one A B, who accepted the bill, and delivered it to the plaintiff for and on account of the said debts and causes of action, and that the plaintiff received it from A B on such account; that the plaintiff, before suit, indorsed the bill to C D, who was still the holder and entitled to sue A B thereon:—Held, a good answer to the action.—*Wankford v. Wankford*, *Ayliffe v. Scrimpsire*, and *Stracey v. the Bank of England* considered and explained. *Belshaw v. Bush*, 22 Law J. Rep. (N.S.) C.P. 24; 11 Com. B. Rep. 191.

In an action for work done, the defendants pleaded that the work was done under an agreement made by the plaintiff with the defendants to build a church on certain terms; that the plaintiff stopped the works until another agreement was entered into with T P for completing the work; that T P paid the consideration-money under the second agreement; and that the plaintiff accepted the second agreement, and the performance thereof by T P in full satisfaction and discharge of the agreement between the plaintiff and the defendants:—Held, that this plea was bad in substance, because it did not shew that the agreement and payment made by T P were made on behalf of the defendants, or that they adopted them; the case thereby being distin-

guishable from *Belshaw v. Bush*. *James v. Isaacs*, 22 Law J. Rep. (N.S.) C.P. 73; 12 Com. B. Rep. 791.

To an action by the indorsees of a bill of exchange, the defendant pleaded that the bill was an accommodation bill; that the drawer indorsed the bill and other bills to the plaintiffs as security for the repayment to them of 30*l.* advanced by them to him, and that the bill was satisfied by payment to them by the acceptor of one of the other bills of the money so advanced:—Held, that the plea was no bar to the further maintenance of the action, the payment having been made by a stranger, and not having been ratified by the defendant. *Kemp v. Balls*, 24 Law J. Rep. (N.S.) Exch. 47; 10 Exch. Rep. 607.

(D) PLEADINGS.

[As to averments of performance, see (B) EXECUTORY ACCORDS.]

To an action upon certain bills of exchange, drawn by M & Sons upon and accepted by the defendant, and payable to the plaintiff at certain periods after date, the defendant pleaded that after the bills came due M & Sons made an agreement with the acceptor to discharge him on receiving 2*s.* 9*d.* in the pound, upon (*inter alia*) the said acceptance, in consideration of the payment of a certain specified sum in settlement of their differences of account, and that the plaintiff took the bills after the agreement. The plea contained an averment that M & Sons were the holders of the bills at the time the agreement was made, and that they afterwards delivered them to the plaintiff. The replication traversed the former of these allegations:—Held, that although the replication admitted a delivery of the bill by M & Sons to the plaintiff after the making of the agreement, that it did not admit such a delivery as to give the plaintiff a new title to the bill, and consequently, that the replication was good so as to put in issue a substantial averment in the plea. *Corlett v. Booker*, 5 Exch. Rep. 197.

ACCOUNT.

[See LEGACY.]

(A) ACTION OF ACCOUNT.

(B) WHEN AN ACCOUNT WILL BE DECREED IN EQUITY.

- (a) *In general.*
- (b) *To clear an Estate.*
- (c) *Destruction of Accounts.*

(A) ACTION OF ACCOUNT.

If one of two tenants in common solely occupy the land, farm it at his own cost, and take the produce for his own benefit, his co-tenant cannot maintain an action of account against the former, under the statute 4 Anne, c. 16. s. 27, as his bailiff, by reason of the former having received more than comes to his just share and proportion. The statute applies to cases where rent or payment in money or in kind due in respect of the premises, is received from a third party by one co-tenant, who retains for

his own use the whole or more than his proportional share. *Henderson v. Eason*, (in error) 21 Law J. Rep. (N.S.) Q.B. 82; 17 Q.B. Rep. 701, reversing the judgment of the Court below in a previous case.

A declaration in account stated that A and B, tenants in common in fee, made a lease with a general covenant on the part of the lessee to pay the rent (without saying to whom) on Michaelmas and Lady-day. A died, and on the following Lady-day, the tenant paid half a year's rent to B. It appeared at the trial that B, the plaintiff, the heir-at-law of A, received 12*s.* 6*d.* from B; but he claimed 6*l.* 5*s.*, which was the amount of half of the half-year's rent:—Held, that the Judge rightly directed the jury that B had received more than his share of the rent, and that he was accountable to the plaintiff for the excess. That the Statute of Apportionment, 4 Will. 4. c. 22, does not apply as between the executor and heir of a tenant in fee—confirming *Browne v. Amyot*, 3 *Hare*, 173; s.c. 13 Law J. Rep. (N.S.) Chanc. 232. That as the demise purported to be a joint demise by tenants in common, with a general *reddendum* not specifying to whom the rent was payable, the rent followed the reversion, and on the death of A, the reversion was split, and the plaintiff became entitled to his share of the rent. Held, also, on motion in arrest of judgment, that the declaration which was in the usual form was good, without any allegation that after a request to account, a reasonable time had elapsed before the action was brought. *Beer v. Beer*, 21 Law J. Rep. (N.S.) C.P. 124; 12 Com. B. Rep. 60.

(B) WHEN AN ACCOUNT WILL BE DECREED IN EQUITY.

(a) *In general.*

A contractor having executed works for a railway company, under two contracts, distinguished respectively as contract No. 1. and contract No. 3, brought an action against the company for the works executed under contract No. 1. The company filed a bill to restrain this action, alleging that the plaintiff's demand depended on the result of complicated accounts, the company being entitled to various items of set-off, and that the account under contract No. 1. was so blended with that under contract No. 3. that what was due to the contractor could not be ascertained without taking both accounts. The contractor, by his answer, denied any complication in the accounts, or that the accounts were blended. He admitted the receipt of various sums in payment of work done under each of the contracts, and also of a large sum which, not being appropriated by the company, he had appropriated partly to one contract, partly to the other. He also shewed that the several heads of set-off were free from all uncertainty. He then stated that there was work done the amount of which had not been ascertained, and other matters in respect of which he had claims on the company:—Held, on appeal from an order of the Master of the Rolls granting an injunction, first, that, taking into account the explanations given in the answer, there would be no difficulty in the company proving at law the claims of set-off under contract No. 1, and that no case for equitable interference was established on this ground; secondly, that before the contractor could recover anything under contract

No. 1. he would be obliged to prove that he had a demand, exclusive of that contract, which justified his appropriation of that part of the sum received from the company which he had not appropriated to contract No. 1; that, thus, the accounts under contract No. 3. would have to be taken, and that, in this way, the accounts of the two contracts were blended; thirdly, that it being equally possible to take at law, with justice to both parties, the accounts under contract No. 3. as those under contract No. 1, the blending of the two accounts formed no reason for withdrawing the case from the jurisdiction of a Court of law; fourthly, that the other claims set up by the contractor in his answer were such as could not be properly decided in the action, and that therefore the injunction granted was proper; fifthly, that the delay of the company in filing their bill was no ground for refusing to interfere in a case where it was clear that the Court of law could not possibly deal with the subject-matter. *The South-Eastern Rail. Co. v. Brogden*, 3 Mac. & G. 8.

The authorities shew that there are many cases in which a Court of equity will entertain jurisdiction in matters of account where, if the party making the claim had proceeded at law, the Court would not if applied to for that purpose, withdraw the matter from the legal jurisdiction. *Ibid*.

A bill was filed by a contractor against a railway company, stating that the plaintiff had, under certain contracts, executed works of considerable magnitude for the defendants, which they had taken possession of; and praying for a settlement of the accounts between them. The cause was brought to a hearing. No action at law had been commenced in respect of the contracts. An objection was taken at the hearing by the defendants, that the matters in dispute ought to have been made the subject of an action at law, and that a Court of equity had not jurisdiction as to them:—Held, that a Court of equity had concurrent jurisdiction with a Court of law, and that, in that stage of the proceedings, such jurisdiction ought to be exercised. *Macintosh v. the Great Western Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 469; 3 Sm. & G. 146.

It is no objection to a claim, or bill filed for an account against a confidential agent, that he has been also employed as a solicitor in respect of the same matter. *Oddy v. Secker*, 2 Sm. & G. 193.

The plaintiff filed a bill on behalf of himself and all other the shareholders in a projected company, against the defendants, who were the finance committee, calling upon them to account for the deposits received, and to divide the surplus amongst the shareholders, minus whatever sum any of the shareholders might have consented to receive back upon their deposits. Fourteen of the shareholders had been repaid in full, on the ground that they had only advanced money as a loan to the company, in order to satisfy the Standing Orders of the House of Commons:—Held, that the persons who had lent money to pass the Standing Orders, which was a fraud upon the House, were liable as contributories, for the shares they had taken. *Clements v. Bowes*, 22 Law J. Rep. (N.S.) Chanc. 1022; 1 Drew. 684.

Held, also, that an objection for misjoinder was removed by the 49th section of the Chancery Procedure Amendment Act, although all the plaintiffs were not named upon the record. *Ibid*.

The plaintiff filed a bill on behalf of himself and the other shareholders in a company against the persons forming the financial committee, praying that an account might be taken of all monies received by the defendants in respect of deposits upon shares, and an account of the costs and expenses incurred by them, and that the amount due to the plaintiff and the other shareholders, after giving credit for the monies paid by them, might be distributed rateably amongst the shareholders:—Held, upon demurrer to the bill, that the fact of the defendants having already rendered an account did not preclude the plaintiff from having an account taken under the authority of the Court: and that the remedy provided for these cases by the Winding-up Acts did not take away the plaintiff's right to file a bill for a similar purpose. *Clements v. Bowes*, 21 Law J. Rep. (N.S.) Chanc. 306.

Held, also, on the demurrer as to parties, that as all the shareholders had a common interest the plaintiff might without their consent file a bill on behalf of all, and that as the financial committee were the only persons alleged by the bill to have had power over the funds of the company, it was not necessary to make any other persons who might have acted as directors parties to the suit. *Ibid*.

(b) To clear an Estate.

Where an estate cannot be cleared until certain accounts have been taken, and is subject to a claim, whether contingent or not upon the taking of such accounts, the Court will direct them to be taken. *Brogden v. Merton*, 22 Law J. Rep. (N.S.) Chanc. 1040.

(c) Destruction of Accounts.

Where a wrong has been committed the wrongdoer must suffer from the impossibility of accurately ascertaining the amount of damage. Therefore, where an account of the equitable waste committed by a tenant for life was directed to be taken against his executors, which it was found impossible to take accurately, and the Master had arbitrarily charged the executors, his report was supported. *The Duke of Leeds v. the Earl of Amherst*, 20 Beav. 239.

When an accounting party destroys the accounts before the matters have been finally adjusted, and still more pending a litigation, the Court will presume everything most unfavourable to him consistent with the established facts. *Gray v. Haigh*, 20 Beav. 219.

ACCOUNT STATED.

- (A) WHAT AMOUNTS TO.
- (B) BARON AND FEME.
- (C) EXECUTORS.
- (D) PLEADING.
- (a) Form of Count.
- (b) General Issue.

(A) WHAT AMOUNTS TO.

Debt for dividends sold and assigned and on an account stated. Pleas, payment into court of parcel, &c., and as to the residue, never indebted. At the trial, it appeared that the plaintiff had agreed to sell

to the defendant certain dividends for 175*l.*, but after the bargain was made it was found that an order of the Court of Chancery was necessary before the dividends could be received by the defendant, and a dispute having arisen as to which party was to pay the costs of obtaining this order, it was agreed that the deed of transfer should be executed and the question of costs referred to two solicitors. The deed was accordingly executed, and 125*l.* paid to the plaintiff, and a paper signed by both parties, in which credit was given for that sum, and 50*l.* stated to be the balance remaining. The deed, however, stated that the whole purchase-money was paid, and contained a release in the usual way:—Held, first, that the plaintiff could not recover the remainder of the purchase-money under the first count, as the debt only accrued upon the execution of the deed, and at the same time the debt was released; secondly, that there was no evidence of an account stated, as at the time the memorandum was signed, the plaintiff's claim to the 50*l.* was contingent upon the result of the reference. *Baker v. Heard*, 20 Law J. Rep. (N.S.) Exch. 444; 5 Exch. Rep. 959.

A declaration in assumpsit stated that the plaintiff agreed to sell, and the defendant to buy, certain land, and that the defendant agreed to pay the purchase-money on the 1st of January 1845, and that the plaintiff agreed, upon payment of the purchase-money, to convey the land to the defendant; breach, non-payment of the purchase-money. There was also a count on an account stated. Pleas, non assumpsit, the Statute of Limitations, and other pleas. The defendant, by a written agreement "agreed to pay the purchase-money, on the 1st of January 1845," and the plaintiff agreed, upon payment of the purchase-money, to convey the land to the defendant. The plaintiff, in support of the account stated, put in evidence a document, dated the 19th of January 1849, in these terms:—"I hereby acknowledge the above account to be correct, the amount owing by me as cash, the 12th of January 1849, being 1,053*l.* 7*s.* 1*d.* Signed H G" (the defendant). The jury found a verdict for the defendant on the Statute of Limitations, and for the plaintiff on the account stated:—Held, that the defendant became bound to pay the purchase-money on the 1st of January, without a conveyance, and that the plaintiff was entitled to recover upon the account stated. *Yates v. Gardiner*, 20 Law J. Rep. (N.S.) Exch. 327.

Declaration on a banker's cheque, and on an account stated. The cheque was post-dated, and in support of the account stated the plaintiff relied on a letter of the defendant's in these terms:—"I must request you to oblige me by holding my cheque till Monday, and in the interim I will send you the amount in cash. I made a mistake in dating it today, as I did not expect to be in funds till Friday or Saturday":—Held, (Erle, J. dissenting) that the letter was not evidence of an account stated, so as even to entitle the plaintiff to nominal damages, there being no statement of any sum acknowledged to be due. *Lane v. Hill*, 21 Law J. Rep. (N.S.) Q.B. 318; 18 Q.B. Rep. 252.

A promissory note was given by the defendant to the plaintiff payable five years after date, for value received:—Held, that it was evidence of an account stated against which the Statute of Limitations did

not commence running until the maturity of the note. *Fryer v. Roe*, 12 Com. B. Rep. 437.

The plaintiff executed a written contract of absolute sale of some goods to the defendant; he afterwards sued the defendant for a sum which he contended was due to him out of the proceeds of the goods as a balance after repaying the amount advanced by the defendant on their security. The plaintiff gave evidence that on the sum being demanded by the plaintiff's agent as the balance out of the proceeds, the defendant admitted the correctness of the amount, and said he would pay it over:—Held, that though the sale was absolute in law, there was evidence that it was accompanied by a trust that the defendant should account for the proceeds, and that the facts shewed a sufficient consideration for the account stated by the defendant to entitle the plaintiff to recover the balance on the count for money due upon an account stated. *Howard v. Brownhill*, 23 Law J. Rep. (N.S.) Q.B. 23.

A lease with a proviso of forfeiture for breach of covenants contained a covenant by the lessee to insure and keep insured the demised premises during the term. The lessee had insured, but did not pay the last premium of insurance until one month after it was due:—Held, that he had thereby incurred a forfeiture which the lessor could enforce notwithstanding such payment of the premium; and that although the lessor had taken no step to enforce the forfeiture, a purchaser, with whom the lessee had contracted to sell his term, might refuse to complete his contract, and might reclaim his deposit; and, therefore, that the lessee could not recover from the purchaser, as money due upon an account stated, the amount of the deposit for which the latter had given his I O U, and that the defendant had a good defence under the general issue. *Wilson v. Wilson*, 23 Law J. Rep. (N.S.) C.P. 137; 14 Com. B. Rep. 616.

(B) BARON AND FEME.

Declaration, by husband and wife, for money lent by, and money received to the use of the wife, "and for money found to be due from the defendant to the wife before her marriage on accounts stated between them, and for money found to be due from the defendant to the plaintiffs since their intermarriage on accounts stated between them since the intermarriage of the plaintiffs":—Held upon demurrer, that the count on the account stated was bad for not averring that the account was stated in respect of money due in right of the wife, or otherwise shewing her interest in the money. *Johnson v. Lucas*, 22 Law J. Rep. (N.S.) Q.B. 174; 1 E. & B. 659.

Semble—that a count by husband and wife, on an account stated with them, in respect of a debt averred to be due in right of the wife, or for which she had been the meritorious cause of action, would be good. *Ibid.*

(C) EXECUTORS.

A, at his death, left among his papers two letters sealed, and directed to the plaintiff (who had been his housekeeper for some years, but had left his service after giving birth to a child, of which he was the father) containing two promissory notes for 400*l.* and 200*l.* respectively. In one letter the note was said to be "in consideration of the long and faithful services of the plaintiff;" in the other he had written

"in addition to any sum I owe you I inclose 200*l.* as a mark of my respect." The defendants, who were the executors of A, paid 200*l.* after his death on account of these notes to the plaintiff, and promised, in writing, to pay the residue, but subsequently declined to do so; and the plaintiff brought an action of assumpsit against them, in which were counts upon the notes, and a count upon an account stated with the defendants as executors:—Held, that the testator's estate was not liable in respect of the notes, as they had not been delivered by him to the plaintiff, and could not operate as testamentary dispositions, because not in conformity with the 1 & 2 Vict. c. 26. (the Wills Act); and held, also, that the defendants were not liable upon the count for an account stated, because the payments and promise had been made under a mistake as to the liability of the testator's estate, and without consideration. *Gough v. Tindon*, or *Findon*, 21 Law J. Rep. (N.S.) Exch. 58; 7 Exch. Rep. 48.

(D) PLEADING.

(a) *Form of Count.*

[See 15 & 16 Vict. c. 76. sch. B.]

A declaration stating that the plaintiff sues the defendant for money found to be due from the defendant to the plaintiff upon accounts stated between them, is a sufficient compliance with the form given in the schedule to the Common Law Procedure Act. *Fagg v. Mudd*, or *Nudd*, 23 Law J. Rep. (N.S.) Q.B. 289; 3 E. & B. 650.

(b) *General Issue.*

On a settlement of accounts between the plaintiff and the defendant, the latter overpaid the plaintiff 1*l.* 1*s.* 5*d.*, which they then agreed should go in discharge of the plaintiff's ensuing account. The plaintiff having afterwards done work for the defendant, sued him in debt on the common counts for the amount:—Held, that the defendant had a good defence as to 1*l.* 1*s.* 5*d.* under the general issue. *Smith v. Winter*, 21 Law J. Rep. (N.S.) C.P. 158.

ACCOUNTANT GENERAL.

W C, being in receipt of an annuity payable out of stock standing in the name of the Accountant General, became indebted to F C, who brought an action against him and obtained a judgment, upon which a *feri facias* was issued, but nothing was found upon which to execute it. Upon half a year's annuity falling due, F C obtained an order stopping the Accountant General from parting with the cheque; but upon a petition, the Court declined to make an order authorizing the sheriff to seize the cheque or to direct it to be dealt with as if it was standing in the name of a trustee, and the petition was dismissed. *Courtney v. Vincent*, 21 Law J. Rep. (N.S.) Chanc. 291; 15 Beav. 486.

ACKNOWLEDGMENT.

[See BARON AND FEME—LIMITATIONS, STATUTE OF.]

ACTION.

[See ABATEMENT — ATTAINDER — DAMAGES — DEBTOR AND CREDITOR — FALSE REPRESENTATION — JUSTICE OF THE PEACE — PARTNERS — PARTIES — SHERIFF — TROVER.]

(A) WHEN MAINTAINABLE.

- (a) *Irish and Scotch Judgments.*
- (b) *Foreign Judgments.*
- (c) *Colonial Judgments.*
- (d) *County Court Judgments.*
- (e) *Disobedience to Judge's Orders.*
- (f) *Former Recovery.*
- (g) *Another Suit pending.*
- (h) *Notwithstanding Statutable Remedy.*
- (i) *Suspension of Right of Action.*
- (j) *Malicious Acts and Legal Procedure.*
- (k) *Against Public Officer for Personal Injury.*
- (l) *Breach of Agreement to refer.*
- (m) *Debentures.*

(B) CIRCUITY OF ACTION.

(C) NOTICE OF ACTION.

- (a) *To Judges and Officers of Inferior Courts.*
- (b) *To Magistrates.*
- (c) *To Revenue Officers.*
- (d) *Under Public Health Act.*
- (e) *Under Malicious Trespass Act.*
- (f) *Form and Service.*

(D) FORM OF ACTION.

- (a) *Assumpsit or Case.*
- (b) *Assumpsit or Trespass.*
- (c) *Case or Covenant.*
- (d) *Case or Trespass.*

(A) WHEN MAINTAINABLE.

(a) *Irish and Scotch Judgments.*

To an action on a judgment of the Court of Queen's Bench in Ireland, the defendants (a corporation) pleaded that they were not served with any process, and that the plaintiff, irregularly and behind the backs of the defendants, caused an appearance to be entered for the defendants, and obtained judgment when the defendants were not within the jurisdiction, and had not been served with process:—Held, that the plea was bad, for not shewing that the defendants did not know of the summons, or that they did not appear in the action. *Sheehy v. the Professional Life Assurance Co.*, 22 Law J. Rep. (N.S.) C.P. 244; 13 Com. B. Rep. 787.

Quære—whether the 9th section of the 13 & 14 Vict. c. 18, which provides for substitution of service by the Irish Courts, applies to corporations. *Ibid.*

Semble, per *Maule, J.*, that it does apply to service upon the agent of a corporation. *Ibid.*

A decree was pronounced in the Court of Session in Scotland, dismissing certain actions, and finding the defender entitled to his expenses, and remitting it to the auditor to tax these expenses. These expenses were afterwards taxed at 49*l.* Against this decree the pursuer appealed to the House of Lords. By the law of Scotland execution cannot issue on a decree pending an appeal; but by the 48 Geo. 3. c. 151. s. 17, when an appeal is lodged

in the House of Lords the Court of Session is to have power to regulate all matters relative to interim possession or execution and payment of costs and expenses already incurred according to their discretion, having a just regard to the interest of the parties as they may be affected by the affirmance or reversal of the decree appealed from; and by section 18, when the appeal shall be heard, the House of Lords may give such judgment respecting all matters which have taken place in pursuance of such regulations as to interim possession, execution and payment of costs as the justice of the case shall appear to require. Under this statute the defender, pending the appeal, petitioned the Court of Session to grant interim execution notwithstanding the appeal, and an interlocutor was pronounced, on the 3rd of June 1852, approving of the auditor's report for 494*l.*, and allowing the decree for that sum to go out and be extracted, and execution to proceed thereon notwithstanding the appeal, to the effect of enabling the petitioner to recover payment of the said sum, upon caution being given to repay the same in the event of the decree being reversed in the House of Lords. An "interim decree for payment" was made at the same time, decreeing and ordaining the pursuer to make payment to the defender of the said sum of 494*l.*, and granting a warrant to the messenger-at-arms to enforce payment of that sum. Caution had been given by the defender in the terms of the interlocutor, and the pursuer having come to England, the defender (while the appeal to the House of Lords was still pending) brought an action on the decree of the 3rd of June 1852 for the payment of the sum of 494*l.*:—Held, that the action was not maintainable, as the 48 Geo. 3. c. 151. only enabled the Court of Session to make regulations for execution and payment of costs pending the appeal, which might be varied or rescinded from time to time; and that therefore the interim decree was not in the nature of a final judgment for the costs. *Patrick v. Shedden*, 22 Law J. Rep. (N.S.) Q.B. 283; 2 E. & B. 14.

(b) Foreign Judgments.

In an action on a judgment of the Tribunal of Commerce, at Brussels, in Belgium, the plea was, that the judgment was obtained in an action commenced in the court "according to the laws then and still in force" by process or summons; and that the defendant had never been served with process, or appeared in the action, and was not a native of the foreign country, nor a resident, nor domiciled within the jurisdiction of the Court, nor had he any property there. Replication, that the judgment was founded upon a bill of exchange drawn in Belgium, according to the laws in force in that country, and accepted by the defendant, payable at the house of M. de W., at Bruges, in Belgium; that by the law of Belgium, "where a bill is accepted, payable at a particular place, such place may, for all purposes and in all actions relating to such bill, be deemed the elected domicile of the acceptor"; and that the process or summons by which the action was commenced was duly served upon the defendant at the said house, where the bill was made payable, the same being such domicile of the defendant, by leaving and delivering the same at such house for him; and that "by the law of Belgium and practice

of the said Court" in which the judgment was pronounced in an action against the acceptor of a bill of exchange, made payable at a particular place, leaving and delivering the process or summons, by which such action is commenced at such place, or at the last residence or domicile of such acceptor, is good service of such process or summons in order to found the jurisdiction of such Court; and "that the issuing of the said process or summons in the said court, and the summoning of the defendant, and the proceedings in the said action, were in all things in accordance with the law of Belgium and the practice of the said court, and according to such law and practice the judgment is good, valid and binding":—Held, that the replication was bad, as it did not sufficiently shew what was the law of the foreign country at the time of the acceptance.—*Pollock, C.B. dubitante. Meess v. Thellusson*, 22 Law J. Rep. (N.S.) Exch. 239; 8 Exch. Rep. 638.

(c) Colonial Judgments.

An act of the colonial legislature of New South Wales enabled the chairman of a company to sue and be sued on behalf of the company, and provided that execution upon any judgment in such an action against the chairman might be issued against the goods, lands, &c. of any member of the company, in like manner as if such judgment had been obtained against him personally:—Held, first, that the colonial legislature had authority to make such an act, and that it contained nothing repugnant to the law of England or to natural justice. Secondly, that the specific mode provided for enforcing the judgment by execution against a member of the company could not be obtained against a shareholder out of the colony; but, thirdly, that the judgment against the chairman might be made the foundation of an action against a member beyond the territory of the colony, in the same manner as if he had been personally served and the recovery had been against him as a party to the record. *Bank of Australasia v. Nias*, 20 Law J. Rep. (N.S.) Q.B. 284; 16 Q.B. Rep. 717: s. p. *Bank of Australasia v. Harding*, 19 Law J. Rep. (N.S.) C.P. 345.

A foreign judgment is examinable, and is only *prima facie* evidence of debt here, so far as to shew that the foreign Court had not jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained; but is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it is founded were never made or were obtained by fraud of the plaintiff. *Ibid.*

Any pleas which might have been pleaded to the original action cannot be pleaded to the action upon the judgment. *Ibid.*

The defendant, being sued as a member of the company upon a contract entered into by the company, pleaded the judgment recovered against the chairman in the colony:—Held, that the plea was bad. *Ibid.*

To an action on a judgment at the Cape of Good Hope, the defendant pleaded that by an ordinance in that country relating to insolvents, it was enacted that the Court might on the petition of an insolvent place his estate under sequestration, and that further execution of any judgment against him or his estate for any debt, should, after lodging the order for

sequestration, be stayed during the pendency of such sequestration, and that all actions pending against any insolvent for any debt proveable against his estate should, upon any order being made for sequestration, be stayed. The declaration then stated the petition of the defendant, the surrender of his estate, its being placed under sequestration, and that the estate was distributed, and upon such distribution the plaintiffs received a dividend of 1s. 6d. in the pound on the amount of the judgment debt in the declaration:—Held, on demurrer, that the plea was bad, as it merely shewed a temporary suspension of the execution during the pendency of the sequestration, but not a discharge of the person or estate of the insolvent. *Frith v. Wollaston*, 21 Law J. Rep. (n.s.) Exch. 108; 7 Exch. Rep. 194.

(d) *County Court Judgments.*

An action is not maintainable in a superior court upon a judgment in a county court established under the 9 & 10 Vict. c. 95. *Berkeley v. Elderkin*, 22 Law J. Rep. (n.s.) Q.B. 281; 1 E. & B. 805.

An action is not maintainable in a superior court on a judgment of a county court, established under 9 & 10 Vict. c. 95, and such judgment is final and complete, and is a bar to an action for the original consideration in any other court. *Austin v. Mills*, 23 Law J. Rep. (n.s.) Exch. 40; 9 Exch. Rep. 288.

(e) *Disobedience to Judge's Orders.*

An action does not lie against an attorney for disobedience of the order of a Judge for delivery of a bill of costs, under the statute 6 & 7 Vict. c. 73. s. 37. *Dent v. Basham*, 23 Law J. Rep. (n.s.) Exch. 161; 9 Exch. Rep. 469.

An action does not lie for disobedience to a Judge's order, whether drawn up by consent or hostilely. *Hookpayton v. Bussell*, 23 Law J. Rep. (n.s.) Exch. 267; 9 Exch. Rep. 24.

A defendant having been arrested in respect of a debt from which he was protected by an order of the Insolvent Court, applied for his discharge to a Judge at chambers, when the following order was made: "Upon hearing the attorneys or agents on both sides I do order that upon payment by the defendant of 5*l.* forthwith the defendant be discharged, the defendant hereby undertaking to pay the rest of the debt and costs," by certain specified instalments:—Held, that a declaration for breach of this undertaking was bad, although it also stated that the order was made with the consent of the plaintiff and the defendant. *Ibid.*

(f) *Former Recovery.*

In an action for a malicious prosecution for larceny, the defendant pleaded that the plaintiff before the present action sued him in an action for assault and imprisonment upon a false and unreasonable assertion that he, the plaintiff, had committed felony; that the defendant pleaded in that action not guilty, and a justification that the plaintiff had committed felony; and that at the trial the Judge directed the jury to consider whether the defendant had falsely and maliciously, and without reasonable and probable cause, charged the plaintiff with the felony; that the jury found the issues for the plaintiff, and assessed the damages accordingly; and that the plaintiff afterwards recovered judgment upon the verdict, with

costs. The plea concluded with an averment of the identity of the imprisonments in the two actions, and that the grievances now complained of had been taken into consideration by the jury in assessing the damages in the first action:—Held, that the direction to the jury in the former action was improper, and that the facts pleaded afforded no answer to the present action. *Guest v. Warren*, 23 Law J. Rep. (n.s.) Exch. 121; 9 Exch. Rep. 379.

Declaration for money had and received; plea, that the debt was for money due from the defendant jointly with A, and that the plaintiff had already sued A in trover and recovered judgment against him for 100*l.*, and that the causes of action for which the plaintiff then recovered judgment included all the present causes of action. The evidence was, that the defendant and A had wrongfully converted the plaintiff's goods by selling them, but that the defendant alone had received the proceeds, 150*l.*; that the plaintiff had sued A in trover and recovered 100*l.* as the value of the goods at the time of the conversion. The plea was then amended by striking out the allegation that the debt was for money due from the defendant and A jointly, and substituting that the money sued for was money received as the proceeds of the sale of the goods in the declaration mentioned:—Held, first, that the amendment was right, and was rightly made without imposing on the defendant the costs of the day; and, secondly, that the plea, as amended, was an answer to the plaintiff's claim for the whole proceeds of the sale. *Buckland v. Johnson*, 23 Law J. Rep. (n.s.) C.P. 204; 15 Com. B. Rep. 145.

Semble, per *Jervis, C.J.*, that judgment recovered in trover for the conversion of goods vests the property in the goods in the defendant from the time of the conversion. *Ibid.*

The withdrawal of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action, as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. Therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, and an accord and satisfaction agreed to and performed between the parties. *Nicklin v. Williams*, 23 Law J. Rep. (n.s.) Exch. 335; 10 Exch. Rep. 259.

To a declaration against the defendant for negligence in causing a collision between the plaintiffs' and defendant's vessel in the River Thames, the defendant pleaded that the merits had been tried in the Court of Admiralty, and, "after due proceedings taken in the said court, and in due form of law determined in favour of the defendant," it was held that the collision occurred through the plaintiffs' negligence, and not by the negligence of the defendant:—Held, a bad plea, for not shewing that the collision occurred within the Admiralty jurisdiction; and that the allegation "that due proceedings were taken, and in due form of law determined," did not cure the defect. *Harris v. Willis*, 24 Law J. Rep. (n.s.) C.P. 93; 15 Com. B. Rep. 710.

The replication was, that the plaintiffs had duly appealed to her Majesty in Council against the decision in the plea mentioned, and that the appeal was pending:—Held, a bad replication. *Ibid.*

Declaration, alleging, in the first count, that, in consideration that the plaintiff would enter the employ of the defendant, in the capacity of European correspondent of a newspaper, called 'The New York Courier and Inquirer,' until the said service should be determined, by due and customary notice on either side, and for a certain salary, the defendant promised to retain the plaintiff in the said capacity, and to pay the said salary and to continue him in such service until determined as aforesaid. Breach, the wrongful discharge of the plaintiff without notice and without reasonable and probable cause. The declaration also contained the common indebitatus counts. Plea as to 50*l.*, part of the plaintiff's demand in the money counts, that an action had been brought against the plaintiff, in the Supreme Court of the State of New York, for a sum exceeding 50*l.*; that by process duly issued out of the said court and executed on the defendant the said sum of 50*l.*, due and owing from the defendant to the plaintiff, was attached in the defendant's hands, according to the laws of the said state, to satisfy the demand in the action; that judgment was afterwards recovered in the said court, and execution was issued to the sheriff of New York, whereupon the defendant was obliged, by the laws of that state, to pay, and did pay, over to the sheriff the value of the said sum of 50*l.*, deducting the necessary expenses of the attachment. The plea further alleged that the plaintiff and the defendant were citizens of the said state, and the defendant was resident there and subject to the jurisdiction and process of the said Court; and that by the laws of that state the defendant was discharged and acquitted of the said sum of 50*l.*:—Held, upon demurrer, that this plea was sufficient, and a good defence *pro tanto*. *Gould v. Webb*, 24 Law J. Rep. (N.S.) Q.B. 205; 4 E. & B. 933.

(g) *Another Suit pending.*

A Scotch steamer ran down an English vessel in the Humber. An action was commenced in the Court of Admiralty in England, by the owners of the English vessel, against the owners of the steamer, and a warrant of arrest issued against the ship; but, before the ship could be arrested, she had sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owners of the steamer, in the Court of Session in Scotland, for the damage, and the steamer was arrested under process of that Court, but subsequently released upon bail. Afterwards, and pending these proceedings, the steamer was sold, without notice to the purchaser of this unsatisfied claim against her. The proceedings in the Court of Session were still pending, when the steamer, having come within the jurisdiction of England, was again arrested under process of the High Court of Admiralty in England, and an action for damage commenced in that court, for the same cause of action as was still pending in Scotland, instructions being sent to Scotland to abandon the proceedings in the Court of Session. The owner of the steamer appeared under protest in the Admiralty Court, and pleaded, first, *lis alibi pendens*; and, secondly, that he was a purchaser for value without notice:—Held, by the Judicial Committee, overruling such protest, —that the plea of *lis alibi pendens* was bad, as the suit in Scotland was, in the first instance, *in personam*, the proceedings being commenced by process

against the persons of the owners of the vessel (the defendants), and the arrest of the steamer only collateral to secure the debt, while the proceedings in the Admiralty Court in England were, in the first instance, *in rem*, against the vessel, and, therefore, the two suits being in their nature different, the pendency of the one suit could not be pleaded in suspension of the other. *Hanner v. Bell*, 7 Moore, P.C.C. 267.

(h) *Notwithstanding Statutable Remedy.*

By the 6 & 7 Vict. c. 79, the Articles of a certain convention between Her Majesty and the King of the French, concerning the fisheries in the seas between the British Islands and France, are declared to have the force of law. By these Articles, all transgressions of the regulations are in both countries to be submitted to the exclusive jurisdiction of the tribunal or magistrates designated by law, who are to settle all differences and decide all contentions between fishermen of the two countries; and the trial and judgment are always to take place in a summary manner. This tribunal is also to have power to award damages for injuries over and above the penalties. By section 11. of the act, all offences against the Articles committed by British subjects are to be determined by Justices of the Peace, who are also declared to have the power of awarding compensation for injuries:—Held, that no action could be maintained for an injury caused by a breach of any of the regulations, as exclusive jurisdiction in such matters was given to the tribunal specified in the act. *Marshall v. Nicholls*, 21 Law J. Rep. (N.S.) Q.B. 343.

Case for the obstruction of a right of way as appurtenant to the messuage and dwelling-house of the plaintiff, by means whereof, as alleged in the second count of the declaration, the plaintiff could not have or enjoy his said way as he of right ought to have done, and otherwise might and would have done, and had been and was deprived of the use, benefit, and advantage of the same, to his damage. Plea, justifying the obstruction complained of, for the purpose of making and constructing a railway under the powers and provisions in the Great Northern Railway Act, 1846, by which the defendants were incorporated, and in the acts therewith incorporated. Replication, that the way was a road within the meaning of the Railways Clauses Consolidation Act, 1845, that the defendants had rendered it impassable, and thereby interfered with the same within the meaning of that act, and that the defendants had not caused a sufficient road to be made instead of the road so interfered with:—Held, on demurrer, that by the 6th and 55th sections of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, the remedy by action for an interference with a private right of way was taken away, except where special damage had been suffered, and therefore that the second count was bad. *Watkins v. the Great Northern Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 391; 16 Q.B. Rep. 961.

The 7 & 8 Vict. c. 112. s. 18. requires that every ship navigating between the United Kingdom and any place out of the same, shall keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, and in case any default be made in keeping such medicines, the owner of a ship is made liable to a penalty, which

by section 62, is recoverable at the suit of any person, and is to be applied in part to the informer, and the residue to the Seamen's Hospital Society:—Held, that the penalty was recoverable for a breach of the public duty, created by the statute, and that the provisions of the statute did not interfere with the common-law right of a seaman serving on board the vessel to maintain an action in respect of a special damage resulting to him from the breach of the duty. *Couch v. Steel*, 23 Law J. Rep. (N.S.) Q.B. 121; 3 E. & B. 402.

(i) *Suspension of Right of Action.*

The doctrine of a right of action being gone by suspension applies only to the case where there has once been a subsisting right of action, and not to a case where the objection is, that if it had accrued earlier, it could not have been enforced from the fact of the same person then being the party both to sue and be sued. *Badeley v. Vigours*, 23 Law J. Rep. (N.S.) Q.B. 377; 4 E. & B. 71.

(j) *Malicious Acts and Legal Procedure.*

No action lies for commencing and prosecuting an action maliciously and without reasonable or probable cause in the name of a third party, without an allegation shewing that legal damage has been sustained. *Cotterell v. Jones*, 21 Law J. Rep. (N.S.) C.P. 2; 11 Com. B. Rep. 713.

Per Williams, J.—With such allegation, the action lies. *Ibid.*

The declaration, after stating that the defendant, in the name of a third party, whom he knew to be insolvent, maliciously and without reasonable or probable cause, commenced and prosecuted an action against the plaintiff, in which the then plaintiff was nonsuited, proceeded as follows: "and it was considered by the said Court that the said L H O should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, &c. Whereupon and whereby the said suit was wholly determined. By means of which premises the plaintiff was put to costs in defending the action, which costs he was unable to obtain from the said L H O, who was and is unable to pay the same; and was otherwise vexed and injured, &c.:—Held, insufficient in arrest of judgment (the plaintiff's counsel admitting that the non-payment of extra costs would not be the subject of legal damage so as to maintain the action), inasmuch as it was consistent with the declaration that no ordinary costs were awarded to the plaintiff on the nonsuit, owing to his own neglect to apply for them, and that this was the only reason of his failing to obtain them. *Ibid.*

A count in case for distraining for more rent than was due is bad, though it alleges it to have been done maliciously,—for an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. *Stevenson v. Newnham*, 13 Com. B. Rep. 285.

A declaration, by the lessee of a theatre, charged in the first and second counts that one J W had contracted with the plaintiff to sing at his theatre, and not elsewhere, during a certain term, without the plaintiff's consent, and that the defendant had during the term maliciously enticed and procured J W to depart from her said contract against the will of the plaintiff, whereby J W refused to sing

for the plaintiff at his theatre during the whole of the term. The third count alleged that J W had been hired by the plaintiff as and was his dramatic artiste, for a certain term, and that the defendant had maliciously enticed and procured her to depart from her said employment during the said term. All the counts alleged special damage. On demurrer to the declaration,—Held, (by *Wightman, J., Erle, J. and Crompton, J.*) that the action was maintainable at common law, as the maliciously procuring J W to break her contract was a wrongful act from which damage accrued to the plaintiff; that the rule of law giving a remedy for enticing away servants, is not confined to menial servants, or to such as fall within the Statute of Labourers, but extends to all cases where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service for a given time under the direction of an employer who is injured by the wrongful act; and that the action for maliciously persuading a servant to quit his service is maintainable wherever there is at the time of the persuading a binding contract of hiring and service existing between the parties, whether the service be then actually subsisting or not. But *semble*—per *Crompton, J.*, that the contract need not be for exclusive service; and that an action will lie for maliciously inducing another to break a contract of any description whereby damage accrues to the party with whom the contract has been made. And held, by *Colebridge, J.*, that the persuading or procuring, whether maliciously or not, a free contracting party to break his contract, to the damage of the party with whom he has contracted, is not actionable, the general rule of law being not to confine the remedy for breaches of contract to the contracting parties. That between master and servant there is an exception to this rule, founded solely on the Statute of Labourers (23 Edw. 3.) and limited by it; and that J W not falling within the class of persons provided for in that statute, the action was not maintainable. *Lumley v. Gye*, 22 Law J. Rep. (N.S.) Q.B. 463; 2 E. & B. 216.

Where the defendant had pleaded and demurred to the declaration, and the demurrer had been decided in this court, an order to postpone the trial of the issues of fact until after the issues in law had been finally disposed of in the court of error, was refused; section 80, of the Common Law Procedure Act applying only to the disposing of the issue by the Court in which it is first raised. *Ibid.*

An action lies at the suit of a debtor taken in execution under a *capias ad satisfaciendum*, upon a judgment against an execution creditor, who "maliciously and without any reasonable or probable cause" causes and procures a warrant to be issued upon the said writ indorsed to levy a larger sum than remained due upon the judgment, and the debtor to be taken to satisfy such sum; there being no difference between an arrest on mesne process and an arrest in execution of a judgment. *Churchill v. Siggers*, 23 Law J. Rep. (N.S.) Q.B. 308; 3 E. & B. 929.

In a declaration in such an action, it is a sufficient allegation of damage that the plaintiff was imprisoned on such warrant until he could procure his discharge, and that by means of the premises he was prevented from attending to his business and injured in his credit and character, and was put to and incurred

great costs and expenses in and about procuring his liberation from imprisonment. *Ibid.*

The declaration stated that the defendant had falsely and maliciously procured the plaintiff to be adjudged a bankrupt. The adjudication of bankruptcy had been made on an affidavit by the defendant, containing statements which were not true in fact. The adjudication was subsequently annulled, on the ground that the affidavit did not shew that an act of bankruptcy had been committed:—Held, that the action was maintainable, although the affidavit did not shew an act of bankruptcy committed and the Commissioners had committed an error in adjudicating the plaintiff to be a bankrupt. *Farley, or Fairlie, v. Danks*, 24 Law J. Rep. (n.s.) Q.B. 244; 4 E. & B. 493.

(k) *Against Public Officer for Personal Injury.*

No action will lie against the county surveyor by an individual to recover damages for a personal or pecuniary injury resulting from the non-repair of a county bridge. *Mackinnon v. Penon* (in error), 23 Law J. Rep. (n.s.) M.C. 97; 9 Exch. Rep. 609—affirming the judgment of the Court of Exchequer, 22 Law J. Rep. (n.s.) M.C. 22.

(l) *Breach of Agreement to refer.*

For the breach of a stipulation in a contract to refer to arbitration any difference that should arise as to the contract, an action will lie, although the agreement to refer could not be pleaded in bar of an action for a breach of the contract. *Livingston v. Ralli*, 24 Law J. Rep. (n.s.) Q.B. 269.

Declaration on a contract for the sale of a cargo of wheat, to consist of a certain quantity as per bill of lading, the contract stipulating that should any difference arise as to the contract, the same should be left to the arbitration of two London corn-factors, or of an umpire in case of difference. Averment, that the said cargo of wheat arrived and was accepted, and the price paid according to the contract; that a difference thereupon arose as to the said contract, which might have been left to arbitration in manner agreed upon, and that the plaintiff had done everything on his part to have the said difference left to arbitration. Breach, that the defendant refused and declined to concur with the plaintiff in referring the said difference, and wrongfully prevented the same from being left to or disposed of by arbitration. Plea, setting out the contract, which stated that the cargo was to consist of 2,630 chetwerts of 10 poods as per bill of lading, reckoning 72 quarters for every 100 chetwerts, and alleging that the said supposed difference was concerning a claim and demand for damages, alleged to be payable by the defendant by reason of the cargo being deficient in quantity, and no other difference, whereupon the defendant refused and declined to concur in referring the said supposed difference to arbitration:—Held, upon demurrer, that for the breach of the agreement to refer a matter of difference as to the contract to arbitration, an action was maintainable; and that upon the pleadings it appeared that there was such a matter of difference between the parties, and therefore that the plea was no answer to the declaration. *Ibid.*

(m) *Debentures.*

The Herne Bay Pier Act, (6 & 7 Will. 4. c. cxii.)

by section 9, enables the company to borrow money on bond, under their common seal, and the money is to be made payable in such manner, at such time, and at such rate of interest, as they shall think proper; and the rents and profits of the undertaking are to be a security for the money so borrowed, with interest, and all bondholders shall be equally entitled to a claim or lien on the said rents and profits in proportion to the sums thereby secured, and without any preference by reason of the priority of date of any such securities, or any other account whatever:—Held, that this clause did not prevent a creditor, to whom the company had given a bond under their common seal, conditioned for the payment of the principal money at a fixed day, and interest in the mean time, from suing the company for the penalty of that bond; the clause at the end of the section only applying to prevent a creditor recovering under his judgment in preference to others. *Bolckow v. the Herne Bay Pier Co.*, 22 Law J. Rep. (n.s.) Q.B. 33; 1 E. & B. 74.

(B) CIRCUITY OF ACTION.

A delivery order for goods stated, that the parties signing it held certain goods which they engaged to deliver to A's order on the "presentation" of the document duly indorsed:—Held, that "presentation" meant delivering up the document, and that A's indorsee was not entitled to the delivery of the goods on merely shewing the order. *Bartlett v. Holmes*, 22 Law J. Rep. (n.s.) C.P. 182; 13 Com. B. Rep. 630.

A breach by the plaintiff of the contract sued upon, since action brought, cannot be pleaded or given in evidence in reduction of damages, to avoid circuity of action. *Ibid.*

A plea is not good in avoidance of circuity of action unless it shews that the sum which the defendant is entitled to recover from the plaintiff must, in law, be the same as that for which the plaintiff sues. *Charles v. Atton*, 23 Law J. Rep. (n.s.) C.P. 197; 15 Com. B. Rep. 46.

By a charter-party A agreed to pay B, the master of a vessel, one-third of the freight at the final sailing of the vessel, the same to be returned to A if the cargo should not be delivered at the port of destination, A insuring at the owners' expense and deducting the costs out of the first payment. A paid the one-third freight, deducting the costs of insurance. The ship and cargo were lost, and A brought his action to recover back the one-third freight. B pleaded that the loss of the one-third freight was a loss which A was to be insured against; that A insured so negligently that the insurance was useless; and that by such negligence A became liable to B for the same amount which he now claimed from B, and to make good the same to B:—Held, that the plea was bad; that the conclusion of law as to A's liability was not warranted by the facts stated, as the amount to be recovered by B as damages for A's negligence was not necessarily identical with that sued for by A. *Dubitante Crowder, J. Ibid.*

(C) NOTICE OF ACTION.

(a) *To Judges and Officers of Inferior Courts.*

The act 9 & 10 Vict. c. 95, s. 138, enacts, that in all actions to be commenced against any person for anything done in pursuance of that act, notice in

writing of such action shall be given to the defendant one month before action brought. In the case of an action brought against the Judge of one of the county courts established under that act, for disobeying a writ of prohibition, in proceeding with a matter therein referred to, such Judge is entitled to notice under the above section if he proceeded honestly believing that his duty as a Judge under the act called upon him to do so. *Booth v. Olive*, 20 Law J. Rep. (N.S.) C.P. 151; 10 Com. B. Rep. 827.

A declaration stated that the plaintiffs in the court of record at Manchester recovered against G a debt of 50*l.*, and sued out a *fi. fa.* directed to the defendant as the officer for executing the process of that court; that the defendant did not levy, but neglected and refused, and afterwards falsely returned *nulla bona*. Plea, that no notice of action had been given under the local act of parliament establishing the said court of record. Demurrer. The defendant was appointed serjeant-at-mace, under the local act, and was bound by that act to execute civil process, and it was enacted that in all actions "for anything done in pursuance of this act" notice of action should be given to the defendant:—Held, that the plea was good; that the defendant was entitled to notice of action, part of the cause of action being for a *misfeasance* in making a false return. *Quære*—whether in case of a mere *non-feasance* on the part of the defendant, notice of action would have been necessary. *Joule v. Taylor*, 21 Law J. Rep. (N.S.) Exch. 31; 7 Exch. Rep. 58.

A bailiff is not deprived of his right under the County Court Act to notice of action by receiving an indemnity from the execution creditor. *White v. Morris*, 21 Law J. Rep. (N.S.) C.P. 185; 11 Com. B. Rep. 1015.

A person who acted in execution of the process of a borough court of record under the serjeant-at-mace of the borough, and who had no appointment from the Judge of the court, was held not to be a "bailiff" entitled to a month's notice of action under the 8th section of the act 7 & 8 Vict. c. 19. for regulating the bailiffs of inferior courts. *Tarrant v. Baker*, 23 Law J. Rep. (N.S.) C.P. 21; 14 Com. B. Rep. 199.

The preamble of that act recites, that "Courts are holden for sundry counties, hundreds, and wapentakes, various manors and other lordships, liberties and franchises, having, by custom or charter, jurisdiction for the recovery of debts and damages in personal actions:—" *Quære*—whether a borough court of record, having jurisdiction for the recovery of debts and damages in personal actions, and also in ejectment between landlord and tenant, under a charter made by virtue of the 7 Will. 4. & 1 Vict. c. 78. s. 49. conferring on the Court the powers of the borough courts under the Municipal Corporations Act (5 & 6 Will. 4. c. 76. s. 118), is a court within the 7 & 8 Vict. c. 19. *Ibid*.

A notice of action given to a bailiff of a county court is not bad because it describes him as having acted under a statute which does not relate at all to county courts or to the matter in question—if it gives him notice of the action, and of the cause thereof, it is sufficient, and such a reference to a wrong statute may be rejected. *Macgregor v. Galsworthy*, 3 Car. & K. 8.

(b) To Magistrates.

A notice of action given to a magistrate, under the 11 & 12 Vict. c. 44. s. 9, stated that an action would be brought against him, for that he with force and arms caused the plaintiff to be assaulted, beaten and ill-treated by one J D, and also caused the plaintiff to be apprehended and seized and laid hold of, and be compelled to go through divers streets, &c. to a certain lock-up or prison, and to be unlawfully imprisoned and detained in prison, without any reasonable or probable cause, for a long space of time. The declaration in the action charged that the defendant maliciously and without reasonable or probable cause issued a warrant for the apprehension of the plaintiff, on a charge of assault upon J D; and that the defendant afterwards maliciously and without reasonable or probable cause procured the plaintiff to be arrested and imprisoned, and to be brought before two Justices to be examined touching the said charge, whereupon he was committed to trial; and that the defendant at the Quarter Sessions maliciously and without reasonable or probable cause procured an indictment to be preferred against the plaintiff, which was returned not found, by the grand jury. The only evidence to connect the defendant with the acts complained of was, that he issued his warrant to apprehend the plaintiff for a matter over which he had jurisdiction:—Held, that the plaintiff could not recover, as the notice of action did not clearly and explicitly state a cause of action against the defendant under section 1. of the 11 & 12 Vict. c. 44, for *maliciously* doing an act in a matter over which he had jurisdiction, but that it rather pointed to a cause of action under section 2, for an act done by the defendant in excess of or without jurisdiction. *Taylor v. Nesfield*, 23 Law J. Rep. (N.S.) M.C. 169; 3 E. & B. 725.

A magistrate acting in the execution of his office is, by the 11 & 12 Vict. c. 44, entitled to notice of action, although he acts maliciously and without reasonable and probable cause. *Kirby v. Simpson*, 23 Law J. Rep. (N.S.) M.C. 165; 10 Exch. Rep. 358.

In actions against magistrates for acts done in the execution of their office, the Judge is to decide whether notice of action is necessary, and the jury are not to determine the question of *bona fides*.

(c) To Revenue Officers.

The 8 & 9 Vict. c. 87. s. 117. (Customs Consolidation Act) enacts, that no writ shall be sued out against any officer of the Customs or against any person acting under the direction of the Commissioners of her Majesty's Customs for anything done in the execution of or by reason of his office until a month's notice of action shall have been given, stating the cause of action, &c. The 118th section enacts, that no plaintiff, in any case where an action shall be grounded on any such act done by the defendant, shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid, or shall receive any verdict against such officer or person unless he shall prove on the trial of such action that such notice was given; and in default of such proof the defendant in such action shall receive a verdict with costs, as hereinafter mentioned:—Held, that, upon the trial of an action against an officer of the

Customs, it is the duty of the Judge, unless the facts are admitted, to hear the evidence and decide whether the defendant did the act complained of honestly believing that his duty called upon him to do it, in which case the provisions as to notice of action would be applicable. *Arnold v. Hamel*, 23 Law J. Rep. (N.S.) Exch. 137; 9 Exch. Rep. 137.

(d) *Under Public Health Act.*

The plaintiff contracted by deed with the defendants as a Local Board of Health, to execute certain works, according to a specification, and that the works should be begun, proceeded with, and completed to the satisfaction of their surveyor. Payment was to be made by instalments, upon the certificate of the surveyor. By the deed it was provided "that if the plaintiff, from bankruptcy, insolvency, or any cause whatsoever, should not proceed with the works to the satisfaction of the surveyor, it should be lawful for the defendants, after three days' notice, signed by their surveyor, to employ other persons to complete the works; and that the deed should, at the expiration of the said notice, be void, at the option of the defendants, and the amount already paid to the plaintiff should be considered the full value of the works which should up to that time have been executed, and the materials on the premises should become the property of the defendants without any further payment:"—Held, that, in an action by the plaintiff against the defendants for not allowing him to complete his contract, no notice of action was requisite under the provisions of the 11 & 12 Vict. c. 63. s. 139. (the Public Health Act). *Davis v. the Mayor, &c. of Swansea*, 22 Law J. Rep. (N.S.) Exch. 297; 8 Exch. Rep. 808.

The defendant contracted with the Local Board of Health of H for the digging of wells for the better supply of water, the work to be done to the satisfaction of the local board, or their surveyor, and the digging to be under the direction of the surveyor. The hole made in digging one of the wells in a highway was negligently left without sufficient light, in consequence of which the plaintiff's horse in passing fell into the hole and was injured, and for the damage thereby occasioned to the plaintiff an action was brought without a previous notice of action having been given:—Held, that the defendant was a person "acting under the direction of the local board" within the meaning of section 139. of the Public Health Act; and that the action was in respect of something "done, or intended to be done, under the provisions of the act," and, therefore, that the defendant was entitled to notice of action. *Newton v. Ellis*, 24 Law J. Rep. (N.S.) Q.B. 337.

(e) *Under Malicious Trespass Act.*

The 7 & 8 Geo. 4. c. 30. s. 41. (the Malicious Trespass Act) enacts, that in all actions for anything done in pursuance of the act, notice in writing of such action shall be given to the defendant one month before action brought. The 7 & 8 Geo. 4. c. 29. s. 75. (the Larceny Act) is to the same effect. The defendant was sued (in the third count) for having giving the plaintiff into custody on a charge of doing wilful damage to the defendant's property, and (in the fourth count) for having given him into custody on a charge of larceny. The jury found that the plaintiff had not, on either occasion, committed the

offence with which he was charged, but that the defendant, on both, *bond fide* believed that he had:—Held, as to each count, that the defendant was entitled to notice of action; and that it was not necessary for him to shew that he knew of the above acts. *Read v. Coker*, 22 Law J. Rep. (N.S.) C.P. 201; 13 Com. B. Rep. 850.

(f) *Form and Service.*

The plaintiff's particulars of demand in a plaint in a county court were: first, for unlawfully entering the plaintiff's premises and seizing cattle under colour of a distress; second, for unlawfully selling three other cattle not distrained; third, for not having the cattle so sold appraised before selling them; fourth, for continuing on the plaintiff's premises and proceeding to sell the plaintiff's cattle after an abandonment of the distress. The notice of action stated that the plaintiff would bring his plaint against the defendant for having, on the 11th of March, entered his premises and seized three heifers there, and for having continued there several days, and also for that defendants, against the plaintiff's will, on the 17th of March, did seize, sell and remove from the plaintiff's premises three heifers belonging to him:—Held, that the plaintiff was entitled to go into evidence in support of the fourth item in the particulars, as it was one for which no notice of action was necessary, or, if necessary, the notice given was large enough to apply to it. *Howard v. Remer*, 23 Law J. Rep. (N.S.) Q.B. 60; 2 E. & B. 915.

In a case in which notice of action is required, a notice of an action in the Common Pleas is insufficient to support an action in the Queen's Bench. *Elastob v. Wright*, 3 Car. & K. 31.

If in such a case the notice be of an action for breaking and entering the plaintiff's house and seizing divers goods, which goods were then "lying and being in and upon my said dwelling-house," this will not support a charge in the declaration of taking the plaintiff's goods. Whether in a notice of an action for breaking into the plaintiff's house it is necessary to give notice of special damage if the plaintiff means to claim any, *quære*. *Semble*, that it is. *Ibid*.

The 11 & 12 Vict. c. 44. s. 2. provides that no action shall be brought against a Justice for any act done under any conviction or warrant issued in a matter of which he has not jurisdiction, until after such conviction or warrant has been quashed; and by section 9. no action shall be commenced against a Justice of the Peace until one calendar month after notice in writing of such intended action:—Held, that a notice of action served before the quashing of a warrant of commitment in respect of which an action was brought against the Justice granting it, was sufficient. *Haylock v. Sparke*, 22 Law J. Rep. (N.S.) M.C. 67; 1 E. & B. 471.

(D) FORM OF ACTION.

(a) *Assumpsit or Case.*

The third and fourth counts of a declaration set forth certain promises of the defendant for a good consideration, and not connected with any common law duty arising from the relation between the plaintiff and the defendant, and then alleged a breach of duty in the defendant consisting solely in the neglect to do the acts, which he had by such promises agreed to do, the plaintiff having performed his part of the

agreement. The last count was in trover:—Held, on general demurrer, that the declaration was bad for misjoinder. *Courtenay v. Earle*, 20 Law J. Rep. (N.S.) C.P. 7; 10 Com. B. Rep. 73.

The case of *Boorman v. Brown*, 3 Q.B. Rep. 511; s.c. 11 Law J. Rep. (N.S.) Exch. 437, and 11 Cl. & F. 1, does not decide that the neglect to perform a contract is in every case a breach of duty for which an action of tort will lie. *Ibid*.

An action on the case will not lie for every neglect to perform a contract. *Wood, or Woods, v. Finnis*, 21 Law J. Rep. (N.S.) Exch. 133; 7 Exch. Rep. 363.

(b) *Assumpsit or Trespass.*

A and B (the defendants) went together to the house of the plaintiff's mother, and A seized there a sum of money belonging to the plaintiff. There was some evidence of A and B having gone with the intent to get the money, but there was no evidence that B went into the house. They subsequently paid the money into a bank to their joint account:—Held, that the plaintiff might waive the trespass, and maintain an action for money had and received against the two defendants. *Neat v. Harding*, 20 Law J. Rep. (N.S.) Exch. 250; 6 Exch. Rep. 349.

(c) *Case or Covenant.*

A lessor of a mine may maintain case against his lessee for an injury to the reversion, by improperly working the mine, notwithstanding that the injury is also a breach of the lessee's covenant, upon which the lessor might have sued. *Marker v. Kenrick*, 22 Law J. Rep. (N.S.) C.P. 129.

(d) *Case or Trespass.*

A railway train driven at the rate of forty miles an hour, according to the general directions of the railway company to the driver, ran over and killed some sheep which had strayed on the line in consequence of the defective fences of the company:—Held, that the train being under the direction and controul of a rational agent, the company were not liable in trespass for the injury; but that the proper form of action was by action on the case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway. *Sharrod v. the London and North-Western Rail. Co.*, 20 Law J. Rep. (N.S.) Exch. 185; 4 Exch. Rep. 580.

Trespass for false imprisonment. The defendant Barnes having obtained a warrant to search the plaintiff's house, and to apprehend him on a charge of felony, the warrant being headed "To the constable of D, in the county of W," delivered it to the defendant Barton, a county constable, appointed under the 2 & 3 Vict. c. 93, who executed it within the parish of D by apprehending the plaintiff. The action was not brought until the expiration of six months from the time of the act committed:—Held, first, that trespass was the proper form of action; secondly, that the parish constable of D, and not the defendant Barton, was the proper party to execute the warrant, but that Barton was "protected," the action not having been brought against him within six months, pursuant to the 24 Geo. 2. c. 44. s. 8, and that the other defendant was liable. *Freegard*

v. Barnes, 21 Law J. Rep. (N.S.) Exch. 320; 7 Exch. Rep. 327.

ACCUMULATION.

[See THELLUSSON ACT.]

ADMINISTRATION.

[See EXECUTOR AND ADMINISTRATOR.]

ADMINISTRATION OF ESTATE IN CHANCERY.

[See EXECUTOR AND ADMINISTRATOR.]

- (A) WHAT DEBTS MAY BE CLAIMED.
- (B) INTEREST ON DEBTS.
- (C) MARSHALLING DEBTS.
- (D) WHAT ARE LEGAL ASSETS.
- (E) MARSHALLING ASSETS.
- (F) PRACTICE.

(A) WHAT DEBTS MAY BE CLAIMED.

An insurance company lent money on the security of a bond given by three obligors to two of the directors, and of a policy effected with the company by one of the obligors on his own life, and deposited as a collateral security. By the terms of the policy the insurance money was charged on funds and property of the company only. The condition of the bond was for payment of the money lent, with interest, and of the premiums upon the policy. The insurance company was dissolved, their funds distributed, and their business transferred to another company, to whom the obligees assigned the bond. One of the obligors, who had not effected the insurance, having died, and the policy having become forfeited for non-payment of the premiums, the assignees of the bond debt sought to prove in the Master's office, under a decree for the administration of the estate of the deceased obligor:—Held, that the proof ought to be admitted to the extent of an unpaid premium, which became payable before the dissolution of the company, although the dissolution took place long before the end of the year for which the premium was paid; but that no proof could be admitted for any premium, the time for payment of which had not arrived when the company was dissolved. *Atkinson v. Gylby*, 21 Law J. Rep. (N.S.) Chanc. 848; 2 De Gex, M. & G. 670.

(B) INTEREST ON DEBTS.

Interest at 4l. per cent. will be allowed on the amount of a demand for work and labour in an administration suit from the time when the demand for interest was made. *Mildmay v. Methuen*, 3 Drew. 91.

(C) MARSHALLING DEBTS.

[*Brearcliff v. Dorrington*, 6 Law J. Dig. 14; 4 De Gex & Sm. 122.]

A covenant by a surety for payment of a debt at a future day is not a contingent, but an actually existing debt, and must be provided for before simple contract creditors are paid. *Atkinson v. Grey*, 1 Sm. & G. 577.

A, a creditor of a testator, in an action against his executor, took a judgment of the assets of the testator *quando acciderint*. B, another creditor, subsequently took a similar judgment. In a suit for the administration of the estate of the testator,—Held, that A was entitled to priority of payment over B. *Dolland v. Johnson*, 23 Law J. Rep. (N.S.) Chanc. 637; 2 Sm. & G. 301.

A testator domiciled in Ireland left assets in Ireland and in England. The will was proved by the same executors in both countries. The Irish assets were remitted to England to be administered here, before the Irish creditors were satisfied:—Held, that an Irish judgment creditor was entitled to be paid out of the Irish assets in priority over English simple contract creditors. *Cook v. Gregson*, 23 Law J. Rep. (N.S.) Chanc. 734; 2 Drew. 286.

A, by his marriage settlement, covenanted under seal with a trustee to settle an estate on the usual trusts. The estate was not settled. A afterwards conveyed away this estate in exchange for another estate and 1,050*l*. A died, and in a suit for the administration of his estate it was declared that the trustee of the settlement was entitled to prove as a creditor of A for the sum of 1,050*l*, and an account was directed of what was due to such trustee in respect of that sum and interest, and to all other the creditors by simple contract of A. On the cause coming on for further directions,—Held, that the debt for which the trustee was entitled to prove, was a specialty debt; and that the Court was not precluded by the above-mentioned decree from so treating it. *Powdrell v. Jones*, 23 Law J. Rep. (N.S.) Chanc. 606; 2 Sm. & G. 335.

By an instrument in writing, operating as an agreement for and not as a lease, A agreed to take and B to grant, a lease of a sugar estate in Jamaica, for a certain term of years, at a certain rent. A died indebted to B in respect of this rent. In a creditors' suit, instituted in the Court of Chancery in England for the administration of the estate of A,—Held, affirming the decision of the Court below, that B was not entitled to rank as a specialty creditor in respect of such rent. *Vincent v. Godson*, 24 Law J. Rep. (N.S.) Chanc. 121; 4 De Gex, M. & G. 546, affirming 22 Law J. Rep. (N.S.) Chanc. 747; 1 Sm. & G. 384.

Rent due ranks as a specialty debt where the relation of landlord and tenant exists in respect of lands within the jurisdiction; and that, whether the demise be by writing or upon a constructive tenancy from year to year. But the doctrine, being founded in privity of estate, will not apply where the lands, the subject of the demise, are out of the jurisdiction. *Ibid*.

In a creditors' suit four persons claimed against a testator's estate for misappropriation of trust funds. A claimed to be a specialty creditor under a trust deed, which was never executed by the testator, although he acted in the trusts:—Held, that A was only a simple contract creditor. *Jenkins v. Robertson*, 22 Law J. Rep. (N.S.) Chanc. 874.

B claimed as a specialty creditor under a trust deed, by which it was "declared" by the parties that the money should be on certain trusts:—Held, that the omission of the word "agreed" did not prevent there being a contract on the part of the trustee. *Ibid*.

C claimed under a trust deed by which the testator was a trustee jointly with another person, who survived him:—Held, that the testator's estate was liable for the breach of trust committed by him, and that C. was a specialty creditor. *Ibid*.

D claimed under a bond:—Held, that as the testator's heirs were bound, D was entitled to priority over the other specialty creditors out of the assets arising from real estate. *Ibid*.

The suit was instituted by A, the simple contract creditor, and the assets were insufficient to satisfy the specialty debts:—Held, nevertheless, that the plaintiff was entitled to his costs out of the estate, as between solicitor and client. *Ibid*.

The personal estate of a testator must be administered according to the law of his domicile. *Wilson v. Lady Dunsany*, 23 Law J. Rep. (N.S.) Chanc. 492; 18 Beav. 293.

Judgments in England will give no priority against assets in England belonging to a testator domiciled abroad; and effect can only be given to them with reference to the law of the domicile. *Ibid*.

A domiciled Irishman, having assets in England, was indebted upon judgments obtained here and also upon a duly registered mortgage of lands in Ireland. By a decree of the Court of Chancery there the lands had been sold, but the proceeds had been found insufficient to discharge the debts. Upon a claim by the mortgagees,—Held, that the decree was not similar to a judgment at law there for payment of a debt, and that it gave no priority; that the balance due on the mortgage was a specialty debt only, and payable *pari passu* with the other specialty debts of the testator. *Ibid*.

(D) WHAT ARE LEGAL ASSETS.

The equity of redemption of a mortgage in fee is made legal assets by 3 & 4 Will. 4. c. 104. *Foster v. Handley*, 1 Sim. N.S. 200.

Monies arising under a will and paid by the executors into court in a creditors' suit, held legal assets. *Lovegrove v. Cooper*, 2 Sm. & G. 271.

The proceeds of real estate directed by the Court to be sold for payment of debts, and paid by the purchaser into court, held legal assets. *Ibid*.

(E) MARSHALLING ASSETS.

[*Harris v. Farwell*, 6 Law J. Dig. 15; 13 Beav. 403.]

A testator was seised of real estate in fee simple, and was possessed of personal estate, and had also a general power of appointment over other real estate; he executed his will, by which he devised his fee simple estate and bequeathed his personality, and also executed his power of appointment over the other estate: the personal estate was insufficient for the payment of the testator's debts:—Held, that the devised real estate was primarily liable to the payment of the debts, and if insufficient, then that the appointed real estate was liable, whether the debts were by specialty or by simple contract. *Fleming v. Buchanan*, 22 Law J. Rep. (N.S.) Chanc. 886; 3 De Gex, M. & G. 976.

Although a specialty creditor has a right to resort to the descended real estates of his debtor as legal assets, he cannot participate in the benefit of the trusts of his debtor's real estate, devised by him upon trust for sale for payment of his debts, without bring-

ing what he had obtained out of the descended estates into hotch-potch. *Chapman v. Esgar*, 1 Sm. & G. 575.

(F) PRACTICE.

An administrator of an intestate died in 1817 indebted to a large amount in respect of his receipts as administrator, but leaving sufficient personal estate to pay this amount, and also leaving freehold estates. In the same year a suit was instituted for the administration of his personal estate; and in 1832 it appeared from the report in that suit that his personal estate had been misapplied, and that his executor had become bankrupt. Thereupon, and in the same year (1832), an administratrix *de bonis non* of the intestate instituted a suit against the administrator's heir and the sureties in the usual administration bond and against the representatives of the Archbishop (who had died), praying to have the benefit of the bond, and to charge by means of it the administrator's estates. No decree was made in this suit, the plaintiff having married in 1838, and having died in 1847 without the suit having ever been revived. In 1848 another of the next-of-kin, who had been a defendant to the suit of 1832, took out administration *de bonis non* of the intestate, and filed a bill of revivor and supplement claiming to have the benefit of the suit of 1832.—Held, that the suit of 1832 must be considered as having been abandoned, and that the suit of 1848 must be considered an original suit, and as such barred by length of time and laches. *Bolton v. Powell*, 2 De Gex, M. & G. 1; 14 Beav. 275.

Quere—whether the circumstance of the administrator dying largely indebted to the intestate's estate was a breach of condition of the bond. *Ibid*.

Quere—whether the suit of 1832 was in its nature one which it was competent for the plaintiff in that of 1848 to revive. *Ibid*.

Quere—whether either suit could be maintained, the ordinary personal representative not having declined to lend his name in an action. *Ibid*.

In an administration suit a creditor's claim was admitted as a claim only by the Master's report to which the creditor did not except. Shortly afterwards the result of a suit tended to establish his debt. After more than a year the creditor petitioned to be admitted as a creditor against the estate.—Held, that he might be admitted without being charged with the costs which had not been increased by the delay. *Lee v. Flood*, 2 Sm. & G. 250.

Sixteen years after a decree for the administration of a testator's estate under which the amount in the hands of the executors had been paid into court, and the decree no further prosecuted, the residuary legatees being infants on attaining twenty-one petitioned to have the fund paid out to them according to the trusts of the will, and upon the affidavit of the executors that there were no outstanding demands upon the estate, the Court ordered the amount to the petitioners. *Harrison v. Lane*, 2 Sm. & G. 249.

An administrator unnecessarily retained a balance of 3,700*l.* in his hands for three years; he was charged with interest, but was allowed his costs of an administration suit.—Held, also, that the pendency of a suit for administration in the Duchy Court of Lancaster during the time was no justification for the non-investment.

An administrator settled with three out of four next-of-kin; and the fourth having instituted a suit for administration.—Held, that his share was only liable to one-fourth of the costs. *Holgate v. Haworth*, 17 Beav. 259.

The provisions of the 13 & 14 Vict. c. 35. for taking accounts of the debts and liabilities of deceased persons, without suit, are not applicable to the proceeds of real estate. *Re Moore*, 23 Law J. Rep. (n.s.) Chanc. 153.

A creditor having continued his proceedings at law after notice of a decree for administration, was ordered to pay the costs of a motion to restrain him, but was allowed to set them off against the costs of the proceedings at law incurred prior to the notice. *Gardner v. Garrett*, 20 Beav. 469.

Legatees and annuitants are bound by the proceedings in a suit for administration between the executors and residuary legatees and devisees, although there may be a question as to the debts being primarily charged on the real estate, and which may incidentally affect them. Therefore, after decree in such a suit, legatees cannot sustain an administration suit against the executors. *Jennings v. Paterson*, 15 Beav. 28.

ADMIRALTY, COURT OF.

[See Stat. 17 & 18 Vict. c. 78.—PROHIBITION—SHIP AND SHIPPING.]

ADVANCEMENT.

Mrs. A, the wife of Mr. A, wrote a letter to her mother B, strongly urging her to lend Mr. A the sum of 2,000*l.* (the amount of an intended legacy from B to Mrs. A) at interest, to be paid to B during her life. B sold out 2,000*l.* consols, and remitted the proceeds to Mr. A, and made the following indorsement on the broker's receipts:—"The inclosed sums were sold out for Mrs. A, with a promise on her part that I should receive interest at 5*l.* per cent. during my life, seeing that it was my intention to have left it to her at my death, but her application was too urgent." B died intestate.—Held, that, under these circumstances, the proceeds of the stock were lent and not given to Mr. A, and that the amount was a debt due from him to B at her death, and ought to be set off against the distributive share to which Mrs. A was entitled in her mother's estate. *Rannie v. Chandler*, 23 Law J. Rep. (n.s.) Chanc. 609.

ADVOWSON.

In 1790 an advowson appendant to a manor was sold and assigned for the residue of a term of 500 years, created in the manor and advowson in 1745, and which, except as to the advowson, had ceased.—Held, that this did not sever the appendancy, and that the advowson passed by a subsequent release of the manor with general words. *Rooper v. Harrison*, 2 Kay & J. 86.

AFFIDAVITS.

[See PRACTICE, IN EQUITY.]

- (A) FORM OF, GENERALLY.
- (B) ENTITLING.
- (C) DEPONENT'S NAME AND ADDITION.
- (D) SEVERAL DEPONENTS.
- (E) ILLITERATE PERSONS.
- (F) INTERLINEATIONS AND ERASURES.
- (G) BEFORE WHOM SWORN.
 - (a) *In general.*
 - (b) *Abroad.*
- (H) JURAT.
- (I) FILING AND TAKING OFF THE FILE.
- (J) WHEN RECEIVABLE.
- (K) EXHIBITS.

(A) FORM OF, GENERALLY.

[See Reg. Gen. Mich. Vac. 27 Nov. 1854, 24 Law J. Rep. (n.s.) iii; 4 E. & B. 361; 14 Com. B. Rep. 769.]

(B) ENTITLING.

Semble—that the proper title of affidavits in support of a rule for an attachment against a sheriff's officer for extortion in the execution of a *fi. fa.* is in the cause. *Masters v. Lowther*, 21 Law J. Rep. (n.s.) C.P. 130; 11 Com. B. Rep. 848.

The defendant was sued as "H W B." He appeared as "Henry William B." The declaration described him as "Henry William B, sued as H W B." The affidavits were entitled "Hilary John B, sued as Henry William B." The court admitted the affidavits. *Baldwin v. Bauerman*, 21 Law J. Rep. (n.s.) C.P. 160; 12 Com. B. Rep. 152.

Upon a motion to enter up judgment on an old warrant of attorney, the affidavit is properly entitled in the cause in which the judgment is to be entered. *Bell v. Fisk*, 12 Com. B. Rep. 493.

Where pending an action against a company the name of the company is changed by act of parliament, and a motion is afterwards made in such action, a suggestion should be entered of the change of name and the affidavits entitled in the new name. *Hebblethwaite v. the Leeds and Thirsk Rail. Co.*, 21 Law J. Rep. (n.s.) Exch. 37.

(C) DEPONENT'S NAME AND ADDITION.

[See Reg. Gen. Hil. term, 1853, r. 138, 22 Law J. Rep. (n.s.) xvii; 1 E. & B. app. xxiv.]

In an affidavit verifying the notes of the Judge of the Liverpool Passage Court, the deponent described himself as "S, clerk to E J, Esq., barrister-at-law and assessor of the Court of Passage of the borough of L":—Held, insufficient for not stating deponent's place of residence. *Winch v. Williams*, 21 Law J. Rep. (n.s.) C.P. 216; 12 Com. B. Rep. 416.

The omission of a deponent's addition in an affidavit, in pursuance of Reg. Gen. Hil. term, 2 Will. 4. r. 5, is an irregularity merely, and the party seeking to take advantage of it must come to the Court within a reasonable time. *Seymour v. Maddox*, 1 L. M. & P. P.C. 543.

A reasonable time in such cases dates from the time when the party complaining of the irregularity had the means of knowing it; although, in point of fact, he did not know of it till afterwards. *Ibid.*

(D) SEVERAL DEPONENTS.

[See Reg. Gen. Hil. term, 1853, r. 139, 22 Law J. Rep. (n.s.) xvii; 1 E. & B. app. xxiv.]

(E) ILLITERATE PERSONS.

[See Reg. Gen. Hil. term, 1853, r. 141, 22 Law J. Rep. (n.s.) xvii; 1 E. & B. app. xxiv.]

(F) INTERLINEATIONS AND ERASURES.

The jurat of an affidavit of the due taking of an acknowledgment at Sydney, had an interlineation in the body of it, and an erasure in the jurat:—The Court refused to allow it to be filed. They also refused to enlarge the time for returning the commission in order to get the defects remedied, the time for the return having expired. *Tierney, in re*, 15 Com. B. Rep. 761.

(G) BEFORE WHOM SWORN.

(a) *In general.*

[See 16 & 17 Vict. c. 78—Reg. Gen. Hil. term, 1853, rr. 142, 148, 22 Law J. Rep. (n.s.) xvii; 1 E. & B. app. xxiv.]

The taking an affidavit is a ministerial, not a judicial act. *Kerr v. Ailsa*, 1 Macq. H.L. Cas. 736.

A Scotch Justice of the Peace may take an affidavit out of his jurisdiction, provided the locality be within the authority of the Great Seal of Great Britain. Hence, an affidavit before a Justice of the Peace of the county of Midlothian was held valid though taken in London. *Ibid.*

An affidavit cannot be used in support of an application to the Court if it be sworn before a Commissioner who is acting in the matter as attorney of the applicant, though there be no action pending, and no attorney on the record. *In re Gray*, 21 Law J. Rep. (n.s.) Q.B. 380; 1 Bail C.C. 93.

A person cannot be indicted for perjury for false statements in an affidavit in a suit in a Court of Admiralty, sworn before a Master Extraordinary in Chancery. *The Queen v. Stone*, 23 Law J. Rep. (n.s.) M.C. 14; 1 Dears. C.C.R. 251.

(b) *Abroad.*

[See 15 & 16 Vict. c. 76. s. 23.—18 & 19 Vict. c. 42. ss. 2, 3.]

Semble—That an affidavit sworn before the Deemster of the Isle of Man is not receivable without proof that he has power to take affidavits. *Cross v. Cheshire*, 21 Law J. Rep. (n.s.) Exch. 3; 7 Exch. Rep. 43.

(H) JURAT.

Where the jurat of an affidavit stated, that it was "sworn by A B, at G, in the county of L, in Scotland, the fifth of June, eighteen hundred and fifty years, before me, G R T, a Commissioner for Scotland, for taking affidavits in the Court of Queen's Bench at Westminster," it was held, that the date

of swearing the affidavit and the authority of the Commissioners to take affidavits for the Court of Queen's Bench, were sufficiently set forth. *In re Bell v. the Port of London Assur. Co.*, 20 Law J. Rep. (N.S.) Q.B. 89; 1 L. M. & P. P.C. 691.

(I) FILING AND TAKING OFF THE FILE.

[See Reg. Gen. Hil. term, 1853, rr. 145, 147, 22 Law J. Rep. (N.S.) xvii; 1 E. & B. app. xxiv.]

The Court will not order an affidavit which is not shewn to be scandalous or irrelevant to be taken off the file merely because it cannot, upon some technical ground, such as a defect in the jurat, be read in the cause in which it is filed. *Brunswick v. Sloman*, 1 L. M. & P. P.C. 247.

(J) WHEN RECEIVABLE.

[See Stat. 17 & 18 Vict. c. 125. s. 45.—Reg. Gen. Hil. term, 1853, rr. 144, 146, 22 Law J. Rep. (N.S.) xvii; 1 E. & B. app. xxiv.]

Practice as to allowing affidavits to be filed in answer to new matter under 17 & 18 Vict. c. 125. s. 45. *Simpson v. Sadd*, 15 Com. B. Rep. 757.

The Court of Common Pleas differing from the Court of Queen's Bench,—Held, that leave should not be granted, under the 45th section of the Common Law Procedure Act, 1854, to make affidavits in answer to affidavits alleged to contain new matter, until the case comes on to be heard, and the Court has so far heard it as to be able to see that there is new matter to be answered. *Hayne v. Robertson*, and *Wood v. Cox*, 24 Law J. Rep. (N.S.) C.P. 155; 15 Com. B. Rep. 760, n.; and 16 Com. B. Rep. 494.

When a Judge at chambers dismisses a summons upon the ground of the insufficiency of the affidavits in support of it, the party applying cannot, in renewing his application to the Court, use fresh affidavits. *Hawkins v. Akril*, 1 L. M. & P. P.C. 242.

Where a Judge declined to make an order to give the plaintiff his costs under the County Courts Act, 13 & 14 Vict. c. 61. s. 13, and an application is made to the Court, fresh affidavits may be used in addition to those made use of before the Judge. *Sanderson v. Proctor*, 23 Law J. Rep. (N.S.) Exch. 320; 10 Exch. Rep. 189.

On motion to rescind an order made at chambers on affidavit as having been erroneously granted, the party moving cannot impeach the order upon affidavits not used at chambers, and containing matters which were known to the party moving, or of which he could have obtained knowledge, before the order was made. *Edwards v. Martyn*, 17 Com. B. Rep. 693.

(K) EXHIBITS.

A Commissioner, before whom an affidavit is sworn, ought to certify that any exhibit annexed is the document referred to in the affidavit. *In re Allison*, 10 Exch. Rep. 561.

ALDERMEN OF LONDON.

[Powers of, as to visiting deserted premises, see JUSTICE OF THE PEACE.]

ALE AND BEERHOUSES.

[Sale of beer, wine and spirits on Sundays and holidays regulated by 18 & 19 Vict. c. 118; repealing 17 & 18 Vict. c. 79. And see APPEAL.]

(A) LICENCE.

(a) *False Certificate to obtain.*

(b) *Removal of, by Certiorari.*

(B) KEEPING OPEN AT IMPROPER HOURS.

(C) GAMING.

(D) PENALTIES, TO WHOM PAYABLE.

(A) LICENCE.

(a) *False Certificate to obtain.*

The jurisdiction to convict of the offence, under the 3 & 4 Vict. c. 61, of using a false certificate for the purpose of obtaining a licence to retail beer, is in the Justices acting in and for the place where the offence is committed. *Regina v. Waghorn*, 22 Law J. Rep. (N.S.) M.C. 60; 1 E. & B. 647.

Where such a conviction was made by two Justices of the county of Kent, having jurisdiction within the division in which the house sought to be licensed was situate, but not within the borough of Maidstone, in which the offence was committed,—Held, (*Cole-ridge, J. dissentiente*) under the 3 & 4 Vict. c. 61. s. 19, the 11 Geo. 4. & 1 Will. 4. c. 64. and the 4 & 5 Will. 4. c. 85, that the jurisdiction given to such Justices by the two latter statutes did not extend to the offence of using a false certificate for the purpose of obtaining a licence to retail beer, subsequently created by the 3 & 4 Vict. c. 61. s. 6, and that the conviction was, therefore, bad. *Ibid.*

(b) *Removal of, by Certiorari.*

A licence for the sale of beer granted by the solicitor of Excise without the production of a certificate from the overseer, required by 3 & 4 Vict. c. 61. s. 2, is not a judicial act removable into the court of Queen's Bench by *certiorari*. *Regina v. Salford (Overseers)*, 21 Law J. Rep. (N.S.) M.C. 223.

(B) KEEPING OPEN AT IMPROPER HOURS.

H was a locality which had a population exceeding 2,500 inhabitants. It comprised parts of three townships, two of which were in one parish and one in another, and each of which maintained its own poor separately. H had no local rights peculiar to itself, being an aggregation of houses and inhabitants which had received a separate name.—Held, that H was a "place" in which a public-house might be kept open until eleven at night, under the provisions of the statute 2 & 4 Vict. c. 61. s. 15.

A licence to sell beer granted to E specified that the house should be closed at ten o'clock.—Held, that on an information against E for keeping open his house beyond ten o'clock contrary to the statute, the direction in the licence as to the time was of no avail to support the information, if E, by the statute, was entitled to keep his house open to a later hour. *Regina v. Charlesworth, or West Riding (Justices)*, 20 Law J. Rep. (N.S.) M.C. 181; 2 L. M. & P. P.C. 117.

The prohibition in a licence granted under the General Licensing Act, 9 Geo. 4. c. 61, that the

publican shall not keep his house open "during the usual hours of the morning and afternoon divine service" in the parish church on Sundays, has reference to what are the ordinary hours of the morning and afternoon service as distinguished from evening service. Where, therefore, a publican kept his house open at half-past six o'clock in the evening of a Sunday, in a parish where the service in the church commencing at three o'clock in the afternoon had been discontinued, and a service commencing at six in the evening and terminating at eight o'clock had been substituted for it, it was held that he could not be convicted of an offence against the tenour of the licence. *Regina v. Knapp, or Justices of Bucks*, 22 Law J. Rep. (N.S.) M.C. 139; 2 E. & B. 447.

(C) GAMING.

A conviction which states that a keeper of a public house, licensed under 9 Geo. 4. c. 61, has been "guilty of an offence against the tenour of his licence, that is to say, that he knowingly suffered a certain unlawful game, to wit, the game of dominoes, to be played in his house," is bad; as the game of dominoes is not itself unlawful, and playing at dominoes does not necessarily amount to "gaming" within the meaning of the licence. *Regina v. Ashton*, 22 Law J. Rep. (N.S.) M.C. 1; 1 E. & B. 286.

(D) PENALTIES, TO WHOM PAYABLE.

On a conviction under the Alehouse Act, 9 Geo. 4. c. 61, by Justices of a borough which has a separate commission of the peace, but no Court of Quarter Sessions, the portion of the penalty which, by section 126, is to be paid to the treasurer of the county or place for which the Justices are acting must be paid to the treasurer of the county in which the town is situate, and not to the treasurer of the borough. *Regina v. Dale*, 22 Law J. Rep. (N.S.) M.C. 44; 1 Dears. C.C.R. 37.

ALIEN.

[Proceedings on Foreign Judgments, see ACTION.
And see COPYRIGHT—FOREIGN LAW.]

(A) WHO ARE ALIENS.

(B) PLEA OF ALIEN ENEMY.

(A) WHO ARE ALIENS.

A child born a bastard in a foreign country not recognizing the doctrine of legitimation *per subsequens matrimonium*, is an alien, although his putative father was a Scotchman domiciled all his life in Scotland, and although such putative father afterwards married the mother of the bastard for the express purpose of rendering the bastard legitimate. *Shedden v. Patrick*, 1 Macq. H.L. Ca. 535.

The children of natural born subjects, who under the 4 Geo. 2. c. 21. are to be considered natural born subjects of this kingdom, must have been legitimate from their birth, and not rendered so by the subsequent marriage of their parents. *Ibid.*

To be within the act the child must be born of a British father; but a bastard, *filius nullius*, can have no father. *Ibid.*

(B) PLEA OF ALIEN ENEMY.

The plea of "alien enemy" is one which the Courts discourage, and against which they will make every intendment. *Shepeler v. Durant*, 23 Law J. Rep. (N.S.) C.P. 140.

The defendant was put under terms to plead issuably by an order of the 23rd of March. On the 28th war was declared against Russia. On the 29th the defendant took out a summons before a Judge for leave to plead a plea of alien enemy, which was dismissed. On application to the Court, it refused a rule *nisi* for leave to plead the plea. *Ibid.*

A plea (*pvis darrein continuance*) that the plaintiff was an alien born in the empire of Russia and an enemy of the Queen, born of alien father and mother, and not a subject of the Queen by naturalization, denization, or otherwise, and that he was residing in this kingdom without the licence, safe conduct, or permission of the Queen, is good, although it does not in terms negative that the plaintiff had obtained a Secretary of State's certificate under the 7 & 8 Vict. c. 66. s. 6. *Alcenius v. Nygren*, 24 Law J. Rep. (N.S.) Q.B. 19; 4 E. & B. 217.

AMBASSADOR.

[Power to administer Oaths, &c., see 18 & 19 Vict. c. 42.]

An action having been brought against a foreign minister and other co-contractors, the minister entered an appearance, and allowed the action to proceed till issue joined, and got a rule for a special jury. He then applied to the Court to stay all proceedings against him, on the ground that he was exempt from suit in this country; but the Court refused to do so (as he had not been interfered with in his person or his goods), on the ground that he had attorned to the jurisdiction by his voluntary appearance. *Taylor v. Best*, 23 Law J. Rep. (N.S.) C.P. 89; 14 Com. B. Rep. 487.

A secretary and councillor of legation of a foreign sovereign, appointed by him, and having charge of the executive of the legation, and acting in the absence of the ambassador as *chargé-d'affaires*, is a public minister to whom the privileges of ambassadors apply. *Ibid.*

A foreign ambassador does not lose his privilege of exemption from suit, by trading in this country; although his domestic servants do, under the limitation in the 7 Anne, c. 12. s. 5. *Ibid.*

Quere—whether an ambassador can be brought unwillingly into the courts of this country by process not affecting either his person or his goods. *Ibid.*

AMENDMENT.

[As to general powers of amendment, see Stats. 15 & 16 Vict. c. 76. s. 222, and 17 & 18 Vict. c. 125. s. 96. As to amendment of Writs of Summons, see 15 & 16 Vict. c. 76. ss. 20, 21. And see MASTER AND SERVANT—PARLIAMENT—TROVER.]

(A) MISJOINDER OF DEFENDANTS.

(B) PARTICULARS IN PLAINT IN COUNTY COURT.

(C) PLEADINGS FRAMED TO EMBARRASS.

- (D) DECLARATIONS.
- (E) RECORDS, AFTER PLEA OF NUL TIEL RECORD.
- (F) ENTRY OF VERDICTS AND JUDGMENTS.
- (G) AFTER PAYMENT INTO COURT AND ACCEPTANCE BY PLAINTIFF.
- (H) AT NISI PRIUS.
 - (a) *In general.*
 - (b) *In Cases of Variance under 3 & 4 Will. 4. c. 42.*
- (I) AFTER TRIAL AND BY THE COURT.
- (J) ON TERMS.
- (K) TO SAVE THE STATUTE OF LIMITATIONS.
- (L) MANDAMUS.
- (M) INDICTMENTS.

(A) MISJOINDER OF DEFENDANTS.

[As to misjoinder and nonjoinder of plaintiffs and defendants, see 15 & 16 Vict. c. 76. ss. 34—38.]

Where, in an action of contract, one of several defendants appears at the trial not to be liable, the proper course for the plaintiff, under the Common Law Procedure Act, 1852, is to apply at the trial for an amendment under section 37. The misjoinder is not such a defect or error as can be amended after the trial by the Court in banco under section 222. *Robson v. Doyle*, 3 E. & B. 396.

Under the power of amendment given by section 37, of the Common Law Procedure Act, 1852, where a misjoinder of defendants appears at the trial, the record may be amended by striking out the name of a defendant improperly joined, against whom judgment by default had been signed. *Greaves v. Humphreys*, 24 Law J. Rep. (N.S.) Q.B. 190.

(B) PARTICULARS IN PLAINT IN COUNTY COURT.

The plaintiff's particulars in a plaint in a county court alleged that the defendant had deepened the bed of a river, and thereby varied the level, whereby the plaintiff had been deprived of his accustomed head of water at his mill. It appeared in evidence that the defendant had formerly deepened the bed of the stream, for which the plaintiff recovered damages in an action; that the defendant then erected on his own land a dam, which while it remained kept up the head of water as of old; that the defendant afterwards removed the dam, on which the water fell, and the plaintiff brought the present action. The county court Judge, thinking the particulars were not full enough to meet the evidence as to the loss of the water, directed an amendment under rule 104. of the County Court Rules, and inserted the words "and unlawfully lowered the dam" before the word "whereby" in the particulars. It was objected that the Judge by rule 104. could only amend in case of a variance between the allegations and proof, that there was no variance here, and that consequently the amendment was improper. The Court of appeal, though they deemed the amendment unnecessary, held that the Judge, who considered that there was a variance, had, under the circumstances, authority to make the amendment at his discretion. *Cannon v. Johnson*, 21 Law J. Rep. (N.S.) Q.B. 164.

(C) PLEADINGS FRAMED TO EMBARRASS.

To an action containing two counts upon two mortgage deeds, and two upon bonds collateral to them,

the defendant pleaded to each count the Statute of Limitations, 3 & 4 Will. 4. c. 42; to which the plaintiff replied, that the defendant before the commencement of the suit made an acknowledgment that the debt remained unpaid and due to the plaintiff, within the true intent and meaning of the statute, and that the action was brought within twenty years after such acknowledgment:—Held, that this replication was framed to embarrass and prejudice the fair trial of the cause, and must be amended by specifying one or more of the modes of acknowledgment mentioned in the statute. *Forsyth v. Bristowe*, 22 Law J. Rep. (N.S.) Exch. 70; 8 Exch. Rep. 347.

(D) DECLARATIONS.

The declaration alleged that "the defendants were indebted to the plaintiff for freight," for the conveyance of goods, &c.:—Held, bad in substance, it not appearing that the debt was a money debt, or that it was payable before the commencement of the action, but an amendment was allowed. *Place v. Potts*, 22 Law J. Rep. (N.S.) Exch. 269; 8 Exch. Rep. 705.

(E) RECORDS, AFTER PLEA OF NUL TIEL RECORD.

In an action on a judgment, after plea of *nul tiel record*, the Court allowed the plaintiff, on application, to amend the declaration under the 15 & 16 Vict. c. 76. s. 222, by substituting the true date for a wrong one. *Noble v. Chapman*, 23 Law J. Rep. (N.S.) C.P. 56.

Where on an issue on a plea of *nul tiel record* there appeared a variance between the sum recovered, as stated in the declaration, and on the record, on motion for judgment the Court allowed the declaration to be amended, by inserting the amount as it appeared by the record. *Hunter v. Emmanuel*, 24 Law J. Rep. (N.S.) C.P. 16; 15 Com. B. Rep. 290.

(F) ENTRY OF VERDICTS AND JUDGMENTS.

Time within which an application for rectifying the entry of a judgment upon a verdict may be applied for. *Marianski v. Cairns*, 1 Macq. H.L. Ca. 212.

A Judge may amend the entry of a verdict from memory, although he have no note either of the evidence or of his summing up to the jury. *Ibid*. 766.

(G) AFTER PAYMENT INTO COURT AND ACCEPTANCE BY PLAINTIFF.

The declaration stated that the defendant had agreed to pay the plaintiff (an actor) a certain weekly salary during three successive seasons, but had dismissed him without cause during the period. The plaintiff claimed 400*l.* damages. Plea, to the further maintenance of the action, that the defendant had, after declaration, pleaded payment of 32*l.* into court, and had paid the 32*l.* into court, which the plaintiff took out of court, and replied, accepting the 32*l.* in satisfaction, and that the defendant paid the plaintiff's costs; that, afterwards, a Judge at chambers made an order, on the plaintiff's application, against the defendant's will, setting aside the replication, and allowing the plaintiff to amend his declaration and the defendant to plead *de novo*, and directing the plaintiff to pay back the money and costs he had received from the defendant; that the plaintiff afterwards amended his declaration by claiming 400*l.* instead of 100*l.*, and his particulars by claiming 216*l.* instead of 32*l.* Replication, that

the plaintiff had replied accepting the 32*l.* paid in by the defendant, and had taken the money out of court under an erroneous belief that, notwithstanding such acceptance, he should be at liberty to bring fresh actions for the remainder of the salary when and as it from time to time became due under the agreement:—Held, on demurrer to the replication (affirming the judgment below)—*Emery v. Webster*, 23 Law J. Rep. (n.s.) Exch. 9; 9 Exch. Rep. 242, that the plea was no answer to the declaration, as the Judge had jurisdiction, under the Common Law Procedure Act, 1852, to make the order for the amendment; and that the Court of error could not interfere to say whether he acted rightly or wrongly in the particular case. *Webster v. Emery*, 24 Law J. Rep. (n.s.) Exch. 186; 10 Exch. Rep. 901.

(H) AT NISI PRIUS.

[See *Buckland v. Johnson*, title TROVER.]

(a) In general.

Where at Nisi Prius the record is withdrawn, by leave of the Judge, for the purpose of making an amendment, which is accordingly made, it is not a new, but an amended issue. Therefore, where a special jury had been struck, the Court refused an application to try it by a common jury. *Skinner v. London and Brighton Rail. Co.*, 1 L. M. & P. P.C. 191.

The Judge, at the trial, allowed a declaration to be amended by inserting a claim of interest, and after an objection to the stamp, the plaintiff abandoned the claim of interest, and the Judge gave leave to alter the record again by striking out the part inserted, to which the defendant objected. On a motion to restore the record to its condition as first amended, without affidavit, the Court refused to interfere with the discretion of the Judge. *Morgan v. Pike*, 23 Law J. Rep. (n.s.) C.P. 64; 14 Com. B. Rep. 473.

Section 222. of the Common Law Procedure Act only authorizes such amendments to be made by a Judge at Nisi Prius as are necessary for determining the real question in controversy between the parties, that is, the real question which the parties intended to have tried, not any question which may come in controversy in the course of the trial, and which was not in controversy before. What the real question in controversy is, is a matter of fact to be determined at the trial by the Judge, from the pleadings and the evidence. *Wilkin v. Reed*, 23 Law J. Rep. (n.s.) C.P. 193; 15 Com. B. Rep. 192.

The declaration alleged, that the defendant fraudulently represented to the plaintiff that the reason why the defendant had dismissed P (a clerk) from his employ, was the decrease in the defendant's business, and that the defendant recommended the plaintiff to try P, and knowingly suppressed the fact that P had been dismissed on account of dishonesty. The evidence was, that although P had been guilty of dishonesty while in the defendant's employ, and the defendant had not mentioned that fact to the plaintiff, yet the reason for his dismissal was that given by the defendant; and whether the defendant had fraudulently suppressed the fact of P's dishonesty had not been in controversy between the parties before the trial, but only whether the defendant had given the true reason for dismissing P:—Held, that the Judge at Nisi Prius had rightly

refused to allow the declaration to be amended by striking out the allegation that the defendant fraudulently represented the reason of dismissal, and substituting for it an allegation that the defendant fraudulently suppressed the fact that P had been guilty of dishonesty. *Ibid.*

(b) In cases of Variance under 3 & 4 Will. 4. c. 42.

A plea of set-off stated that the plaintiffs authorized one G W, trading as G W & Co., to sell the goods for the price of which the action was brought, as and for the proper goods of him G W, and that he did so sell them; and that G W was indebted to the defendant, &c. The evidence was that the plaintiffs authorized G W to sell the goods as and for the goods of G W & Co., which firm consisted of G W and L S:—Held, that this was a material variance. *Addington v. Magan*, 20 Law J. Rep. (n.s.) C.P. 82; 10 Com. B. Rep. 576.

The jury having found the facts as above according to the evidence, and that finding having been indorsed upon the record,—Held, that the Court could not give judgment for the defendant "according to the very right and justice of the case" by section 24. of 3 & 4 Will. 4. c. 42; that power only being given to the Court in the cases of variance which they shall think immaterial to the merits of the case. *Ibid.*

A declaration in assumpsit alleged that in consideration that the plaintiff, at the request of the defendant, would make for him such a number of aerometers as the defendant should from time to time require, and deliver the same when completed, the defendant would accept the same and pay for them. Breach, by not accepting a part completed according to order, and discharging the plaintiff from continuing the making of the other part, commenced to be made according to order. It was proved that the original contract was an order to make 2,000 aerometers, that 300 had been accepted, and the rest were in course of being made when the defendant discharged the plaintiff from completing them. The Judge at Nisi Prius having allowed the declaration to be amended, the Court refused to grant a new trial. *Jones v. Hutchinson*, 20 Law J. Rep. (n.s.) C.P. 114; 10 Com. B. Rep. 515.

The parties having agreed to the terms of the amendment, and that it should be made after the trial was over on the same day, the amendment was not actually made until eight days after the trial, but in the terms agreed on, and before the following term:—Held, no ground for a new trial. *Ibid.*

The defendant's affidavits alleged that if the declaration had originally contained an allegation of an order for 2,000 aerometers he would have been prepared to shew that such an order was absurd and impossible:—Held, insufficient to shew that the defendant had been prejudiced in his defence, in the absence of any allegation that 2,000 aerometers had not in fact been ordered. *Ibid.*

A declaration in ejectment stated a joint demise by H and M his wife. Proof that H was devisee in trust for the sole use of M:—Held, that the Judge had no power under the 3 & 4 Will. 4. c. 42. s. 23. to amend the record by striking out the name of M. in the demise. *Doe d. Wilton v. Beck*, 22 Law J. Rep. (n.s.) C.P. 6.

Semble (per *Maule, J.*)—that the variance was in a particular material to the merits. *Ibid.*

A declaration stated that the plaintiff entered into the service of the defendant as a commercial traveller at a yearly salary, and that the defendant agreed to continue him in his employ for a whole year, and then alleged that the defendant discharged him. It was proved that there was a usage in the trade that commercial travellers should be dismissed with a three months' notice:—Held, that the contract was not proved, the condition as to the notice not being in defeasance of the contract, but forming part of it; but that the plaintiff ought to have been allowed to amend at the trial, without costs. *Metzner v. Bolton*, 23 Law J. Rep. (N.S.) Exch. 130; 9 Exch. Rep. 518.

(I) AFTER TRIAL AND BY THE COURT.

Semble, that the Court may give leave to amend after trial, by adding a plea. *Chamley v. Grundy*, 23 Law J. Rep. (N.S.) C.P. 121; 14 Com. B. Rep. 608.

(J) ON TERMS.

[See *Buckland v. Johnson*, title TROVER. Also *Metzner v. Bolton*, (H) AT NISI PRIUS (b).]

If an order for leave to amend be abandoned after service, the opposite party has no right to costs incurred before the abandonment, on the supposition that the order would be acted upon by the party obtaining it. *Brown v. Millington*, 22 Law J. Rep. (N.S.) Exch. 138.

(K) TO SAVE THE STATUTE OF LIMITATIONS.

The plaintiff, a customer of a banking firm, having brought an action against the firm, was nonsuited, on the ground of two of the defendants not being members of the firm at the time of the accruing of the cause of action. Negotiations on the subject of the action had been going on for several years, during which the defendants had not questioned their liability to be sued, and in a bill in equity filed by them against the plaintiff after pleading, and before trial, had stated that the liabilities of the previous firm had been transferred to themselves, and further stated who the members of the firm were when the cause of action accrued. The Court, to prevent the operation of the Statute of Limitations, set aside the nonsuit, and gave the plaintiff leave to amend the declaration by striking out the two defendants who had been erroneously included in the action. *Crawford, or Crawford, v. Cocks or Cox*, 20 Law J. Rep. (N.S.) Exch. 169; 6 Exch. Rep. 287.

A firm carried on business as A, B and C. At the time of an alleged debt being contracted B and C were surviving, and an action was subsequently commenced in their names. For more than three years after issue joined negotiations were pending for a reference, which ultimately went off, and notice of trial was then given. It was then discovered that at the time of the debt being contracted eight other persons were beneficially interested in the firm. The Court allowed the writ and other proceedings to be amended, by adding the names of these persons, in order to avoid the effect of the Statute of Limitations. *Curme v. Malins*, 20 Law J. Rep. (N.S.) Exch. 434; 6 Exch. Rep. 803; 2 L. M. & P. C. 498.

An original writ of summons expired on the 8th of October before the Common Law Procedure Act came into operation. In order to save the Statute of Limitations, the Court directed an *alias* writ to issue under the Uniformity of Process Act. *Gapp v. Robinson*, 22 Law J. Rep. (N.S.) C.P. 5.

The Court has power, under section 222. of the Common Law Procedure Act, 1852, to amend the indorsement upon a pluries writ of summons, issued more than five months before the 24th of October 1852, by altering the date of the first writ to its true date, in order to save the Statute of Limitations. But the Court refused to make a similar amendment in the copy of the pluries writ served upon the defendant. *Cornish v. Hocking*, 22 Law J. Rep. (N.S.) Q.B. 142; 1 E. & B. 602.

A Judge made an order for amending the declaration by striking out one of the defendants, the other to be at liberty to plead the nonjoinder of a co-defendant in abatement, and also *de novo*. The plaintiff had previously brought an action against the defendants for some part of the same subject-matter, but failed to prove the joint liability of the defendants; and on an application for a new trial, on the ground of surprise, stated that he could have proved the joint liability of the defendants. On that occasion the Court refused, after the trial, to amend by striking out the name of one defendant. The plaintiff, in support of his present application to amend, stated that the evidence to be adduced in the present case was similar to that relied on on the other trial:—Held, that the Judge was right in ordering the amendment. *Cowburn v. Wearing*, 23 Law J. Rep. (N.S.) Exch. 81; 9 Exch. Rep. 207.

(L) MANDAMUS.

[By 17 & 18 Vict. c. 125. s. 77, the 15 & 16 Vict. c. 76. applies to Writs of Mandamus.]

A mandamus, after reciting letters patent incorporating a company, and alleging that D was duly qualified to be elected an assistant of the company, that he was elected, that he had not misconducted himself, that there was no good cause for removing him, and that the wardens wrongfully removed him from his office, prayed that he might be restored. The return of the wardens alleged, that the letters patent were not fully set out, that D was not duly qualified, that he had misconducted himself, that there was good cause for removing him, and that the wardens did not wrongfully remove him. The return then proceeded to state a bye-law that bankrupts and insolvents should be ineligible, that D obtained his election by fraudulently representing himself solvent when insolvent, that he afterwards became bankrupt, whereupon they duly and according to law removed him. On an application under section 52. of the statute 15 & 16 Vict. c. 76. (the Common Law Procedure Act), calling on the defendants to amend the general allegations in their return, it was held (assuming the statute to apply to proceedings by mandamus) that the rule should be refused, as the latter part of the return plainly shewed on what the defendants relied, and therefore that D could not be embarrassed, prejudiced, or delayed in trying the question; but that the case might have been different had the general traverse in the return not been followed by the special statement. *Regina v. the*

Saddlers' Co., 22 Law J. Rep. (N.S.) Q.B. 451; 1 Bail C.C. 183.

Where a party under section 56. of the same act sets out any omitted part of a document pleaded by his opponent, the latter is not called upon to make any answer to it. *Ibid.*

Where a company was incorporated as the "D. S. and W. Junction Railway," and a mandamus had issued directed to them by the name of the "D. S. and W. Junction Railway Company," the Court, upon the argument of the mandamus, ordered the name to be amended. *Regina v. Derbyshire, &c. Rail. Co.*, 23 Law J. Rep. (N.S.) Q.B. 333.

(M) INDICTMENTS.

As a general rule a Judge on the trial of an indictment will not allow an amendment to be made after the counsel for the defence has addressed the jury. The proper course is for the prosecutor's counsel to adduce all his evidence and ask for the amendment before he closes his case; and if the amendment is made, the prisoner's counsel addresses the jury on the indictment as amended. *Regina v. Rymes*, 3 Car. & K. 326.

An indictment against L alleged that L "six pounds weight of steel, of the goods and chattels of A B, then lately before feloniously stolen, taken, and carried away, then and there feloniously did receive, he, the said A B, then and there well knowing the said last-mentioned goods and chattels to have been feloniously stolen, taken, and carried away," &c.:—Held, that the indictment which, by mistake, alleged that the prosecutor (instead of the prisoner) well knew that the goods were stolen, was bad on the face of it; that the words "the said A B," in the allegation of guilty knowledge, could not be rejected as surplusage; that the prisoner was at liberty, after the verdict was recorded, to move in arrest of judgment for the defect in the count, it being more than a formal defect, and, consequently, not cured by the statute 14 & 15 Vict. c. 100. s. 25; and, lastly, that the Court below had no power after verdict, and motion in arrest of judgment, to amend the indictment by substituting the prisoner's name for the prosecutor's, in the allegation in question. *Regina v. Larkin*, 23 Law J. Rep. (N.S.) M.C. 125; 1 Dears. C.C.R. 365.

An indictment for obstructing a highway described it as a footway leading from A to B. It appeared in evidence that the way in question passed from A to B through C, and that from A to C it was a carriageway and from C to B only a footway. The obstruction complained of was between C and B:—Held, that this might be amended under the 14 & 15 Vict. c. 100. s. 1. *Regina v. Sturge*, 23 Law J. Rep. (N.S.) M.C. 172; 3 E. & B. 734.

The prisoners were charged in an indictment with having, by night, in pursuit of game, entered the lands of George William Frederick Charles Duke of Cambridge. On the trial, a witness proved that George William were two of the Duke's Christian names, and that he had others. No proof was given what they were. The prosecutor prayed an amendment of the indictment, by striking out the names "Frederick Charles." This the Court refused, and left the case to the jury, who, being satisfied as to the identity of the Duke, convicted the prisoners:—Held, that the conviction was wrong, as the Christian

names, being on the indictment, required to be proved as laid, though it would have been sufficient to have described the Duke in the indictment by his title alone; that it is discretionary with a Court to allow an amendment; that they did right in refusing the amendment asked for, as the evidence did not support it, but that it would have been wrong in the Court to have refused to amend had the application been to strike out all the Christian names. *Regina v. Frost*, 24 Law J. Rep. (N.S.) M.C. 116; 1 Dears. C.C.R. 474.

ANIMALS.

- (A) INFECTIOUS DISORDERS.
- (B) DANGEROUS ANIMALS.

(A) INFECTIOUS DISORDERS.

[See 15 & 16 Vict. c. 11. and 15 & 16 Vict. c. 62.]

(B) DANGEROUS ANIMALS.

To bring a horse infected with the glanders into a public place to the danger of infecting the Queen's subjects is a misdemeanour at common law; and an indictment which stated that the defendant knew that a mare which he brought into a fair was glandered, was, after verdict, held good, without an averment that the defendant knew that the glanders was a disease communicable to man. *Regina v. Henson*, 1 Dears. C.C.R. 24.

Case for an injury done to the plaintiff by the defendant's bull. The plaintiff, whilst walking along a public street, wearing a red handkerchief, was attacked and injured by the defendant's bull, which was being driven along the street. The defendant stated, after the accident, that the red handkerchief was the cause of the injury, for that he knew the bull would run at anything red. He also stated on another occasion that he knew that a bull would run at anything red:—Held, that this was evidence for the jury in support of the averment of the *scienter*. *Hudson v. Roberts*, 20 Law J. Rep. (N.S.) Exch. 299; 6 Exch. Rep. 697.

In an action to recover damages for an injury sustained from the bite of a dog, it is not necessary to shew that the dog was accustomed to run about and shew a disposition to snap at and bite everybody; but it will be sufficient, if the dog was accustomed, from time to time, to bite people under circumstances which would not provoke a dog of good temper. *Semble*—that the case of *Smith v. Pelah* is not now law.—(Cresswell). *Charlwood v. Greig*, 3 Car. & K. 46.

ANNUITY.

[As to registering, see 18 & 19 Vict. c. 15. s. 12. And see APPORTIONMENT—BANKRUPTCY—ESTOPPEL—LEGACY—PRINCIPAL AND SURETY—REVENUE.]

- (A) INJOLMENT.
 - (a) *When necessary.*
 - (b) *Form and Requisites of the Memorial.*
- (B) WHEN ASSIGNABLE.
- (C) PAYMENT.

(D) SETTING ASIDE.
(E) RIGHTS AND LIABILITIES OF THE ANNUITANT.

(A) INROLMENT.

(a) When necessary.

[Of Annuities, see 17 & 18 Vict. c. 90.]

A deed releasing part of an annuity previously granted, to which the grantor is no party, does not require to be enrolled under the provisions of the 53 Geo. 3. c. 141. s. 2. *Humphreys v. Jenkinson*, 22 Law J. Rep. (n.s.) Exch. 250; 8 Exch. Rep. 684.

The plaintiff, having a life interest in a sum of 300*l.*, to the principal of which her daughter, M E, was absolutely entitled, upon the marriage of M E with the defendant, paid over to her the 300*l.*, upon condition that the defendant and M E would secure to the plaintiff for her life an annuity equal to the amount of interest at 4*l.* per cent. upon the 300*l.* In pursuance of this agreement, the defendant gave to the plaintiff a bond conditioned for payment of such interest half-yearly to the plaintiff during her life:—Held, that this was not a grant of an annuity within the Annuity Acts, and that no enrolment of a memorial was necessary. *Evatt v. Hunt*, 22 Law J. Rep. (n.s.) Q.B. 348; 2 E. & B. 374.

(b) Form and Requisites of the Memorial.

An annuity duly charged on freehold was by deed assigned, and by that deed a further security was given by the grantors upon copyholds in consideration of an additional sum of money paid to the grantors, and the sum payable for redemption was increased in amount. The assignees of the annuity appeared in the memorial to be trustees for other persons, but the trust was not disclosed on the deed of assignment:—Held, that the deed of assignment, so far as it affected the copyholds, and so far as it contained any alteration of the terms on which the original annuity was granted, was void, but that it was valid as an assignment of the original annuity.—*Bolton v. Williams*, 2 Ves. jun. 138. observed upon. *Tidd v. Lister*, 3 De Gex, M. & G. 874.

A and B granted an annuity of 75*l.* to the defendant, in consideration of 750*l.*, which was paid over to A and B in Bank of England notes. 220*l.*, part of the consideration, was paid to a judgment creditor; and on the same day, other part of the consideration-money was returned to the defendant in satisfaction of certain debts due to him from A and B, and one of the notes was traced to the defendant's bankers two days after the transaction:—Held, upon appeal, (reversing the decree below,) that this was not a return of the consideration-money within the 6th section of the 53 Geo. 3. c. 141. *Pennell v. Smith*, 24 Law J. Rep. (n.s.) Chanc. 750; 5 De Gex, M. & G. 167.

The burden lies upon the person seeking to set aside the deed to shew that some part of the consideration-money was improperly returned. *Ibid.*

Semble—the word “action,” in the 6th section, is not to be confined to its technical sense; but a Court of equity has jurisdiction to give relief. *Ibid.*

(B) WHEN ASSIGNABLE.

A testator bequeathed to his son W B an annuity

payable quarterly, charged upon his personal estate; and by his will declared that the receipt of W B in his own hand should be the only receipt which his executor H C B, should be bound to accept, and that it should be lawful for H C B to require W B to attend at the town hall in N in order to receive and give receipts for the annuity, and to suspend payment until such requisition should be complied with; and subject to such annuity the testator gave all his estate to H C B:—Held, that such annuity was assignable by W B without H C B's consent, notwithstanding the power in H C B to require W B's attendance to receive payment at a particular place, and that the right in H C B to suspend payment did not amount to a “gift over” to him. *Arden v. Goodacre*, 21 Law J. Rep. (n.s.) C.P. 129; 11 Com. B. Rep. 883.

(C) PAYMENT.

By the 1 & 2 Will. 4. c. 11. King William the Fourth was empowered, by indenture, to grant to the Queen an annuity of 100,000*l.*, to commence from the death of the King and to be paid out of the Consolidated Fund. By indenture, dated the 6th of April 1832, in pursuance of this act, the King granted to trustees in trust for her Majesty the annuity of 100,000*l.*, and directed that it should be paid at the receipt of the Exchequer, and that the auditor of the Exchequer should issue debentures for paying the same, and that the Commissioners of the Treasury should cause the said sum of 100,000*l.* to be paid out of the Consolidated Fund. By the 4 & 5 Will. 4. c. 15. the office of auditor of the Exchequer is abolished, and in all cases of grants by parliament charged on the Consolidated Fund, instead of debentures being issued by the auditor, the Commissioners of the Treasury are required to issue warrants for the payment of the monies granted:—Held, that a mandamus would lie to the Lords of the Treasury to issue such a warrant. *Regina v. the Lords of the Treasury*, (*in re the Queen Dowager's Annuity*), 20 Law J. Rep. (n.s.) Q.B. 305; 16 Q.B. Rep. 357.

(D) SETTING ASIDE.

It is no good ground for setting aside an annuity deed under the 53 Geo. 3. c. 141. s. 16, that upon the execution of the deed, and immediately after the consideration-money had been handed over to the grantor by his agent J G, who acted also as the agent of the grantee, the grantor voluntarily returned to J G a part of such consideration-money, in payment of a debt due from the grantor to J G, and of the costs and expenses relating to the annuity transaction. *Aberdeen v. Jerdan*, 20 Law J. Rep. (n.s.) Q.B. 111; 15 Q.B. Rep. 990.

(E) RIGHTS AND LIABILITIES OF THE ANNUITANT.

Interest not allowed on the arrears of an annuity, and the discretion of this Court on the question is not affected by the stat. 3 & 4 Will. 4. c. 42. s. 28. *In re Powell's Trust*, 10 Hare, 134.

A testator purchased an estate in consideration of an annuity for the lives of the vendor and his wife, and the life of the survivor of them. This annuity was secured by a rent-charge upon the estate purchased, and collaterally by a rent-charge upon another estate, and by the testator's personal covenant to pay the rent-charge:—Held, in a suit for the administration of the testator's estate, that the per-

sonal estate was the primary fund for payment of the annuity. *Yonge v. Furze*, 24 Law J. Rep. (N.S.) Chanc. 643; 24 Beav. 380.

An act of parliament was passed in 1816 for the purpose of raising 5,000*l.* for the repair of one of the parish churches in London. The act appointed certain persons to be trustees, and gave them the power of levying rates, and authorized them to raise the money required by the granting of life annuities, by way of simple annuity, or for the lives of two persons or the survivor, with this restriction, that no annuity should be granted for any single life at a higher rate than 8*l.* 3*s.* per cent. when the life of the annuitant should be under thirty-five. In 1817, in consideration of 2,500*l.* paid by A, the trustees granted an annuity of 225*l.* to A and B and the survivor. B was then thirty-three years of age. Another act was passed in 1819, which recited that the trustees had raised 5,000*l.* and granted annuities to the extent of 297*l.* (which included the above-mentioned sum of 2,500*l.* and the annuity of 225*l.*), and enacted that the annuities already granted should be paid in the first place out of the rates. The annuity was paid up to 1848, when the trustees resisted further payment, on the ground that the grant had been void under the act of 1816:—Held, that, if the grant had been void under the act of 1816, the defect was cured by the act of 1819. *Delarue v. Church*, 20 Law J. Rep. (N.S.) Chanc. 183.

The restriction contained in the act of 1816 was directory and not prohibitory—*semble*. *Ibid*.

APOTHECARY.

[See SURGEON AND APOTHECARY.]

APPEAL.

[See BASTARDY—HIGHWAY—INFERIOR COURT—PARLIAMENT—POOR—SESSIONS.]

APPEARANCE.

[By Counsel and Attorney, see BARRISTER. And see PRACTICE.]

APPOINTMENT.

[See POWER.]

APPORTIONMENT.

(A) UNDER STATS. 11 GEO. 2. c. 19. AND 4 & 5 WILL. 4. c. 22.

(a) *Tenant for Life.*

(b) *Annuity.*

(c) *Rents.*

(d) *Salary for Services.*

(B) OTHER CASES.

(A) UNDER STATS. 11 GEO. 2. c. 19. AND 4 & 5 WILL. 4. c. 22.

(a) *Tenant for Life.*

By a will, dated in 1795, an estate was devised to A for life, with remainder to B. The estate was purchased by a railway company, and the purchase-money was paid into court and invested. Upon the death of A it was held, that his representatives were not entitled to have an apportionment of the dividends becoming payable after his decease. *Re Longworth's Estate*, 23 Law J. Rep. (N.S.) Chanc. 104; 1 Kay & J. 1.

If stock directed to be laid out in land is sold between the half-yearly days of payment of dividends, in order to complete a purchase, a compensation or equivalent will be made to a tenant for life who would have been entitled to the dividends becoming due on the next day of payment. *Londesborough v. Somerville*, 23 Law J. Rep. (N.S.) Chanc. 646; 19 Beav. 295.

(b) *Annuity.*

The annuity to Queen Adelaide was, by the act of parliament and the indenture granting it, "to commence and take effect immediately after the decease of his Majesty, and to continue from thenceforth for and during the natural life of her Majesty, and to be paid and payable at the four most usual days of payment, viz., the 31st of March, the 30th of June, the 30th of September, and the 31st of December, by even and equal portions, the first payment to be made on such of the said days as should first and next happen after the decease of his Majesty." King William the Fourth died on the 25th of June 1837, and upon the 30th of the same month a full quarter's annuity was paid to the Queen Dowager. The Queen Dowager died on the 2nd of December 1849:—Held, that no apportionment of the quarter's annuity which would have been payable on the 31st of December could be made in her favour. *Regina v. the Lords of the Treasury (in re the Queen Dowager's Annuity)*, 20 Law J. Rep. (N.S.) Q.B. 305; 16 Q.B. Rep. 357.

Held, also, that the fact of a whole quarter's annuity have been paid on the 30th of June 1837 would not have prevented a mandamus being issued to compel payment of a proportional part of the last quarter, up to the day of her death, if the annuity had been apportionable. *Ibid*.

The same act of parliament and indenture settled upon the Queen Dowager Marlborough House during her life, and limited an interest therein to her executors for a year after her death, and the indenture (to which the Queen was a party) expressed that the annuity was in lieu of dower:—Held, that these circumstances did not shew that the annuity was apportionable. *Ibid*.

A testator gave an annuity to A B for life, no period of payment being mentioned. Under a decree of the Court, the first payment was directed to be made at the expiration of one year after the testator's death. The annuitant died eight days before the end of the year:—Held, that the annuity must be apportioned, although it was not continued to any other person after the death of the annuitant. *Trimmer v. Danby*, 23 Law J. Rep. (N.S.) Chanc. 579.

(c) *Rents.*

By indentures, dated in 1828, certain lands were settled on A for life, and a power of leasing was given to A. The Apportionment of Rents Act was passed in 1834. After 1834 A, under his power, granted leases of divers portions of the settled property. A died in 1849:—Held, that A's personal estate was entitled to a proportion of the rents of the lands of which he had granted leases under his power, between the last days of payment of rent and his death. *Lock v. De Burgh*, 20 Law J. Rep. (N.S.) Chanc. 384; 4 De Gex & S. 470.

(d) *Salary for Services.*

Where the plaintiff was by deed appointed to "the offices of auditor and superintending manager of the defendant's estates" at a salary of 1,800*l.*, payable half-yearly, on the 7th of July and the 7th of January in every year, and the defendant had revoked the appointment in the middle of a current year,—Held, that the 4 & 5 Will. 4. c. 22. s. 2. did not enable the plaintiff to recover a proportionate part of the salary in respect of that portion of the year during which the plaintiff held the offices. That statute applies to cases where payment for the whole period must be made to some person, and does not include a payment under a contract between employer and employed for services performed, where the payment entirely ceases upon the determination of the claimant's right to receive it. *Lowndes v. Stamford and Warrington (Earl)*, 21 Law J. Rep. (N.S.) Q.B. 371; 18 Q.B. Rep. 425.

(B) OTHER CASES.

The income of a fund belonging to a charitable corporation having for its object the support, relief and maintenance of a master and five poor persons, held apportionable between the new and the representatives of deceased masters, though not within the Apportionment Acts (11 Geo. 2. c. 19. and 4 & 5 Will. 4. c. 22). *The Attorney General v. Smythies*, 16 Beav. 385.

APPRENTICE.

(A) CONTRACT OF APPRENTICESHIP.

(B) PARISH APPRENTICE.

(a) *Allowance by Justices.*

(b) *Form of Indenture.*

(A) CONTRACT OF APPRENTICESHIP.

[Stamping, see 16 & 17 Vict. c. 59.]

By deed of apprenticeship A became bound to the plaintiff described therein as an auctioneer, appraiser and corn-factor, as apprentice in the business of an auctioneer, appraiser and corn-factor, to learn his art, and with him after the manner of an apprentice to serve; and the defendant, the father of A, covenanted in the usual way for the performance of his duties as apprentice. The plaintiff sued the defendant on the deed, alleging as a breach that A had absented himself from the service of the plaintiff. To this the defendant pleaded that the plaintiff had given up the trade of a corn-factor. The replication was,

that the plaintiff had given it up with the consent of the defendant, and that afterwards the apprentice had continued to serve until he absented himself:—Held, on demurrer, first, that the replication was bad as setting up an alteration of the deed by parol; secondly, that the carrying on all the three trades was a condition precedent to the plaintiff's right to complain of the absence of the apprentice, and that the plea was, therefore, an answer to the action. *Ellen v. Topp*, 20 Law J. Rep. (N.S.) Exch. 241; 6 Exch. Rep. 424.

In covenant against a surety on an indenture of apprenticeship of A, to serve B & C, the defendant pleaded that there never were or was any services or service for A to perform to or for the plaintiffs jointly. To this plea the plaintiffs—setting out the indenture, whereby the defendant covenanted for the service of A as apprentice to "B, of &c., surgeon and apothecary"—replied that at the time of the execution of the indenture, the plaintiffs were not in partnership, nor did they carry on business jointly on the same premises, but that they carried on business wholly separate and apart from and independent of each other, which the defendant at the time of executing the indenture well knew, and that the plaintiffs never represented to the defendant that they should carry on business in partnership:—Held, that this replication was bad in substance. *Popham v. Jones*, 13 Com. B. Rep. 225.

Semble—that the proper course would have been to take issue on the plea, if the plaintiffs intended to rely on the service of the one as being a constructive service of both masters. Ibid.

(B) PARISH APPRENTICE.

(a) *Allowance by Justices.*

By the 3 & 4 Will. 4. c. 63. s. 3. indentures for binding parish apprentices within any city, &c. are to be allowed by two Justices, one acting for and on behalf of the county, and the other for and on behalf of the city, &c. within the limits of which the child is bound. By the 2 & 3 Vict. c. 71. s. 14. a single police magistrate sitting at a police court may do any act directed to be done by more than one Justice. A pauper was bound apprentice by the parish of A, which was situate within the city and liberty of Westminster, into the parish of B, in the county of Middlesex. Justices for the county of Middlesex have concurrent jurisdiction and usually act in the liberty of Westminster:—Held, that the indenture of apprenticeship was properly allowed by a single police magistrate. *Regina v. St. George, Bloomsbury*, 20 Law J. Rep. (N.S.) M.C. 200; 16 Q.B. Rep. 1005.

An order of Justices for the binding of a parish apprentice, made under the 56 Geo. 3. c. 139, must shew on the face of the order itself that the Justices acted at the time within their jurisdiction. Where, therefore, in the order two Justices of the county of Middlesex, by whom it was made, were described as Justices of the peace "of the said county," and in the margin were the words "Middlesex, to wit," and the order purported to be signed "at the board-room of the Holborn Union Workhouse,"—Held, that the Court could not take judicial notice that the board-room was in the county of Middlesex; and that the order did not shew on the face of it that the Justices were acting within their jurisdiction, and being therefore bad, that no settle-

ment by service under the apprenticeship was gained. *Regina v. the Parish of St. George, Bloomsbury*, 24 Law J. Rep. (N.S.) M.C. 49; 4 E. & B. 520.

The allowance of Justices to an indenture for binding a parish apprentice under the 43 Eliz. c. 2, is a judicial act, and it must appear on the face of the allowance that the Justices were at the time of granting it acting within their jurisdiction. *The Parish of Staverton v. the Parish of Ashburton*, 24 Law J. Rep. (N.S.) M.C. 53; 4 E. & B. 526.

(b) *Form of Indenture.*

Certain rules issued by the Poor Law Commissioners for regulating the binding of parish apprentices, provided, by article 5, that no person above the age of fourteen should be bound without his consent, and no child under sixteen should be bound without the consent of the father, or (if he was dead) of the mother of such child: provided that where such parent should be transported, &c. such consent should be dispensed with. Article 15. provided, that the indenture should be executed in duplicate by the master and guardians, and *should not be valid* unless signed by the apprentice without assistance, and that the consent of the parent when requisite should be testified by his signing the indenture; and where such consent was dispensed with under article 5, the cause of such dispensation should be stated at the foot of the indenture. They also required that the Justices who allowed the binding should certify at the foot of the indenture that they had examined and ascertained that these rules had been complied with. An indenture binding a poor child purported on its face to be signed by the apprentice "without aid or assistance," and there was a certificate of a magistrate at the foot, as required by the above rules. There was nothing on the face of the indenture, nor was any evidence adduced, to shew whether the indenture had been executed in duplicate, or the apprentice or his parents had consented to the binding, nor was any cause of such consent being dispensed with stated in the indenture:—Held, that these regulations were merely directory, and that the omission to comply with them (if established) would not affect the validity of the indenture; and that the certificate of the magistrate afforded a presumption that the rules had been properly complied with. *Regina v. St. Mary Magdalen, Bermondsey*, 23 Law J. Rep. (N.S.) M.C. 1; 2 E. & B. 809.

The necessity for stating in the indenture that a child apprenticed to a chimney sweeper is above eight years of age, and that the consent of two Justices has been obtained, according to the 28 Geo. 3. c. 48, applies only to bindings of poor children by parish officers. A voluntary binding of himself by a child as apprentice to a chimney sweeper is valid if in the ordinary form, provided the child is, in fact, above eight years of age. *Regina v. the Inhabitants of Epson*, 24 Law J. Rep. (N.S.) M.C. 119.

ARBITRATION.

[Entry of verdict for less than 40s., see COSTS—Authority of arbitrator to swear witnesses, see PERJURY—Waiver by agent of improper appointment of umpire, see PRINCIPAL AND AGENT. See also titles ATTORNEY, Lien for Costs—FRIENDLY

AND BENEFIT SOCIETIES — INCLOSURE — LANDS CLAUSES CONSOLIDATION ACT — PROHIBITION — PUBLIC HEALTH—RELEASE—SEWERS.]

(A) AGREEMENTS TO REFER; EFFECT OF.

(B) SUBMISSION.

- (a) *By Bankrupts.*
- (b) *Under Power of Attorney.*
- (c) *By Married Women.*
- (d) *Of Indictments.*
- (e) *By Compulsory Order of the Court or a Judge.*
- (f) *Making the Submission a Rule of Court.*

(C) ARBITRATOR.

- (a) *Power and Duty generally.*
- (b) *Evidence and Witnesses.*
- (c) *Power over Costs.*

(D) AWARD.

- (a) *Form and Validity in general.*
- (b) *Partial Validity.*
- (c) *When sufficiently final and certain.*
- (d) *When sufficiently final and certain as to Costs.*
- (e) *Sufficiency of finding on several Issues.*

(E) EXECUTION OF AWARD BY TWO OR MORE ARBITRATORS.

(F) ENLARGEMENT OF TIME FOR MAKING AWARD.

- (a) *By the Arbitrator.*
- (b) *By the Court.*

(G) REMITTING AWARD FOR AMENDMENT.

(H) SETTING ASIDE AWARD.

(I) REMEDIES FOR ENFORCING PERFORMANCE OF AWARD.

- (a) *Action.*
- (b) *Signing Judgment.*
- (c) *Attachment.*
- (d) *Rule and Execution.*

(J) COSTS.

- (a) *In general.*
- (b) *Arbitrator's Charges.*
- (c) *Taxation of.*

(A) AGREEMENTS TO REFER; EFFECT OF.

[See Stat. 17 & 18 Vict. c. 125, ss. 11, 12, 13, 14, 15; also *Livingston v. Ralli*, title ACTION (A) (l).]

The plaintiff and the defendant were members of an insurance company, which, by one of its rules, provided "That the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society. And if a difference shall arise between the committee and any suffering member relative to the settling of any loss or damage, or to a claim for average or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another; and

if the committee refuse for fourteen days to make such selection, the suffering member shall select two, and in either case, the two selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute according to the rules and customs of the club," &c. "Provided always, &c., that no member who refuses to accept the amount of any loss as settled by the committee, in the manner hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or suit in equity, on his policy until the matters in dispute shall have been referred to and decided by arbitrators appointed as hereinbefore specified, and then only for such sum as the said arbitrators shall award; and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain an action or suit." The defendant subscribed a time policy of insurance effected by the plaintiff on a certain vessel in which the plaintiff was interested, which was lost during the time covered by the policy. It was agreed by the policy that all the rules of the association should be as binding on the parties as if inserted in the policy. To an action on the policy, alleging as a breach that the committee had refused to ascertain the loss, the defendant pleaded, after setting out the rule, that the committee did ascertain the loss; that the plaintiff was dissatisfied, and refused to accept the amount settled; that thereupon a dispute arose as to the extent of the loss and the sum to be paid; that the defendant and the committee were willing to refer the matter to arbitration, but the plaintiff was not willing; that the matters in difference had not been referred to arbitration, nor the loss ascertained or settled by arbitration as by the rule required.—Held (reversing *Scott v. Avery*, 22 Law J. Rep. (n.s.) Exch. 157), that the contract between the parties was, that in case of dissatisfaction with the decision of the committee, the assured should procure the amount of the loss to be settled by arbitration pursuant to the rule, before bringing any action on the policy; that the making the settlement of the amount by arbitration a condition precedent to suing on the policy was legal; and consequently that the plea was good. *Avery v. Scott*, 22 Law J. Rep. (n.s.) Exch. 287; 8 Exch. Rep. 497.

Held, also, that a similar plea, but stating that the committee did ascertain and settle the loss, and that the plaintiff was dissatisfied with the settlement, and then refused to refer to arbitration, was bad. *Ibid*.

(B) SUBMISSION.

(a) By Bankrupts.

Where a bankrupt submitted matters to arbitration which had passed to his assignees, and the arbitrator awarded that the bankrupt should pay the costs of the award,—Held, that the submission was not void; and the Court made absolute a rule upon the bankrupt to pay. *In re Milnes*, 24 Law J. Rep. (n.s.) C.P. 29; 15 Com. B. Rep. 451.

(b) Under Power of Attorney.

W & M, who had contracted to cover wires with gutta percha for R, who supplied the wires, afterwards assigned their business to C, and gave him a power of attorney authorizing him in their names to

bring any action or suit or other proceeding to enforce any existing contracts, and otherwise to deal in respect thereof as he might think proper. C himself, after the assignment, covered wires with gutta percha for R. Afterwards C brought two actions for debt against R, one in his own name, the other in the name of W & M, to recover the balance due for covering the wires. The defendant pleaded in each action the general issue, payment and set-off. Issue was not joined in the second action. On the trial of the first action, an order of reference by consent of C and R was made in the cause C v. R, and professed to refer "this cause, and all matters in difference in this cause, and in the cause of W & M v. R, and all matters in difference between the said parties, and all matters in difference in the cause of W & M v. R between those parties." After the reference a rule for a discontinuance having been obtained in the action of W & M v. R, the order of reference was amended by consent, and it was ordered "that the rule for a discontinuance should be suspended, and left to the decision of the arbitrator." R before the arbitrator made a claim for damages in respect of some wires spoilt by M & R in covering them. The award, among other things, decided that the claim was not valid, and awarded a discontinuance in the action of W & M v. R. M was called by R as a witness before the arbitrator:—Held, that the order of reference was good, although it did not appear on the face of the document that W & M consented to the reference, and although W & M did not, in fact, consent to it, as the power of attorney from W & M gave C power to refer all matters arising out of the contract, and the order of reference referred nothing in the names of W & M, except the matters in the action W & M v. R. *Hancock v. Reid*, 21 Law J. Rep. (n.s.) Q.B. 78; 2 L. M. & P. C.C. 584.

(c) By Married Women.

Award upon a submission to arbitration, respecting freehold estates and interest in land in Jamaica. Some of the parties to be bound by the reference, being married women interested in the real estate, it was held by the Judicial Committee, (reversing the decree of the Court below,) that such award was invalid, by reason of the coverture of the parties whose interests could not be bound by such a reference. Plea setting up such award in bar to a bill for an account overruled. *Strachan v. Heard*, 7 Moore, P.C.C. 365.

(d) Of Indictments.

An agreement to refer to arbitration an indictment for non-repair of a highway is illegal, and the Court refused to enforce the award, though the submission had been made a rule of Court. *Regina v. Blake-more*, 14 Q.B. Rep. 544.

(e) By Compulsory Order of the Court or a Judge.

[See Stat. 17 & 18 Vict. c. 125. ss. 3, 4, 6. Also Reg. Gen. Mich. Vac. 1854; 24 Law J. Rep. (n.s.) v; 4 E. & B. 365.]

(f) Making the Submission a Rule of Court.

[See Stat. 17 & 18 Vict. c. 125. s. 17.]

(C) ARBITRATOR.

[As to stating special case for the Court, see 17 & 18 Vict. c. 125. s. 5.]

(a) Power and Duty generally.

[See *Kirk v. Unwin*, post (F), Enlargement of time for making award. Also *Smith v. Hartley*, post (J), Remedies for enforcing performance of award.]

By the submission, the costs of the reference and award were in the arbitrator's discretion, and there was also a clause empowering the Court, in the event of any application being made to them, to send the matters referred, or any of them, back to the arbitrator for reconsideration. The original award, after deciding all matters in difference, added, that for the better defining the height of the weir such permanent marks should be placed as B should direct. This direction being held bad as a delegation of authority, the Court remitted the award to the arbitrator, for the purpose of reconsidering the prospective directions that should be given for the purpose of defining the depth at which the defendant might maintain his weir. The arbitrator, without calling the parties before him, made a new award, repeating verbatim the terms of the old award, that the plaintiff should pay the costs "of this my reference and of this my award," and as to all other matters, except as to the prospective directions, on which he awarded as above stated:—Held, that the arbitrator had adopted a proper course in making a new award, repeating the old adjudication as to the matters not sent back to him, and the adjudication on the matters remitted for consideration. *Johnson v. Latham*, 20 Law J. Rep. (n.s.) Q.B. 236 ; 2 L. M. & P. C. 205.

Held, also, that it was not necessary for the arbitrator to give the parties an opportunity of being heard before him, either with respect to the prospective directions, or with respect to the costs of the second reference and award, as incidental thereto. *Ibid*.

W & M, who had contracted to cover wires with gutta percha for R, who supplied the wires, afterwards assigned their business to C and gave him a power of attorney authorizing him in their names to bring any action or suit or other proceeding to enforce any existing contracts, and otherwise to deal in respect thereof as he might think proper. C himself, after the assignment, covered wires with gutta percha for R. Afterwards C brought two actions of debt against R, one in his own name, the other in the name of W & M, to recover the balance due for covering the wires. The defendant pleaded in each action the general issue, payment, and set-off. Issue was not joined in the second action. On the trial of the first action, an order of reference by consent of C and R was made in the cause C v. R, and professed to refer "this cause, and all matters in difference in this cause, and in the cause of W & M v. R, and all matters in difference between the said parties, and all matters in difference in the cause of W & M v. R between those parties." After the reference a rule for a discontinuance having been obtained in the action of W & M v. R the order of reference was amended by consent, and it was ordered "that the rule for a discontinuance should be suspended, and left to the decision of the arbitrator." R before the arbitrator made a claim for damages in respect of some wires spoilt by M & R in covering them. The

award, among other things, decided that the claim was not valid, and awarded a discontinuance in the action of W & M v. R. M was called by R as a witness before the arbitrator:—Held, that the award of a discontinuance was a sufficient decision of the action W & M v. R within the meaning of the parties; and further that there was no excess of jurisdiction in awarding on the claim by R against W & M for spoilt wires, as it was a cross-claim under the contract, and consequently one which C had authority to settle by virtue of the power of attorney. *Hancock v. Reid*, 21 Law J. Rep. (n.s.) Q.B. 78; 2 L. M. & P. C. 584.

The Eastern Counties Railway Company were proprietors of a line between London and Colchester, at which place it joined the Eastern Union Railway, and differences having arisen between the two companies as to the interchange and transmission of traffic from one of the said lines to the other, it was enacted, by the 14 & 15 Vict. c. lvi. s. 4, that if at any time after the passing of the act either company should so require, then within fourteen days after a notice in writing by the company so requiring to the other, it should be referred to arbitration to determine what arrangements should be made by the two companies, or either of them, for affording proper facilities and convenience for the conveyance and all other accommodation of passengers, animals, and goods to be conveyed from the Eastern Union Railway upon and along the Eastern Counties Railway between London and Colchester, and from the Eastern Counties Railway between London and Colchester, upon and along the Eastern Union Railway, and to determine the terms and conditions on which such use, conveyance and accommodation should be offered, and generally to determine all matters incident to the arrangements hereinbefore mentioned, or which might be necessary or expedient for giving effect to the same. Arbitrators were appointed under this clause, who awarded, first, that the Eastern Counties Railway Company should for the conveyance and accommodation of passengers, to be conveyed from the Eastern Union Railway upon and along the Eastern Counties line, run every day (except Sundays) an express train from the junction at Colchester to London, such train to leave Colchester at 10 A.M., and to arrive at London at 11:30 A.M., and by such train should carry all such passengers to be conveyed as aforesaid; secondly, that the Eastern Counties Railway Company should, for the conveyance and accommodation of passengers to be conveyed upon and along the Eastern Union line, run an express train from London to Colchester, and should cause such train to depart every day (Sundays excepted) from London at 7:45 P.M., and to arrive at Colchester at 9:15 P.M., and should by such train convey all such passengers as should offer themselves to be so conveyed as aforesaid; thirdly, for affording proper facilities and convenience for the conveyance and accommodation of passengers to be conveyed from the Eastern Union line upon and along the Eastern Counties line between London and Colchester, that the Eastern Counties Railway Company should use and employ for the conveyance of the same passengers and passengers' luggage on their line, all such carriages and vans as should have been employed for the conveyance of the same passengers and passengers' luggage on the Eastern Union line, and which should

be tendered to them and be ready for their use at Colchester five minutes at least before the departure of their trains.—Held, on demurrer to a declaration in an action on this award, that all the matters awarded upon were within the authority of the arbitrators; that if the speed directed were dangerous, it should have been set up as an answer to the award; that the arrangement was not defective because not limited in point of time, as either party might at any time by a notice require a fresh arbitration. *The Eastern Union Rail. Co. v. the Eastern Counties Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 371; 2 E. & B. 530.

(b) *Evidence and Witnesses.*

[As to administering oaths, see PERJURY.]

A usage for arbitrators appointed to determine, as between outgoing and incoming tenants of a farm, the value of the away-going crop and the deductions for want of repairs of the farm buildings and fences, to make their award, on inspection of the crops and premises, without notice to the parties and without evidence, may be good; but no usage can justify the arbitrators in hearing one party and his witnesses only, in the absence of and without notice to the other party. *Oswald v. Grey*, 24 Law J. Rep. (N.S.) Q.B. 69.

The affidavit in support of a motion to set aside an award, on the ground that the arbitrator has refused to examine a material witness, should state what reason, if any, the arbitrator gave for refusing to hear the witness. *Bradley v. Ibbetson*, 2 L. M. & P. C.C. 583.

(c) *Power over Costs.*

If a submission to reference, by agreement, containing a clause for making it a rule of Court provide that the costs of the reference and award shall be in the discretion of the arbitrator, who may award and direct by and to whom the same shall be paid, the arbitrator cannot by his award conclusively fix the amount of the costs of the award. *Fernley v. Branson*, 20 Law J. Rep. (N.S.) Q.B. 178.

If, in the award, he name an exorbitant sum as costs of the award, and a party to the reference is obliged to pay such sum to obtain possession of the award, such party may recover the excess beyond what a jury may deem a reasonable compensation to the arbitrator in an action against the arbitrator for money had and received to his use. *Ibid.*

Semble—where the submission places the costs of the reference and award in the discretion of the arbitrator, and contains a clause giving the Court power to remit the matters or any of them back to the arbitrator, and the award is sent back to him on any point, without any new direction as to costs, the arbitrator has a discretionary power over the costs of the second reference and award. *Johnson v. Latham*, 20 Law J. Rep. (N.S.) Q.B. 236; 2 L. M. & P. C.C. 205.

An arbitrator to whom a cause is referred before trial, under the 3rd section of the Common Law Procedure Act, 1854, has no power over the costs if the order of reference is silent on the subject. *Leggo v. Young*, 24 Law J. Rep. (N.S.) C.P. 200; 16 Com. B. Rep. 626.

A paper delivered by an arbitrator to one of the parties to a reference, along with his award, in which

the arbitrator stated that he would have given that party the costs if he had had power, cannot be taken into consideration by the Court on an application to send back the case to the arbitrator upon the question of costs,—distinguishing *Kent v. Elstob*. *Ibid.*

An action for an illegal arrest was referred, the costs of the reference being in the arbitrator's discretion. The award directed that final judgment be entered for the plaintiff, with 50% damages, and gave him the costs of the reference and award. The arbitrator had no authority to direct judgment to be entered, and for this excess the award was remitted to the arbitrator, who, in a second award, recited that he had made a former award, that it had been referred back, and gave the plaintiff the same damages and costs of the reference and award, and also the costs of the amended award. After the first award the plaintiff became insolvent. The vesting order was made after the reference back, and a few days before the second award. A rule, applied for on the part of the plaintiff (in substance by his attorney), calling on the defendants to pay the damages and both sets of costs, was made absolute: though the defendants objected that the plaintiff's right had passed to his assignees; that they themselves were judgment creditors of the plaintiff to a larger amount than the damages awarded; and that the arbitrator had no authority over the costs of the reference back. For the Court held, first, that, the action being for a personal tort, no right could pass to the assignees until the matter was adjudicated on, which could not be said to have been done until the second award; and that as this award was not made until after the vesting order, the title of the plaintiff would be good, unless the assignees interfered, which they had not done. Secondly, that the plaintiff's attorney had a right to a lien on the amount awarded for his costs in the reference superior to the claim of the defendants to a set-off. And, thirdly, that the arbitrator had a discretionary power over the costs of the second reference. *Brearey v. Kemp*, 24 Law J. Rep. (N.S.) Q.B. 310.

(D) AWARD.

(a) *Form and Validity in general.*

Where all differences between A on the one side, and B and C on the other, are referred, the arbitrator may award as to differences which A has with B or C severally, as well as those which he has with them jointly. *Adcock v. Wood*, 20 Law J. Rep. (N.S.) Exch. 435; 6 Exch. Rep. 814. Affirmed in error, *Wood v. Adcock*, 21 Law J. Rep. (N.S.) Exch. 204; 7 Exch. Rep. 468; 2 L. M. & P. C.C. 501.

A direction in an award that one party shall pay money to a stranger, is good, if it does not appear impossible that such payment can be for the benefit of a party to the award. *Ibid.*

A declaration in assumpsit upon an award, after stating that differences had arisen between the plaintiff on the one part, and the defendant and one S A on the other, alleged that it was agreed between the plaintiff, the defendant, and S A, mutually and reciprocally to refer the same differences to T S and W I, who made their award concerning the said matters in difference, and awarded that the defendant should pay 150*l.* 18*s.* 6*d.* to T S, who should immediately pay it to the plaintiff. Plea, that T S and W I did not make their award concerning the mat-

ters in difference referred to them, *modo et forma*:—Held, that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue. *Ibid*.

Held, also, that the declaration was good in arrest of judgment, as it sufficiently appeared, first, that the arbitrator had power to award upon differences between A on the one side, and B and C severally on the other; and secondly, that the direction to pay the money to the arbitrator was for the benefit of the plaintiff. *Ibid*.

It is no objection to an award that it recites a clause in the submission which provides that documents shall be admitted in evidence without a stamp, it not appearing that the arbitrator admitted in evidence any unstamped documents. *Phillips v. Higgins*, 20 Law J. Rep. (N.S.) Q.B. 357; 2 L. M. & P. C.P. 355.

An award, ordering the defendant to pay the sum awarded to the plaintiff or his attorney S, is good, without any power of attorney to S to demand the money. *Hare v. Fleay*, 20 Law J. Rep. (N.S.) C.P. 249; 11 Com. B. Rep. 472; 2 L. M. & P. P.C. 393.

There were figures on a plan which referred to written descriptions at the foot of it, delineating certain places. Without these descriptions the plan was unintelligible:—Held, that these written descriptions were part of the plan and incorporated with the award. *Johnson v. Latham*, 20 Law J. Rep. (N.S.) Q.B. 236; 2 L. M. & P. P.C. 205.

An action on the case for obstructing the plaintiff's right to water was one of the matters referred:—Held, that it was not necessary to set out the pleadings in the award. *Ibid*.

(b) Partial Validity.

Where an arbitrator having power, but not being bound by the terms of the submission, to direct as to a particular matter, gives a direction which is invalid, the whole award is not thereby vitiated, but such invalid direction may be treated as surplusage. *Nicholls v. Jones*, 20 Law J. Rep. (N.S.) Exch. 275; 6 Exch. Rep. 373; 2 L. M. & P. P.C. 519.

(c) When sufficiently final and certain.

[See *Bradley v. Phelps*, *post* (G), Remitting award for amendment. Also *Wood v. the Copper Miners Co.*, *post* (I) (b).]

An arbitrator had to decide upon the depth at which the defendant was entitled to keep a weir which penned back the water of a river so as to interfere with the plaintiff's mill higher up the stream, and to determine all manner of rights of water between the parties. The arbitrator awarded that the defendant was entitled to maintain his weir to the depth of fourteen inches and no more, and added that he had caused marks to be placed, which marks pointed out the depth the defendant was to keep his weir, and that a plan annexed to the award correctly defined and described the depth of the weir and the marks:—Held, that the award sufficiently pointed out the depth of the weir, and was sufficiently precise, although it made no provision for the case of floods, or for regulating the depth of the paddle in the defendant's weir, by which the water could be let off. *Johnson v. Latham*, 20 Law J. Rep. (N.S.) Q.B. 236; 2 L. M. & P. P.C. 205.

Where one of the matters in difference between A B and C D, at the time of a submission to arbitration by them, was whether the two parties had been in partnership together upon a day named, and whether, if there had been a partnership between them the same had been put an end to, and where the arbitrator found by his award that no deed of partnership ever existed between the parties, and also, that if any partnership ever existed the same was dissolved on a day subsequent to that mentioned, and that nothing was due from A to B in respect of the profits or otherwise,—Held, that the award was bad because it did not decide the question as to a partnership having once existed. *Bhear v. Harra-dine*, 21 Law J. Rep. (N.S.) Exch. 127; 7 Exch. Rep. 269.

If an action and all matters in difference between the plaintiff and the defendant be referred to arbitration, and the award made *de præmissis* be silent respecting any further claim beyond the action put forward by the plaintiff or any cross-demand urged by the defendant, the award is nevertheless final, as it will be intended that the arbitrator has by his silence negated the right of the party to maintain such claim or cross-demand. *Harrison v. Creswick*, in error, 21 Law J. Rep. (N.S.) C.P. 113; affirming *Creswick v. Harrison*, 20 Law J. Rep. (N.S.) C.P. 56; 10 Com. B. Rep. 441; 1 L. M. & P. P.C. 721.

To a declaration on a special contract, the defendant pleaded several pleas going to the whole cause of action, one of which raised an immaterial issue. The cause was referred, on the terms of the costs abiding the event, and of the parties being bound not to sue out a writ of error. The arbitrator found the immaterial issue for the defendant, and the others for the plaintiff, with 5*l.* damages:—Held, that the final event of the record was in favour of the defendant, and that he was entitled to the costs, as the arbitrator had no power to award judgment *non obstante veredicto*, and no writ of error could be brought. *Linegar v. Pearce*, or *Price*, 23 Law J. Rep. (N.S.) C.P. 225; 9 Exch. Rep. 417.

A submission to arbitration to which the plaintiff and defendants, who were executors, and two other persons, were parties, provided that the costs of the agreement and of the reference, and of the arbitration and award, and of making the submission a rule of court, should be in the discretion of the arbitrators. The award, after directing certain things to be done by each party, provided that the costs of the agreement, and of the reference, and of the award, should be paid equally by the plaintiff and defendants in the action, and that the costs of making the submission a rule of court should be paid by the party disobeying the award, and obliging the same to be made a rule of court:—Held, that the award was void for not finally ascertaining who was to pay the last-mentioned costs. *Williams v. Wilson*, 23 Law J. Rep. (N.S.) Exch. 17; 9 Exch. Rep. 90.

To an action on an award, the defendants pleaded by setting out the agreement of reference and the award, and averring that the said award was not final. Issue being joined thereon,—Held, that upon a special verdict finding the agreement and award as set out, the award might be held void for not finally deciding as to the costs of making the submission a rule of court, which by the submission was left in the ordinary way in the discretion of the arbitrators. *Ibid*.

An action of ejectment (before the passing of the Common Law Procedure Act) upon the demise of A and the joint demise of B and C, was referred by a Judge's order, after issue joined, to the award, final end, and determination of S, the costs of the cause and reference to abide the event. The arbitrator, after reciting the order of reference, awarded as follows:—"I award and determine that the verdict in the said cause be entered for the lessors of the plaintiff":—Held, per *Maule, J.* and *Talfourd, J.* (*dissentiente Williams, J.*), in an action by the lessors of the plaintiff, against the defendant, to recover the costs, that the arbitrator having used words which had no technical meaning, must be understood to have finally determined the cause in favour of the lessors of the plaintiff. *Law v. Blackburn*, 23 Law J. Rep. (N.S.) C.P. 28; 14 Com. B. Rep. 77.

An action of ejectment (before the passing of the Common Law Procedure Act, 1852) upon two demises by T and A was, after issue joined, referred by a Judge's order to the award of C, the costs of the action and of the reference and award to abide the event; and it was ordered, "that the arbitrator should, in the event of his finding in favour of the lessors of the plaintiff, have power to order immediate possession to be given of the land and premises in question in the action to the lessors of the plaintiff T, and also how and in what manner such possession should be given, and if not given, how it should be taken." The arbitrator awarded, "I award in favour of the lessors of the plaintiff, and order that immediate possession be given of the land and premises in question in this action to the lessor of the plaintiff T; and that the defendant pull or take down the wall he has erected upon the land of the lessors, or so much thereof as now stands four inches and a half, or thereabouts, upon the land of the lessors":—Held, in an action by the lessors of the plaintiff against the defendant to recover the costs, that the award in favour of the lessors of the plaintiff was sufficiently certain and final,—confirming *Law v. Blackburn*. *Mays v. Cannel*, 24 Law J. Rep. (N.S.) C.P. 41; 15 Com. B. Rep. 107.

Also, that the direction as to pulling down the wall was sufficiently certain, the defendant not having shewn that he was misled by it. *Ibid.*

(d) *When sufficiently final and certain as to Costs.*

[See *Baily v. Curling*, (1) (c).]

Where an agreement of reference provided that the arbitrator should by his award direct by whom, to whom, and in what proportions and manner the costs of the award and the compensation to the arbitrator should be paid, and the award directed the same to be paid by A, B & C in equal proportions, the award was held good, although it did not otherwise shew by whom, to whom, or in what manner these costs were to be paid, as it sufficiently indicated that each of the three parties was to pay one-third of them to the arbitrator. *In re Young*, 22 Law J. Rep. (N.S.) C.P. 160; 13 Com. B. Rep. 623.

After writ issued, and before any pleadings, the cause and all matters in difference were referred; the costs of the cause to abide the event, the costs of the reference and award to be in the discretion of the arbitrator. The award directed that all further proceedings in the cause should cease, that the defendant

should pay to the plaintiffs 190*l.* in satisfaction and discharge of all claims and demands in the cause and matters in difference, and then disposed of the costs of the reference and award:—Held, that the award was sufficiently final and certain, for that it was to be inferred that something was due to the plaintiffs in the cause, and the amount was immaterial, as the rule as to costs upon the lower scale does not apply to awards. *Nicholson v. Sykes*, 23 Law J. Rep. (N.S.) Exch. 193; 9 Exch. Rep. 357.

(e) *Sufficiency of finding on several Issues.*

An action of assumpsit was referred, the costs to abide the event of the award. The declaration contained two counts. There were several pleas to the first count, one of which set up that a new agreement was substituted for the agreement in the declaration. There were also pleas to the second count. The award was that "the plaintiff had a good cause of action against the defendant, as stated in the declaration," and then assessed damages to the plaintiff:—Held, that the award sufficiently decided all the issues in favour of the plaintiff. *Phillips v. Higgins*, 20 Law J. Rep. (N.S.) Q.B. 357; 2 L. M. & P. C. 355.

The plaintiffs entered into four separate written contracts with the defendants for the completion of four separate portions of the defendants' railway, and subsequently into three verbal contracts for the making of three extensions of the line. In the plaintiffs' bill of charges, the several portions were kept distinct and charged for separately. The defendants not paying the full amount claimed, the plaintiffs brought an action of debt against them, which before plea was referred to arbitration with all matters in difference relating to the railway works. The costs of the cause, reference, and award were to abide the event of the award. Before the arbitrator, the case was opened separately and proved separately in respect of the claim under each contract. The plaintiffs made further claims for damage done to an engine by the defendants, and for their not delivering certain waggons. The arbitrator awarded that the plaintiffs had good cause of action, and that in respect of such cause of action, and the other matters in difference, the defendants should pay to the plaintiffs a specified sum. It was objected that the award was bad and uncertain, as it did not find separately in respect of the claims under the separate contracts, the costs as to each contract being, as was contended, to abide the event of the award on each:—Held, that the award was sufficient, and that it was not necessary for the arbitrator to award specifically as to each contract. *Crawshaw v. the York and North Midland Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 274; 1 Bail C. C. 45.

To a declaration containing a single count for work and labour, money paid, board and lodging, and on an account stated, the defendant pleaded never indebted and a set-off. The cause was referred, the costs of the cause and of the reference and award or certificate to abide the event of the award or certificate. The arbitrator certified that a verdict should be entered on the first issue for the plaintiff, and on the second issue for the defendant. He afterwards stated that he considered that the plaintiff had made out no claim against the defendant, except for board and lodging. The Court, under a power to that

effect, remitted the matters to the arbitrator to certify specifically upon each of the claims in the declaration; and as to what sum (if any) he found to be due from the defendant to the plaintiff in respect of one or either of such claims. *Gore v. Baker*, 24 Law J. Rep. (n.s.) Q.B. 94; 4 E. & B. 470.

On a reference of all matters in difference in a cause which involves several issues, the costs of the cause to abide the event, the award is good although there is no specific finding upon each issue, if it appears by necessary intendment that the arbitrator has disposed of all the issues in the cause. *Humphrey v. Pearce*, 22 Law J. Rep. (n.s.) Exch. 120; 7 Exch. Rep. 696.

Semble—that the case would be otherwise where the reference is of the cause and of all matters in difference. *Ibid*.

(E) EXECUTION OF AWARD BY TWO OR MORE ARBITRATORS.

Where a case was referred to the arbitration of three persons, the award to be that "of the said arbitrators or any two of them," and the award was signed by one of the arbitrators in London, and afterwards sent to another arbitrator at Bristol, who there signed it. —Held, in an action upon the award, that the arbitrators should together have executed the award, and that their not having done so rendered the award invalid. *Wade v. Dowling*, 23 Law J. Rep. (n.s.) Q.B. 302; 4 E. & B. 44.

By an order of reference a cause was referred to A and B, and such third person as they should nominate before proceeding to the reference, so that they or any two of them should make the award. The plaintiff requested the arbitrators to appoint an umpire, and asked C to act as umpire, to which he consented, and they appointed him third arbitrator, and they enlarged the time for making the award, but without consulting C. Afterwards A asked the plaintiff for further documents besides what he had already furnished, and the plaintiff said that no more were necessary. A and B from time to time told the plaintiff that they were proceeding without C, but they did not ask him if he had any further evidence to offer, nor state that they were going to make their award. A and B gave no notice of their meetings to C, or to the plaintiff's attorney, and made their award without consulting C. The plaintiff stated in his affidavit that he had material witnesses whom he had not had an opportunity of examining before the arbitrators:—Held, that although the plaintiff might not be entitled to object that the award was made by two of the three arbitrators, without consulting the third, having agreed to treat C as an umpire, and having known that A and B were proceeding alone, yet that the arbitrators had not perfectly discharged their duty, as they had not given the plaintiff notice that they were about to make their award, and afforded him the opportunity of examining his witnesses, and, therefore, that the case should be referred back, with a direction to the third arbitrator to act as such. *In re Peterson v. Ayre*, 23 Law J. Rep. (n.s.) C.P. 129; 14 Com. B. Rep. 665.

(F) ENLARGEMENT OF TIME FOR MAKING AWARD.

(a) By the Arbitrator.

A declaration stated that it was agreed between the

plaintiff and the defendants that in a certain event *Joseph H* should say, by his award in writing, "to be delivered "on or before the 30th of December next, or on some such ulterior day as the said *Joseph H*, by a memorandum in writing under his hand to be indorsed thereon," (omitting the words "shall appoint,") what, if anything shall be paid to S K, and "that the said *James H*. took upon himself the burthen of the reference," and enlarged the time, &c. The declaration then set out the award, which commenced thus: "To all to whom these presents shall come, I, *Joseph H*, of, &c. send greeting," and further, "I, *Joseph H*," award the sum of 270*l*. to be paid to S K by the defendants, and that a promissory note of S K and *Mary A K* shall be given up to be cancelled, on condition that S K or *Mary A K*, or either of them, shall not, by any proceeding, seek to compel the defendant or other the plaintiff in certain actions to prosecute the said actions on the promissory note, or to pay costs thereon; also on the condition that the plaintiff shall release the defendants from all actions as to the colliery; the deed of release, in case of difference, to be settled for both parties by *Henry V*." The arbitrator ordered, lastly, that the costs of the arbitration and award should be paid thus: "two third parts thereof by the defendants, and the remaining one third part thereof by the plaintiff." In witness whereof I, *Joseph H*, have hereunto set," &c. First breach, non-payment of the sum of 270*l*; second, that two third parts of the costs of the arbitration amounted to 500*l*., and that the defendants had not paid two third parts of the costs:—Held, that there was a sufficient power to enable the arbitrator to enlarge the time; that it sufficiently appeared by the declaration that the award was made by the same person to whom the submission was made; and that the first breach was good and the second bad. *Kirk v. Unwin*, 20 Law J. Rep. (n.s.) Exch. 345; 6 Exch. Rep. 908; 2 L. M. & P. P.C. 519.

(b) By the Court.

Pursuant to the power given by an order of reference at *Nisi Prius*, an arbitrator enlarged the time for making his award. The case proceeded, and the parties attended before the arbitrator after the time specified in the enlargement had expired. Neither party was aware that the arbitrator had omitted to keep the time enlarged. The award was made in favour of the plaintiff. Two terms having further elapsed since the award was made, the plaintiff proceeded to tax his costs, on which occasion the defendant discovered the want of the enlargement, and objected that the award was bad. The Court, on the application of the plaintiff, enlarged the time for making the award, under the stat. 3 & 4 Will. 4. c. 42. s. 39. *Browne v. Collyer*, 20 Law J. Rep. (n.s.) Q.B. 426; 2 L. M. & P. P.C. 470.

If it appear on the affidavits, in support of an application for an enlargement, that the cause has been referred by an order of *Nisi Prius*, and that the order of reference has been made a rule of court, it is sufficient to draw up the rule *nisi* for the enlargement on reading the affidavits and order of *Nisi Prius*; and it is not absolutely necessary for such an application that the rule *nisi* be drawn up on reading the rule making the order of reference a rule of court. *Ibid*.

A cause was referred to arbitration in 1846, after which both parties having delayed proceeding with the reference, and the arbitrator having omitted to enlarge the time for making his award beyond Easter term, 1850, the Court refused, under the 3 & 4 Will. 4. c. 42, s. 39, to enlarge the time to Michaelmas term 1852, the defendant refusing his consent to such enlargement. *Andrews v. Eaton*, 21 Law J. Rep. (N.S.) Exch. 110; 7 Exch. Rep. 221.

The cause and all matters in difference between two partners were referred by order of Nisi Prius to an arbitrator, who was to make his award on or before the 24th of August 1852, or on or before such ulterior day as he might indorse on the order. In case of the death of either party, the award was to be delivered to the personal representative. When the plaintiff was about to be examined before the arbitrator an adjournment was agreed to with a view to a compromise, and the 24th of August passed without any enlargement of time by the arbitrator. The defendant afterwards refused to consent to any enlargement. In June 1853 the plaintiff died. His executrix was desirous of proceeding in the reference, and applied to the Court to enlarge the time. The defendant opposed the enlargement, denied the power of the Court to enlarge the time, and charged in his affidavit that the plaintiff had received large sums of money on account of the partnership which he had not brought into account. The Court held, that it had power to enlarge the time; but, under the circumstances, in the exercise of its discretion, refused to grant an enlargement. *Edwards v. Davies*, 23 Law J. Rep. (N.S.) Q.B. 278.

Arbitrators were to award by the 25th of June, with liberty to them to enlarge their time, but not to exceed the 31st of August; if they did not award within the time limited for them, the matters were to be determined by an umpire, who was to make his award within two months from his appointment, with liberty to him to enlarge his time, but not exceeding another two months. On the 20th of April the arbitrators appointed an umpire, and in the appointment stated that his duties should commence officially on the 1st of September, and should terminate before the 1st of January following. The arbitrators could not agree on an award. The umpire did not enlarge his time, and the 31st of October passed. The Court, without deciding as to the validity or effect of the umpire's appointment, granted a rule enlarging the time of the umpire for making the award until the end of December. *In re Johnson*, 24 Law J. Rep. (N.S.) Q.B. 63.

(G) REMITTING AWARD FOR AMENDMENT.

[See 17 & 18 Vict. c. 125. s. 8.]

Covenant on a mortgage deed. Pleas—*Non est factum* and payment. After issue the cause and all matters in difference were referred to arbitration; the costs of the cause of the reference and award and all other costs to abide the event. The submission stipulated that "if either party, by affected delay or otherwise, should wilfully delay or otherwise wilfully prevent the arbitrator from making the award, he should pay costs; and in case of either party disputing the validity of the award, and moving the Court to set aside the same, the Court should have power to remit the matters referred to the arbitrator." The arbitrator awarded of and concerning the matters re-

ferred "that on a settlement of all matters in difference, accounts, claims, and demands between the parties, up to the date hereof, there is due from the defendant to the plaintiff 300*l.* 15*s.* 9*d.*," and he ordered the same to be forthwith paid. The defendant having moved to remit the award to the arbitrator for amendment, and also that upon payment of the sum awarded, satisfaction should be entered on a judgment, and that the plaintiff should pay costs by reason of his having wilfully delayed the making of the award,—Held, first, that the award might be remitted to the arbitrator, in favour of the defendant, who disputed the validity of the award, without seeking to set it aside; and that the clause in question was not confined to cases of applications to set aside an award, and as against the party disputing the validity of it. Secondly, that the award was good on the face of it, as the arbitrator had awarded upon every matter in difference. *Bradley v. Phelps*, 21 Law J. Rep. (N.S.) Exch. 310; 6 Exch. Rep. 897.

Semble—that the clause relating to "wilful delay" did not apply to cases where an award had in fact been made, but to those cases only where the completion of the award is prevented. *Ibid.*

An appeal was referred by the Quarter Sessions to arbitration, under the 12 & 13 Vict. c. 45. s. 13, the arbitrator to have the same power as to costs as the Sessions. The arbitrator made his award directing the appeal to be dismissed, and ordering the appellant to pay costs to the respondent, but did not ascertain the amount of costs. A rule was afterwards obtained in this court, on behalf of the respondent, to set aside the award, or to refer the case back to the arbitrator for this defect. Cause was shown against this rule, which was made absolute to refer back the appeal to the arbitrator, "on the ground that he had not ascertained the amount of costs to be paid by the appellant to the respondent," no other objection being then suggested by the appellant. On the attendance before the arbitrator to inquire into the costs, the appellant offered to produce additional evidence as to the merits of the appeal which he had not before brought forward. This the arbitrator refused to hear, and proceeded to make a fresh award in the same terms as before, except that it contained the amount of the costs. On an application by the appellant to set aside this award, on the ground of the refusal to hear the evidence,—Held, that it could not be objected to on that ground, as the only purpose for which it was referred back was to ascertain the costs, and the arbitrator was not bound to hear any fresh evidence or the merits. *Ex parte Huntley*, 22 Law J. Rep. (N.S.) Q.B. 277; 1 E. & B. 787.

A rule to pay money pursuant to an award was discharged, on the ground of the award being bad. Three years afterwards the plaintiff applied to have the award sent back to the arbitrator for re-consideration, pursuant to a power in the submission. No explanation was given of the delay:—Held, that the application was too late. *Doe d. Mays v. Cannell*, 22 Law J. Rep. (N.S.) Q.B. 321.

(H) SETTING ASIDE AWARD.

[See 17 & 18 Vict. c. 125. s. 9.]

The original agreement of reference may be looked at on a motion to set aside an award, though the rule *nisi* be not drawn up on reading it; for the rule *nisi*

is drawn up on reading the rule making the agreement of reference a rule of court, and the agreement of reference is in law part of the rule embodying it. *Oswald v. Grey*, 24 Law J. Rep. (n.s.) Q.B. 69.

A rule to set aside an award void on the ground of its having been made by two out of three arbitrators without the concurrence of the third, may be drawn up without reading the award, the party seeking to set aside the award not being bound to incur the expense of taking it up. *Hinton v. Meade*, 24 Law J. Rep. (n.s.) Exch. 140.

(I) REMEDIES FOR ENFORCING PERFORMANCE OF AWARD.

(a) Action.

A declaration stated that a difference existed between the plaintiff and the defendant concerning certain shares bought by the plaintiff for the defendant at his request, and for which the plaintiff had paid 122*l.*; that they submitted themselves to the award of W W and R P concerning the said difference; that the defendant promised to fulfil the award; that W W and R P made their award concerning the said difference, and decided in favour of the plaintiff, and found that 50*l.* which had been deposited by the defendant with the plaintiff was in part payment of the shares; and, "by their award," they "requested" the defendant to pay the balance of the account:—Held, that it sufficiently appeared that the arbitrators had authority to make the award, and to award a specific sum of money, although the nature of the difference was not stated. *Smith v. Hartley*, 20 Law J. Rep. (n.s.) C.P. 169; 10 Com. B. Rep. 800; 2 L. M. & P. P.C. 304.

Held, also, that the "request" made by the award was equivalent to a direction to pay. *Ibid.*

Quære—whether the allegation that they awarded that the defendant should pay the "balance" would have been good, if it had been pointed out on special demurrer that no specific sum was awarded. *Ibid.*

To an action for goods sold, the defendant pleaded that an action having been brought in the County Court of G. in respect of the causes of action in the declaration mentioned, the plaintiff and defendant mutually submitted themselves to refer the action, &c. to arbitration; that the umpire awarded that the defendant should pay into the county court to the plaintiff 4*l.* 10*s.* 6½*d.* in full satisfaction of all matters referred; and that the plaintiff refused to receive the said sum, and discharged the defendant from paying it into court. Replication, *nul tiel award*:—Held, first, that under these pleadings the plaintiff was not at liberty to shew that the award had been set aside. Secondly, that the plea was not bad, on motion for judgment *non obstante veredicto*, in omitting to state that the reference was ordered by the Judge under the 77th section of the County Courts Act, the obligatory part consisting of the mutual consent to arbitration. *Roper v. Levy*, 21 Law J. Rep. (n.s.) Exch. 28; 7 Exch. Rep. 55.

(b) Signing Judgment.

Where a cause and all matters in difference between the parties are referred by order of Nisi Prius, and the arbitrator out of term finds for the plaintiff in the cause, there being no other matters in difference, the allocator for costs ought not to be granted until the end of the term after the making

of the award, the defendant having all that term to move to set aside the award—*Little v. Newton* distinguished. *Jones v. Ives*, 20 Law J. Rep. (n.s.) C.P. 69; 1 L. M. & P. P.C. 689.

An action and all matters in dispute between the parties were referred by an order, which was made a rule of court. The arbitrator was to raise questions of law for the Court, and assess damages contingently, and the costs were to abide the event. Before the award was made, a second rule was obtained by which the arbitrator was to make two several awards, and by the first to raise points of law for the opinion of the Court and to assess damages contingently, and after the judgment of the Court he was to make his award concerning the other matters, reference being had to the judgment of the Court; and neither party was to enforce payment of anything the arbitrator might find due by the first award till the publication of the final award between the parties. The arbitrator made an instrument, which was called an award, stating points of law for the Court, and assessing the plaintiff's damages contingently at 2,272*l.*, without saying anything about costs. The Court gave judgment in favour of the plaintiff. No other award was ever made, and the time for making it expired. The plaintiff accepted mining company's shares in satisfaction of his damages under an act of parliament for the winding up of the defendants' affairs, and he afterwards signed judgment for the damages and the costs in order to get the costs of the first action, and issued execution:—Held, that the instrument made by the arbitrator was not a final award, even though no other was ever made, and the time for making one had expired; that, therefore, the plaintiff had no right to enforce payment of what the arbitrator found to be due by the first instrument, and that the judgment, having been signed, for the purpose of enforcing payment, should be set aside. *Wood v. the Copper Miners Co.*, 24 Law J. Rep. (n.s.) C.P. 34; 15 Com. B. Rep. 464.

(c) Attachment.

An award made in an action, in which A and B were plaintiffs, and C defendant, ordered that the defendant should pay the plaintiffs a certain sum of money, and directed that the defendant should pay the costs of the reference and award (not saying to whom the costs were to be paid). After more than two years from the making of the award, one of the plaintiffs demanded payment of the amount awarded from the defendant. The defendant did not pay:—Held, that the plaintiffs were entitled to an attachment to compel payment, although the plaintiffs had given no explanation of the delay in coming to the Court. *Bailey v. Curling*, 20 Law J. Rep. (n.s.) Q.B. 235; 2 L. M. & P. P.C. 161.

Held, also, that the direction in the award as to the costs was sufficiently certain, as the award could not reasonably be construed to mean that the defendant should pay costs to any one but the plaintiffs. *Ibid.*

Held, further, that the demand made by one only of the two plaintiffs was a sufficient demand to bring the defendant into contempt. *Ibid.*

An award ordered H to pay, on a day and at a place named, to the attorney of C, for C's use, one sum for debt, and another for C's costs of the reference, and then directed that C should pay to the

arbitrator's attorney, at or before the delivery of the award, 62*l.* 10*s.* for the costs of the arbitrator and of the award; and that H should, on a day and at a place named, repay the said sum of 62*l.* 10*s.* to the attorney of C for C's use. H not complying with the award, a demand was duly made on him on C's behalf for payment of the three specific sums, but H did not pay any of them. On an application by C against H for an attachment for not paying the three sums,—Held, that, assuming the direction to pay the 62*l.* 10*s.* to be valid, no attachment could issue in respect of that sum, as it was not shewn that C had paid it in the first instance for the arbitrator's use; but that the Court could mould the rule, and that the attachment might issue in respect of the other two sums. *In re Cardigan*, 22 Law J. Rep. (N.S.) Q.B. 83; 1 Bail C.C. 98.

(d) *Rule and Execution.*

A cause and all matters in difference had been referred to an arbitrator, the costs of the cause to abide the event. The arbitrator found for the defendant, as to the cause, and as to the matters in difference awarded 303*l.* 15*s.* to the plaintiff to be paid at the same time and place at which the plaintiff was to pay the costs of the action; and the defendant did at the appointed time and place pay the sum awarded to the plaintiff's attorneys, minus 180*l.* the amount of the costs of the action, but refused to pay the residue unless the plaintiff paid the costs of the action. The plaintiff having become bankrupt after the making of the award, the Court discharged a rule calling upon the defendant to pay the balance of the sum awarded to the plaintiff's attorneys, who had a lien against the plaintiff, for more than the amount awarded, for costs incurred by them in the prosecution of the reference. *Dunn v. West*, 20 Law J. Rep. (N.S.) C.P. 1; 10 Com. B. Rep. 420.

The rule of Hil. 2 Will. 4. s. 93. only applies to cases in which the Court has a discretion to allow costs or damages of different actions to be set off against each other, and where there has been an application to allow such set-off. *Ibid.*

Where an arbitrator has awarded a sum to be paid to A in respect of matters in difference between him and B, and the costs of the action (a smaller sum) to be paid to B at the same time and place, the Court has no jurisdiction to order B to pay the whole sum awarded to A to A's attorney on account of his lien for A's costs. *Ibid.*

The Court will not make an order under the statute except in cases where before the statute it would have granted an attachment. *Creswick v. Harrison*, 20 Law J. Rep. (N.S.) C.P. 56.

Where all matters in difference in a cause are referred by Judge's order, the Court will enforce the payment of the sum awarded by a rule of court under 1 & 2 Vict. c. 110. s. 18, although the time for moving to set aside the award has not expired. *Hare v. Fleay*, 20 Law J. Rep. (N.S.) C.P. 249; 11 Com. B. Rep. 472; 2 L. M. & P. C. 393.

When a rule is granted to pay money pursuant to an award, the original award must be produced and deposited with the Master at the time of drawing up the rule. *Davis v. Potter*, 21 Law J. Rep. (N.S.) Q.B. 134; 1 Bail C.C. 11.

The fact that the award has been deposited as a security with a person who has advanced money on

it, and who declines to produce it on the drawing up of the rule, and to allow it to be deposited with the Master for fear of losing his lien on it, is no sufficient reason for allowing the rule to be drawn up on production of a verified copy; for if the lender is willing to assist in the application and produces the award, and gives the Master notice that he is entitled to it, the Master will draw up the rule and will hold the award for the lender until the judgment of the Court has been executed and then return it to him. *Ibid.*

On shewing cause against a rule it was agreed by indorsements on the counsel's briefs, that the matters should be referred to a barrister, who should be at liberty to certify what rule, if any, should be drawn up. The arbitrator certified that the rule should be drawn up in certain terms. The Court thereupon permitted a rule of reference to be drawn up in the terms of the indorsements, and then a second rule pursuant to the certificate of the barrister. *Brandon v. Smith*, 22 Law J. Rep. (N.S.) Q.B. 321.

An award made on a reference of an action by two plaintiffs to recover debt from the defendant, ordered the defendant to pay a sum of money to the plaintiffs. One plaintiff alone demanded the money from the defendant, and swore that the defendant had not paid him, and, to the best of his belief, had not paid his co-plaintiff nor the attorney, and that the money was still wholly due and unpaid. On an application on the part of the plaintiffs for a rule calling on the defendant to pay the money pursuant to the award,—Held, that the demand by the one plaintiff was sufficient to warrant the granting the rule. *Drew v. Woolcock*, 24 Law J. Rep. (N.S.) Q.B. 22.

According to the practice of the Court of Queen's Bench, a rule *nisi* to pay money pursuant to an award may be issued to shew cause at chambers. *Ibid.*

(J) Costs.

(a) *In general.*

Where a verdict is taken subject to a reference of the action to an arbitrator, who is to certify for whom and for what amount the verdict shall be entered, and the costs of the cause and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the verdict. *Deere v. Kirkhouse*, 20 Law J. Rep. (N.S.) Q.B. 195; 1 L. M. & P. C. 783.

Agreeing to such a reference at Nisi Prius does not preclude a defendant from applying for costs under the 12 & 13 Vict. c. 106. s. 86. *Ibid.*

If such an application be successful, the defendant's costs are to be deducted from the amount, exclusive of costs recovered by the plaintiff. *Ibid.*

It sufficiently appears that the action was commenced subsequent to the passing of the 12 & 13 Vict. c. 106, if the affidavit of the defendant recite the issue delivered by the plaintiff, and that issue shew that the action was commenced subsequent to the passing of the act. *Ibid.*

(b) *Arbitrator's Charges.*

Where an award, being defective, is referred back by the Court to the arbitrator, who hears fresh evidence and makes a second award, the arbitrator's charges for the first award are to be borne equally by each party. *Blair v. Jones*, 20 Law J. Rep. (N.S.) Exch. 295; 6 Exch. Rep. 701.

Semble—that a lay arbitrator may employ a professional person to prepare his award; per *Maule, J.* that he ought to do so. But where a separate charge was made for an attorney's costs of preparing the award, the arbitrator having charged a sufficient sum for the award,—Held, that the Master was right in disallowing the amount of the attorney's bill in the costs. *Galloway v. Keyworth*, 23 Law J. Rep. (N.S.) C.P. 218; 15 Com. B. Rep. 228.

(c) *Taxation of.*

By an agreement of reference matters were referred to two arbitrators, and if they failed to make an award within a limited time, to an umpire. The costs of the reference and award and umpirage were to be in the discretion of the arbitrators and umpire respectively. The parties agreed that the umpire should sit with the arbitrators, so that, if they did not make an award, it would not be necessary for him to rehear the evidence. The arbitrators did not conclude the reference within the time limited. The parties then further agreed, that the arbitrators should sit with the umpire, and assist him in taking the evidence, which they did. The award ordered the losing party to pay to the other the costs "of the said umpirage and of this my award," and that each party should "pay their own costs of the reference other than the costs of my said umpirage and of this my award." The umpire included the charges of the two arbitrators in his costs of umpirage and award, and the same were paid by the successful party on taking up the award:—Held, that the charges of the arbitrators were costs of the umpirage, and not costs of the reference; and that the successful party was entitled to have such amount as was duly charged by the arbitrators, and paid by him on taking up the award, allowed on the taxation of costs, and to have the same repaid to him by his opponent. *Ellison v. Akeroyd*, 20 Law J. Rep. (N.S.) Q.B. 193; 1 L. M. & P. P.C. 806.

After the costs had been taxed the original award was sent back; and after the second award was made, the defendant demanded the same costs without any new taxation:—Held, that by the reference back the allocatur became null, and that there ought to have been a fresh taxation of costs after the making of the new award, before any demand for costs could be enforced. *Johnson v. Latham*, 20 Law J. Rep. (N.S.) Q.B. 236; 2 L. M. & P. P.C. 205.

Upon a reference by Judge's order with the usual clause that the submission may be made a rule of court, the arbitrator under a power to award the costs of the reference and award may direct such costs to be taxed by the officer of the court, although no cause was pending at the time of the reference. *Bhear v. Harradine*, 21 Law J. Rep. (N.S.) Exch. 127; 7 Exch. Rep. 269.

ARREST.

[For furious driving, see POLICE; and see BANKRUPT—INSOLVENT—PRISONER.]

- (A) AFFIDAVIT OF CAUSE OF ACTION.
- (B) UNDER ABSCONDING DEBTORS ARREST ACT.
- (C) PRIVILEGE FROM.
- (D) DISCHARGE FROM.

(A) AFFIDAVIT OF CAUSE OF ACTION.

On a motion to rescind a Judge's order to hold a defendant to bail in an action, the Court will not receive affidavits of collateral facts not submitted to the notice of the Judge. *Bullock v. Jenkins*, 20 Law J. Rep. (N.S.) Q.B. 90; 1 L. M. & P. P.C. 645.

It is not absolutely necessary that the plaintiff's affidavit, in support of the application to the Judge to hold the defendant to bail in an action for criminal conversation, should have averred that the plaintiff had sustained damages to the amount of 20*l.*, if the Court, on the motion to rescind the order, can see that the Judge was justified in holding that the affidavit shewed sufficiently that the plaintiff had sustained damage to that amount. *Ibid.*

The affidavit need not state that the writ of summons has been sued out. It is enough if the Judge, at the time of the application for the order, was satisfied that it had issued. *Ibid.*

(B) UNDER ABSCONDING DEBTORS ARREST ACT.

[See 14 & 15 Vict. c. 52.]

After a warrant for arresting a debtor under the 14 & 15 Vict. c. 52. (the Absconding Debtors Arrest Act) has been issued, the *capias* required to be issued under section 1. must be served on the defendant, if in custody, within seven days of the date of the warrant, and if not so served it ceases to have any operation, nor can it be treated as a valid *capias* under the 1 & 2 Vict. c. 110. A second *capias* may, however, be issued after the seven days upon fresh materials, under the general powers given by the 1 & 2 Vict. c. 110. *Masters v. Johnson*, 21 Law J. Rep. (N.S.) Exch. 253; 8 Exch. Rep. 63.

Where a defendant is arrested under the 14 & 15 Vict. c. 52. s. 1. and is discharged upon making a deposit in lieu of bail it is not necessary to serve him with a writ of *capias*, although he may be in custody upon another warrant. *Eld v. Vero*, 22 Law J. Rep. (N.S.) Exch. 276; 8 Exch. Rep. 655.

(C) PRIVILEGE FROM.

A person acquitted on a criminal charge, is not entitled to privilege from arrest under civil process *morando aut redeundo*. *Hare v. Hyde*, 20 Law J. Rep. (N.S.) Q.B. 185; 16 Q.B. Rep. 394.

Where, therefore, the defendant in a civil action, immediately after his acquittal and discharge on a trial for a charge of embezzlement at the Quarter Sessions, and whilst he remained in the court, was arrested under a writ of *capias* in the action, this Court refused to discharge him out of custody. *Ibid.*

An attorney's clerk going to or returning from Judge's chambers on business having reference to a pending suit is not privileged from arrest. *Phillips v. Pound*, 21 Law J. Rep. (N.S.) Exch. 277; 7 Exch. Rep. 381.

The Court out of which the *Nisi Prius* record is sent has jurisdiction to punish a contempt committed by the arrest of a witness in the cause during the continuance of his privilege *eundo, morando, et redeundo*. *Kimpton v. The London and North-Western Railway*, 23 Law J. Rep. (N.S.) Exch. 232; 9 Exch. Rep. 766.

Semble—a warrant of commitment issued by the county court Judge, under the 9 & 10 Vict. c. 95. s. 99, is so far a criminal process that a witness in a

cause at Nisi Prius is not privileged from arrest *redevendo*. *Ibid*.

Where a witness had been so arrested, and a rule nisi had been obtained for his discharge, and for costs against the officer of the county court, the Court, no one appearing to support the arrest, made the rule absolute for his discharge, but without costs. *Ibid*.

A witness coming from Newbury to Westminster to give evidence on a trial at the sittings under a subpoena, was taken under process from a county court and lodged in Reading gaol, and thence brought up to give his evidence at the sittings under a *habeas corpus ad testificandum*. He had been arrested by a bailiff of the county court, but was brought to the trial by the governor of Reading gaol. The Judge at Nisi Prius would not order his discharge, as there had been a change of custody, but held that the proper course was to apply to a Judge at chambers for *habeas corpus*. *Astbury v. Belbin*, 3 Car. & K. 20.

A judgment for debt was obtained in the county court against the defendant, who, as one of the Queen's priests in ordinary, was privileged from arrest on civil process. A judgment summons issued against him, under section 99. of the 9 & 10 Vict. c. 95, to which he did not appear, whereupon the Judge committed him for thirty-five days:—Held, that the commitment was in the nature of a qualified execution, and not of a punishment for contempt; and, therefore, that the defendant was entitled to be discharged by reason of his privilege; and that such privilege was not taken away by the 12 & 13 Vict. c. 101. s. 18. *Ex parte Dakins, in re Swann v. Dakins*, 24 Law J. Rep. (n.s.) C.P. 131; 16 Com. B. Rep. 77.

Held, also, that the proper mode of obtaining his discharge was by *habeas corpus* from one of the superior Courts. *Ibid*.

The return to the *habeas corpus* shewed that the defendant was legally detained under civil process:—Held, that he might by affidavit shew that he was privileged from arrest. *Ibid*.

(D) DISCHARGE FROM.

It is competent for the defendant to apply to the Court to be discharged out of custody, although he has already applied for that purpose, but in vain, to the same Judge who made the order warranting his arrest. On such a motion to the Court, the defendant may use additional affidavits to those used before the Judge, and may shew as grounds of discharge that the plaintiff has no cause of action, and also that he, the defendant, has no intention of leaving the country. *Bullock v. Jenkins*, 20 Law J. Rep. (n.s.) Q.B. 90; 1 L. M. & P. P.C. 645.

The plaintiff sued the defendant upon a judgment recovered against him in a county court. The writ was specially indorsed. A *capias* was obtained under 1 & 2 Vict. c. 110. s. 3, and the defendant arrested; but he did not appear to the action, and final judgment was signed. The defendant subsequently learned that the Court of Queen's Bench had decided that no action would lie upon a county court judgment, and thereupon a motion was made for the defendant to be allowed to come in and defend the action, and that he might be discharged from custody. The Court refused the application, except upon the terms of the debt and costs being paid into court.

Austin v. Mills, 22 Law J. Rep. (n.s.) Exch. 263; 8 Exch. Rep. 723.

Where a plaintiff has arrested the defendant on a *capias* obtained on an affidavit that he has sustained damages from the defendant to the amount of 20*l.*, and that he has probable cause for believing that the defendant is about to quit England, the Court will not allow the defendant, on his application to be discharged from custody, to read affidavits denying the existence of a cause of action, as that is a matter to be tried by the jury. *Copeland v. Child*, 22 Law J. Rep. (n.s.) Q.B. 279; 1 Bail C.C. 175.

ARSON.

A supplied the materials and superintended the building of some houses on his own freehold estate, with the object of letting or selling the houses. He also erected a building, about twenty-four feet square, with slated roof, wooden sides and glass windows. This was used as a storehouse for seasoned timber, as a place of deposit for tools, and as a workshop where timber was worked up into its proper form and prepared for use. The prisoner wilfully set fire to this building:—Held, that in the indictment for arson the building was correctly described as a "shed." *Regina v. Amos*, 20 Law J. Rep. (n.s.) M.C. 103; 2 Den. C.C.R. 55.

Semble—per *Patteson, J.* that A carried on the trade of a builder within the meaning of the statutes, and that the building might properly be described as a building for carrying on the trade of a builder. *Ibid*.

The prisoner was indicted for arson in setting fire to his own house, with intent to defraud an insurance office. Notice to produce the policy was given him in the middle of the day before the trial. The policy was not produced:—Held, that secondary evidence of the policy was not admissible. *Regina v. Kitson*, 22 Law J. Rep. (n.s.) M.C. 118; 1 Dears. C.C.R. 187.

ARTICLES OF THE PEACE.

Where one partner by violence forces his co-partner out of the business premises of the firm, and threatens such co-partner with violence and danger to his life if the latter should venture again to enter the premises, and it is necessary for such co-partner to enter and use the premises for the purposes of carrying on his ordinary business as partner, the Court will permit the latter to exhibit articles of the peace against the former. *Regina v. Mallinson*, 20 Law J. Rep. (n.s.) M.C. 33; 1 L. M. & P. P.C. 619.

H had written a letter to a young lady, a relative of T. T afterwards, in consequence of his writing the letter, violently assaulted H, and said, "if you write again, I will flog you within an inch of your life." On a subsequent occasion, T, meeting H, said to him, "Remember what I said to you, I am determined to put a stop to your proceedings." The Court permitted H to exhibit articles of the peace against T. *Ex parte Hulse*, 21 Law J. Rep. (n.s.) M.C. 21.

A warrant of commitment in substance stated, that whereas the plaintiff had been brought before the

defendant (who was a Justice) charged, on the oath of T P, with having written on the pavement in a certain lane the offensive words reflecting on the character of R J W, "Donkey Watt, the railway jackass;" and it having been stated to the defendant, on the oath of T P, that the continued writing for some time past of the offensive words was calculated to produce a breach of the peace, and T P praying that the plaintiff might be required to find sureties to keep the peace, he, the defendant, ordered and adjudged that the plaintiff should enter into his own recognizance of 20*l.*, with two sufficient sureties in 15*l.* each, to keep the peace for three calendar months. The warrant then stated that the plaintiff had refused to enter into such recognizance and find such sureties, and commanded that the plaintiff should be conveyed to prison and there kept for the space of three months, unless the plaintiff, in the mean time, entered into such recognizance with such sureties. This warrant was afterwards quashed on motion, and an action of trespass brought against the defendant, who granted it:—Held, first, that the warrant put in by the plaintiff was evidence of the information recited in it. Secondly, that it must be taken that the defendant intended to require sureties for good behaviour, notwithstanding the words "sureties of the peace" in the warrant. Thirdly, that a Justice of the Peace has jurisdiction to require sureties for good behaviour in some cases of libels against private individuals. That, therefore, the defendant had jurisdiction in the matter out of which the cause of action arose, and within the meaning of the 11 & 12 Vict. c. 44. s. 1, and consequently was not liable to an action of trespass. *Haylock v. Sparke*, 22 Law J. Rep. (n.s.) M.C. 67; 1 E. & B. 471.

When articles of the peace have been filed, and an attachment issued for the purpose of bringing in the defendant to find sureties, the Court will not entertain an application to discharge the articles and to award costs under stat. 21 Jac. 1. c. 8. s. 2. on the ground of alleged insufficiency of the articles, though notice of such application has been given to the prosecutor. *Regina v. Mallinson*, 16 Q.B. Rep. 367.

It is sufficient ground for articles of the peace that the complainant has been accustomed to go to a particular place, rightfully as he alleges, for the transaction of business, and has been threatened with violence if he goes there again. *Ibid.*

Affidavits are not admissible in contradiction to articles of the peace; nor for the purpose of supplying facts said to have been suppressed by the complainant; as the contents of a correspondence alluded to in the articles. Nor is it an objection to the articles that such correspondence is not set out, if it does not contain any part of the menace relied upon. *Ibid.*

The Court will, if it sees ground, require sureties of the peace, although Justices have refused to do so on the same complaint. *Ibid.*

The Court granted an attachment upon articles of the peace, where the threat of further violence was conditional on the exhibitant writing again to a member of defendant's family; although it did not appear that the exhibitant had written again, or was under any necessity of doing so. *Regina v. Tollemache*, 2 L. M. & P. P.C. 401.

ASSAULT.

[See Stat. 14 & 15 Vict. c. 100. s. 10; the 7 Will. 4 & 1 Vict. c. 85. s. 11. is repealed by that act. See also for assaults with intent, the titles of the various offences. Apprehension and giving in charge for, see FALSE IMPRISONMENT—POLICE. Actions and justifications for, see TRESPASS. And see title JUSTICE OF THE PEACE, Jurisdiction.]

(A) WHAT AMOUNTS TO AN ASSAULT.

(B) CONVICTION FOR ON INDICTMENT FOR ROBBERY.

(A) WHAT AMOUNTS TO AN ASSAULT.

The defendant ordered the plaintiff to leave his shop, and on his refusal, sent for some men, who mustered round the plaintiff, tucked up their sleeves and aprons, and threatened to break his neck if he did not go out, and would have put him out if he had not gone out:—Held, an assault upon the plaintiff. *Read v. Coker*, 22 Law J. Rep. (n.s.) C.P. 201; 13 Com. B. Rep. 850.

(B) CONVICTION FOR ON INDICTMENT FOR ROBBERY.

The prisoners were indicted for robbery and at the time of the robbery beating the prosecutor. The jury found as their verdict, that the prisoners were guilty of assaulting the prosecutor *with intent to rob him*:—Held, that the finding did not warrant a conviction for the felony of assaulting with intent to rob, as the indictment for robbery with violence did not include a charge of the minor felony of assaulting with intent to rob, although the word "rob" was used in the indictment. *Regina v. Reid*, 20 Law J. Rep. (n.s.) M.C. 67; 2 Den. C.C.R. 88.

Held also, that the verdict being a finding of a felonious assault would not justify a conviction of assault under the statute 7 Will. 4. & 1 Vict. c. 85. s. 11; that consequently there was no proper verdict, and that the judgment must be arrested. *Ibid.*

ASSIGNMENT.

[For the benefit of creditors, see BANKRUPTCY—DEBTOR AND CREDITOR. And see ASSIZES. LEASE.]

(A) PROPERTY ASSIGNABLE.

(B) WHAT AMOUNTS TO AN ASSIGNMENT.

(C) CONSTRUCTION OF.

(A) PROPERTY ASSIGNABLE.

An officer in the army may assign for the benefit of his creditors the difference received by him upon going on half-pay. *Price v. Lovett*, 20 Law J. Rep. (n.s.) Chanc. 270.

The office of Warden of the Forest of Hainault was granted by James the First to Lord Oxford, his heirs and assigns, and was subsequently assigned by the holder of the office, upon various occasions, and lastly to the petitioner, without any objection on the part of the Crown:—Held, that the office passed under the assignment to the petitioner; and that he

was entitled to claim the compensation allowed by the act, upon the forest being disafforested. *Wellesley v. Mornington*, 23 Law J. Rep. (n.s.) Chanc. 49.

A debt or other chose in action may be assigned in equity without any concurrence on the part of the debtor. *Bell v. the London and North-Western Rail. Co.*, 15 Beav. 548.

A railway contractor gave his bankers a letter, directing the railway company to pass the cheques which might become due to him "to his account with the bank":—Held, that this was not an equitable assignment, but that it would have been if it had directed the cheques to be passed to the bank. *Ibid.*

(B) WHAT AMOUNTS TO AN ASSIGNMENT.

Where A having money in the hands of B, directs a payment generally to C, and B consents, C may enforce payment against B, but it is necessary that A's order should be communicated to C. *Morrell v. Wootten*, 16 Beav. 197.

When A having money in the hands of B, directs him to pay a sum out of that particular fund to C, this amounts to an equitable assignment, and the assent of B is necessary to give it validity. *Ibid.*

By an order in a suit A was ordered to pay a sum to B. After A had appealed, B's bankers induced B to enforce the order, and to pay the amount to his account, the bankers undertaking to repay it if, on appeal, B should be ordered to repay it. The order was reversed, and B directed his bankers to pay the amount to A, but the direction was not communicated to A. The bankers had also said they were quite ready to pay the money to A, and B had said "there it is for you," viz., at the bankers. B became bankrupt:—Held, that neither the agreement, nor the order, nor the statements so made gave to B any claim upon the fund in the hands of the bankers. *Ibid.*

An agreement between a debtor and a creditor, that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will operate as an equitable assignment of such debt or funds. *Rodick v. Gandell*, 1 De Gex, M. & G. 763.

A railway company was indebted to A, their engineer, who was greatly indebted to his banker; the latter having pressed for payment or security, A, by letter to the solicitors of the company, authorized them to receive the money due to him from the railway company, and requested them to pay it to the banker. The solicitors by letter promised the banker to pay him such money on receiving it:—Held, that this did not amount to an equitable assignment of the debt. *Ibid.*

(C) CONSTRUCTION OF.

A assigned "all his ready money, securities for money," &c. &c., "and all other his personal estate and effects whatsoever or wheresoever of or belonging or due or owing to him":—Held, that the general words passed only property *ejusdem generis* with that specified, and that they did not convey a contingent reversionary interest in a legacy. *Re Wright's Trusts*, 15 Beav. 367.

Assignees of a chose in action are liable to all the equities which attach to the thing assigned as against the assignor. *Smith v. Parkes*, 16 Beav. 115.

A retiring partner received security from the continuing partners for his share, and which he assigned to third parties:—Held, that the assignees took subject to the right of equitable set-off of the continuing against the acting partner. Held, also, that the assignees, having assented to a substituted security in 1846, in lieu of a prior one in 1845, were subject to all the equities existing at the dates of the second security. *Ibid.*

Equitable right of set-off enforced after a judgment at law. *Ibid.*

In a sale by an executor of "book debts" due to his testator, the purchaser is entitled, not to the sums appearing in the books as due to the testator, but only to what, on a proper adjustment of accounts between his debtors and his estate, should be found to be due to his estate. *Chick v. Blackmore*, 23 Law J. Rep. (n.s.) Chanc. 622; 2 Sm. & G. 274.

ASSIZES.

[As to who may act as Judges of Assize, see Stat. 13 & 14 Vict. c. 25.]

Although in contemplation of law the whole time during which assizes continue at one place is considered for some purposes as one legal day, yet the particular day on which a conviction actually took place may be proved when necessary. Therefore, where a convicted felon made a *bond fide* assignment of goods after the commission-day of the assizes, but before the day on which he was actually convicted, it was held that the assignee could prove the actual day of the conviction, although the record mentioned only the commission-day, and that the assignment was valid. *Whitaker v. Wisbey*, 21 Law J. Rep. (n.s.) C.P. 116; 12 Com. B. Rep. 44.

ASSUMPSIT.

[See ACCORD AND SATISFACTION—ACCOUNT STATED—ACTION—MARRIAGE; Breach of Promise—MONEY HAD AND RECEIVED—MONEY LENT—MONEY PAID—PLEADING.]

(A) WHEN MAINTAINABLE.

(B) CONSIDERATION TO SUPPORT THE PROMISE.

(a) *Sufficiency of, in general.*

(b) *Forbearance.*

(c) *Substitution of Separate for Joint Liability.*

(A) WHEN MAINTAINABLE.

The plaintiff agreed with the defendant H to prepare and issue certain advertisements and notices for the purpose of selling tickets to see a procession, and to use his best endeavours in selling the same, being paid 10l. per cent. upon the proceeds of the tickets sold. The plaintiff issued the advertisements and notices, but before the sale of the tickets the defendant H countermanded his authority to sell, and the plaintiff therefore sold none, but sent the applicants to the defendant H. The plaintiff then brought an

action in *indebitatus assumpsit* for the value of the work done.—Held, that he was not entitled to recover in this form of action, it not being shewn that the contract was mutually abandoned. *De Bernardy v. Harding*, 22 Law J. Rep. (N.S.) Exch. 340; 8 Exch. Rep. 822.

(B) CONSIDERATION TO SUPPORT THE PROMISE.

(a) *Sufficiency of, in general.*

[See *Crowther v. Farrer*, ACCORD AND SATISFACTION (B).]

A declaration stated that heretofore, to wit, &c. in consideration that the plaintiff then, through placing confidence in the defendants that they were then acting fairly by the plaintiff in then recommending the plaintiff to purchase of the defendants on their recommendation 211 pockets of hops at 63s. the cwt., the defendants promised the plaintiff that they were not then abusing the said confidence of the plaintiff, in recommending the purchase at the said price; that the plaintiff, relying on the said promise, did then, to wit, on the day and year aforesaid, through placing confidence in the defendants that they were at the time of the said promise acting fairly by the plaintiff in then recommending him to purchase at the said price, purchase of the defendants on their recommendation at the said price. The declaration then alleged that the defendants broke their said promise in this, that at the time of making it, they were abusing the plaintiff's confidence in this, that at the time of their said recommendation the hops were worth only 50s. the cwt., as the defendants then well knew, by means whereof the plaintiff had sustained damage, &c.—Held, on motion in arrest of judgment, that the declaration disclosed a good consideration for the defendants' express promise. *West v. Jackson*, 20 Law J. Rep. (N.S.) Q.B. 240; 16 Q.B. Rep. 280.

In assumpsit against the executors of Sir J C for a breach of agreement in a lease made by their testator, Sir J C "by an agreement, dated, &c., agreed with the plaintiff as follows:—Memorandum of an agreement made the 23rd of March 1850, between Sir J C of the one part and T F (the plaintiff) of the other part. The said Sir J C agrees to let, and the said J F agrees to take all that messuage, lands, &c., to hold to the said J F from &c. for two years, at the yearly rent of" &c. Then followed an agreement by the plaintiff to pay the rent and taxes, and to farm in a husbandlike manner; and in consideration thereof and provided the plaintiff should pay the rent and perform the agreements Sir J C agreed to grant the plaintiff a lease at the end of the two years, at a rent to be then fixed according to a valuation. There were other stipulations, the agreement concluding thus: "To which both parties agree. Witness their hands.—Sir J C." The breach was, the non-appointment of a valuer by Sir J C.—Held, that the declaration was bad on general demurrer, on the ground of its not alleging that there was any agreement on the part of the plaintiff, or any consideration for the agreement on the part of Sir J C. *Fremlin v. Hamilton*, 22 Law J. Rep. (N.S.) Exch. 105; 8 Exch. Rep. 308.

The first count of a declaration stated that the defendant and certain other persons had formed a company, upon a principle known as a *société anonyme*, in the kingdom of Spain, the capital of which

was divided into 96,000 shares of 1*l.* each, out of which 12,000 were to be appropriated to the public at 12s. 6*d.* per share, free from all further calls; that the defendant was one of the promoters and managing director of the said company, and in offering the said 12,000 shares to the public, had, in such character of director, guaranteed and promised to the bearers of the said 12,000 shares at 12s. 6*d.* per share, a minimum annual dividend of 33*l.* per cent. payable in half-yearly dividends of 16*l.* 10*s.* upon each of such shares; that the plaintiff, confiding in the said promise, became the purchaser and bearer of 2,500 of the said 12,000 shares at 12s. 6*d.* each, and took the same upon the faith of the said guarantee and promise of the defendant, and had fulfilled the said agreement in all things on his part. Breach, that the defendant had not paid to the plaintiff the said half-yearly dividends of 16*l.* 10*s.* per cent., or any part thereof, nor had repaid the said sum of 12s. 6*d.* on the said shares:—Held, that the count was bad, as it shewed no privity between the plaintiff and the defendant, nor any consideration for the promise moving from the defendant to the plaintiff. *Gerhard v. Bates*, 22 Law J. Rep. (N.S.) Q.B. 364; 2 E. & B. 476.

To an action on a promissory note given by the defendant to his father, the defendant pleaded, that he, the defendant, had just grounds to complain of the distribution that his father had made of his property, as his father had admitted; and that it was therefore agreed between them that the defendant should cease for ever to make any such complaint, and that in consideration thereof his father would discharge him from liability on the note and the cause of action in respect thereof; and that the defendant's agreement should be accepted in full satisfaction and discharge, and that it was so accepted:—Held, that the plea was bad, as not shewing any consideration for the promise by the father. *White v. Bluett*, 23 Law J. Rep. (N.S.) Exch. 36.

To an action for money lent and for interest, the defendant pleaded, as to the money lent, that originally no interest was payable to the plaintiff's testator, but that afterwards it was agreed that the defendant should pay interest, and should not be required to pay the principal until the expiration of six months' notice by the testator requiring payment, and that no such notice had been given. The defendant and the testator were merchants, and in 1847 the defendant was indebted to the testator in a balance, which was thus stated in a letter sent by the testator to the defendant in January 1847:—

	£.	s.	d.
"Balance as by my book . . .	7	49	8
Deduct as allowed	4	64	16
	3	85	0

£284 12 1

The balance settled as due by you to me payable in the course of the present year, without interest." To this statement the defendant assented. There was evidence of a usage amongst merchants to pay interest upon balances. It was proved that in June 1848 the testator agreed not to require payment of the principal until the expiration of six months' notice of payment:—Held, that as by the terms of the testator's letter, and by the mercantile usage, interest was payable at the end of 1847, there was no consideration for the testator's agreement not to

require payment until after six months' notice, and that the plea was not supported. *Orme v. Galloway*, 23 Law J. Rep. (N.S.) Exch. 118; 9 Exch. Rep. 544.

(b) *Forbearance.*

A declaration stated that before, &c. one W was indebted to the plaintiff in 236*l.* 14*s.*; that the plaintiff, according to the provisions of the Bankrupt Law Consolidation Act, 1849, had filed an affidavit in bankruptcy against W, and had caused a summons to be issued out of the Court of Bankruptcy, by which W was required to appear before the said Court, for the purpose of ascertaining whether he admitted the plaintiff's demand or had a good defence; and which summons was pending at the time of the defendants' promise and capable of being enforced; that in consideration that the plaintiff would withdraw the said summons out of the court, the defendants promised and guaranteed to pay the plaintiff the sum of 236*l.* 14*s.* Averment, that the plaintiff withdrew the summons out of the Court of Bankruptcy, of which the defendants had notice. Breach, non-payment of the 236*l.* 14*s.* Plea, that the defendants had not notice that the plaintiff had withdrawn the summons:—Held, on general demurrer, that the words "withdraw the summons" meant the taking some step whereby W might be exonerated from attending the Court, which must be by making some communication to him on the part of the plaintiff; or that it meant the taking some step in the Court of Bankruptcy; in either of which cases notice was not necessary, and therefore that the plea was bad. *Alhussen v. Prest*, 20 Law J. Rep. (N.S.) Exch. 440; 6 Exch. Rep. 720.

A declaration stated that the defendant was indebted to the plaintiffs in divers unliquidated debts, namely, for so much as the plaintiffs deserved to have of the defendant for work done by the plaintiffs as attorneys for the defendant; that the plaintiffs alleged that the said debts amounted to 171*l.* 9*s.* 8*d.* and the defendant to 147*l.*; that it was agreed that the dispute between them should be put an end to, and the amount of the debts fixed at 150*l.*; that the plaintiffs should relinquish their claim to the residue, and that the debts should be satisfied upon the terms of the defendant agreeing to pay the plaintiffs 150*l.*; that the disputes were ended; that the debts were agreed and fixed at 150*l.*; that the plaintiffs had not made any further claim, and that the debts were satisfied upon the terms in that behalf. Breach, non-payment of 150*l.* Plea, that the plaintiffs did not, "one calendar month before the commencement of this suit, deliver to the defendant a signed bill":—Held, first, that the plea was good; secondly, that the declaration was bad in not disclosing a sufficient consideration for the defendant's promise to pay the 150*l.* *Bridgman v. Dean*, 21 Law J. Rep. (N.S.) Exch. 90; 7 Exch. Rep. 199.

The first count of a declaration was debt for chattels; the third trover; the fourth detinue; the fifth that at the time of the writing the letter therein mentioned the plaintiff's claims in the first, third, and fourth counts had accrued, that the defendant ought to have paid or satisfied them, and had been requested to do so, and that the defendant had requested the plaintiff to give him time for payment or satisfaction, which the plaintiff had done; and

that thereupon the defendant being unable to pay or satisfy the said claims, and in order to obtain further time, wrote to the plaintiff a letter.—The letter was then set out with innuendoes; the material parts of it were as follows:—"That I have wronged you in not having, because incapable, repaid or returned that which you lent me (thereby meaning the loan in the first count mentioned) it were useless for me to deny. I know how worthless are promises of reparation, how wholly disregarded are entreaties for indulgence (meaning that the defendant did then entreat for indulgence from the plaintiff for payment or satisfaction of the said claims), yet I will say that the most anxious endeavour and hope of every future day shall be to prove my gratitude in the only way in which the world esteems the proof, by restoring you all that I owe" (meaning the payment or satisfaction of the said claims). Averment, that in pursuance of the letter, and on the faith of the defendant's promise therein, the plaintiff, at the defendant's request, gave the defendant further time for payment, and although a reasonable time had elapsed for the performance of the defendant's contract contained in the letter, yet the defendant, though able to do so, had not paid or satisfied, &c.—Held, on demurrer to the fifth count, that it was bad, for that the letter did not shew any contract of forbearance to sue, or any consideration on which to found a fresh promise by the defendant to pay claims which he was already liable to pay, and that the original consideration being exhausted by the promise to pay implied by law, any subsequent promise was without consideration, and afforded no foundation for a new action. *Deacon v. Gridley*, 24 Law J. Rep. (N.S.) C.P. 17; 15 Com. B. Rep. 295.

Semble—that the letter did not contain a promise to pay. *Ibid.*

(c) *Substitution of Separate for Joint Liability.*

The acceptance by a creditor of the separate liability of one of several persons jointly liable is a sufficient consideration for the discharge of the others from their joint liability. *Lyth v. Ault*, 21 Law J. Rep. (N.S.) Exch. 217; 7 Exch. Rep. 669.

ATTACHMENT.

[For nonperformance of awards, see ARBITRATION. As to moving on the last day of term, see PRACTICE. And see AFFIDAVITS, Entitling—ATTORNEY AND SOLICITOR—CERTIORARI.]

- (A) FOR CONTEMPT OF PROCESS AND ORDERS.
- (B) PRACTICE, AS TO AFFIDAVITS AND RULES.
- (C) FOREIGN ATTACHMENT.
- (D) OF DEBTS BY JUDGE'S ORDER.

(A) FOR CONTEMPT OF PROCESS AND ORDERS.

The governor of Cold Bath Fields Prison having, in obedience to an order of the visiting Justices, refused to allow service of a writ upon a defendant, who was in the prison under criminal sentence, the Court granted a rule to shew cause why an attachment should not issue against him; after which the Justices permitted service of the writ. *Danson v.*

Le Capelain, 21 Law J. Rep. (n.s.) Exch. 219; 7 Exch. Rep. 667.

An attachment for disobedience of a Judge's order cannot issue against two partners, unless each has been served with the order. *Ex parte Welland*, 11 Com. B. Rep. 544.

A bailiff went to the premises of a defendant, and seized the goods there under a *fi. fa.* The goods were in possession of a claimant who had advertised them for sale on the following day. The sheriff thereupon obtained an interpleader summons, and served it upon the claimant before the sale. The claimant, nevertheless, proceeded with the sale, and the goods were removed by his direction, notwithstanding the opposition of the sheriff's officers. On the following day the interpleader summons was heard and dismissed, on the ground that the goods were not in the sheriff's possession. The claimant was in fact entitled to the goods under a bill of sale. On motion for an attachment against the claimant for a contempt of court in carrying away the goods:—Held, that he was justified in so doing, the goods being his property, although the interpleader summons was not disposed of. *Day v. Carr*, 7 Exch. Rep. 883.

(B) PRACTICE, AS TO AFFIDAVITS AND RULES.

[In what cases rules for attachment are to be absolute in the first instance; and as to service, see Reg. Gen. Hil. Term, 1853, rr. 163, 168; 22 Law J. Rep. (n.s.) xviii.; 1 E. & B. App. xxvi. xxviii. And see AFFIDAVIT, Entitling—PRACTICE.]

A rule absolute will be granted for an attachment without a direct affidavit of personal service of the rule *nisi*, if the affidavits disclose circumstances to satisfy the Court that the rule *nisi* has reached the hands of the party, though they shew that he is keeping out of the way to avoid service. *In re Morris*, 22 Law J. Rep. (n.s.) Q.B. 417; 1 Bail C. C. 190.

The rule that a party cannot shew cause unless he takes office copies of the affidavits on which the rule has been obtained, applies equally to a rule for an attachment as to any other proceeding. *Regina v. Carttar*, 1 L. M. & P. P.C. 274.

(C) FOREIGN ATTACHMENT.

[See *Gould v. Webb*, title ACTION (A) (f).]

No English Court has jurisdiction to entertain an action against a foreign sovereign for anything done, or omitted to be done, by him in his public capacity as representative of the nation of which he is the head. *De Haber v. the Queen of Portugal*; and *Wadsworth v. the Queen of Spain*, 20 Law J. Rep. (n.s.) Q.B. 488.

Where the Lord Mayor's Court of London has no jurisdiction over the person of a defendant against whom a plaint has been entered in that court, the awarding process of foreign attachment against a person having funds in his hands belonging to the defendant as a means of compelling an appearance, is an excess of jurisdiction for which prohibition will lie. *Ibid.*

Where, therefore, a plaint was entered in the Lord Mayor's Court against the Queen of Portugal "as reigning sovereign and supreme head of the nation of Portugal" to recover a debt alleged to be due from the Portuguese government, and a foreign attachment had issued according to the custom of

the city of London, the Court made absolute a rule for a prohibition to restrain proceedings in the action and in the attachment. *Ibid.*

The same principle was applied to a case where a plaint was entered in the Lord Mayor's Court against the Queen of Spain not expressly as reigning sovereign and head of the Spanish nation; but where it appeared by affidavit that the plaintiff's sole cause of action arose upon a Spanish government bond purporting to have been issued under a decree of the Cortes sanctioned by the Regent of Spain, in the name of the Queen, then a minor. *Ibid.*

The writ of prohibition may in such cases be granted on the application of the Queen (the defendant) before she has appeared to the action in the Lord Mayor's Court; or on the application of the garnishee, either before or after he has pleaded *nil debet*. *Ibid.*

The process of foreign attachment can only be resorted to where the cause of action against the original defendant arises within the jurisdiction of the Court from which the attachment issues. *Ibid.*

Debt on bond. Plea, setting out the proceedings in foreign attachment against the plaintiff in the Mayor's Court of the city of London, and alleging a regular judgment obtained and execution executed against the defendant as garnishee; and that the sum attached in the defendant's hands, and for which such judgment was obtained and execution executed, was the same sum as the plaintiff in his declaration alleged to be due. Replication, that the debt alleged to have been sued for did not arise or accrue within the jurisdiction of the Mayor's Court, and that the said Court had not jurisdiction of the same, nor over the plaintiff, nor had the plaintiff notice of the said proceedings. Replication, also, alleging that the action was brought for the benefit of E B, to whom, before the proceedings in the Mayor's Court, the plaintiff had assigned the bond in the declaration mentioned, to secure a debt then and still due from him to E H, of which the defendant had notice before the said proceedings in the said court; that the defendant allowed judgment and execution to be given against him in the said court without setting up and proving the said assignment and debt; that the custom of foreign attachment did not apply to or include the beneficial interest which had become vested in a person other than the defendant, sued in the said court, whereof the garnishee had notice, and that debts, the beneficial interest in which had become vested in a person other than the defendant sued in the said court, whereof the garnishee had notice, were not attachable under the said custom:—Held, upon demurrer, that, after payment of the debt under a regular judgment and execution in the Mayor's Court against the garnishee, he cannot afterwards be compelled to pay the debt to his creditor, the defendant in the Mayor's Court, upon proof that the debt did not arise within the jurisdiction of the said Court, and, therefore, that the first of the above replications was no answer to the plea. And, as to the other replication, that the qualified custom stated in it was just and reasonable, and upon demurrer must be taken as the true custom, and, therefore, that the replication was a good answer to the plea, and the plaintiff entitled to sue upon the bond as trustee. *Westoby v. Day*, 22 Law J. Rep. (n.s.) Q.B. 418; 2 E. & B. 605.

The plaintiffs were equitable mortgagees of the shares of J H in the Woollen Cloth Company, and the Dhobah Company were generally creditors of J H. Both companies having notice of the plaintiffs' rights, the Dhobah Company commenced proceedings in the Lord Mayor's Court, and attached the dividends on the shares in the hands of the Woollen Cloth Company. The same solicitor was employed for both companies, and two persons were directors in both companies. No defence was made, and the Dhobah Company obtained payment:—Held, first, that the plaintiffs could not recover them back from either company; but, secondly, that the Dhobah Company could not avail themselves of a similar attachment in the Lord Mayor's Court obtained pending this suit; and, thirdly, that the plaintiffs were entitled to a receiver of the future dividends. *Anderson v. Kemshead*, 16 Beav. 329.

(D) OF DEBTS BY JUDGE'S ORDER.

[See 17 & 18 Vict. c. 125. ss. 61—67.]

An executor who has not revived a judgment recovered in an action by his testator, nor entered a suggestion upon the roll, as provided by section 129. of the Common Law Procedure Act, 1852, is not a "creditor who has obtained a judgment" within the meaning of the 60th section of the Common Law Procedure Act, 1854, and cannot, therefore, proceed under this act to attach a debt due to the judgment debtor, in order to satisfy the judgment recovered by his testator. *Baynard v. Simmons*, 24 Law J. Rep. (N.S.) Q.B. 253.

From the time of the service upon the garnishee of an *ex parte* order of attachment made under section 62. of the Common Law Procedure Act, 1854, the debt due to the judgment debtor is bound in the hands of the garnishee, but subject to the provisions of the Bankrupt Act, 12 & 13 Vict. c. 106, for the distribution of the bankrupt's property. *Holmes v. Tutton*, 24 Law J. Rep. (N.S.) Q.B. 546.

C having, at the request of Diamond, the present defendant, brought an action, as a nominal plaintiff, against the present plaintiff Johnson, received from Diamond a bond whereby the latter stipulated that he would pay the present plaintiff such costs as C should be liable to pay the present plaintiff in case C should discontinue, become nonsuit, &c., and that he would also permit C, during the pendency of the action or any liability arising therefrom, to retain and apply any money of him (Diamond) that might come into the hands of C towards the discharge of any costs and liabilities which C might incur by reason of his permitting the action to be brought and carried on in his name, or from any injury to him from the default of Diamond. C was nonsuited, and the present plaintiff had judgment to recover against C the cost of such nonsuit:—Held, that the bond did not constitute a "debt" from Diamond to C within the 61st and 64th sections of the Common Law Procedure Act, 1854, and that the alleged debt in the hands of Diamond could not be attached by the present plaintiff. *Johnson v. Diamond*, 24 Law J. Rep. (N.S.) Exch. 217; 11 Exch. Rep. 73.

ATTAINER.

[See ASSIGNMENT.]

Where a party, who is afterwards convicted of felony, is entitled to a chose in action, the right of suing being in another in trust for him, that right of suit does not vest in the Crown upon the conviction. *Bishop v. Curtis*, 21 Law J. Rep. (N.S.) Q.B. 391.

To an action by the executor of E C, deceased, on a promissory note made by the defendant, payable to E C, on demand, the defendant pleaded that E C, by his will (made after the passing of the 1 Vict. c. 26), bequeathed the note to C C; that the plaintiff assented to the bequest, whereby C C became entitled to the said note, and the money due thereon; and that whilst the said C C was so entitled, he was convicted of felony, by reason whereof he forfeited to the Crown the said note, and all interest therein, and causes of action in respect thereof:—Held, on general demurrer, that the plea was no answer to the action. *Ibid*.

ATTORNEY AND SOLICITOR.

[Privileged communications, and production in evidence of client's papers, see EVIDENCE. And see ARREST—ATTACHMENT—PARTNERS.]

- (A) ARTICLED CLERK.
 - (a) *Service under Articles.*
 - (b) *Premium and Enrolment of Articles.*
- (B) ADMISSION AND RE-ADMISSION.
- (C) CHANGE OF NAME ON THE ROLL.
- (D) CERTIFICATE.
 - (a) *Renewal.*
 - (b) *Effect of acting without.*
- (E) RIGHTS AND PRIVILEGES.
- (F) DUTIES AND LIABILITIES.
 - (a) *In general.*
 - (b) *Summary Jurisdiction over.*
 - (1) *At Law.*
 - (i) *Attachment.*
 - (ii) *Striking off the Roll.*
 - (2) *In Equity.*
 - (i) *Orders to pay over Money.*
 - (ii) *Striking off the Roll.*
 - (c) *To conduct Suit to its Termination.*
 - (d) *Care of Client's Papers.*
 - (e) *Negligence.*
 - (f) *On Undertakings.*
 - (g) *Expenses of executing Process.*
- (G) RETAINER AND AUTHORITY TO INSTITUTE PROCEEDINGS.
- (H) CHANGE OF.
- (I) DEALINGS WITH CLIENT.
- (J) BILL OF COSTS.
 - (a) *Delivery of.*
 - (b) *Heading and Contents of.*
 - (c) *Taxation of.*
 - (1) *In general.*
 - (2) *What Bills are taxable.*
 - (3) *Order of course for, under 6 & 7 Vict. c. 73*
 - (4) *Upon special Circumstances after Expiration of a Year.*

- (5) *Upon special Circumstances after Payment.*
- (6) *Upon Terms.*
- (7) *Filing Certificates of Taxation.*
- (8) *Costs of Taxation.*
- (9) *Practice.*

(K) LIEN FOR COSTS.

(A) ARTICLED CLERK.

[As to the stamp duty on articles, see 16 & 17 Vict. c. 59. s. 6. and 16 & 17 Vict. c. 63. s. 1.]

(a) *Service under Articles.*

A clerk, duly articled to an attorney, served a portion of his time with his master. It was then agreed that the clerk should be assigned to his father, also an attorney, for the residue of his term. On this understanding, the clerk immediately left his first master with his consent, and served his father as a clerk for the residue of the five years. A dispute having arisen between the first master and the father respecting the amount of premium to be repaid, which was not settled for some months, the assignment of the clerk was not executed until about six months after he had actually commenced to serve his father:—Held, that the service during the interval before the execution of the assignment, could not be considered as a service with the father under the articles; but as it was by the consent of the original master and for his purposes, it might, under the circumstances, be considered a service with that master. *Ex parte Brutton*, 23 Law J. Rep. (n.s.) Q.B. 290.

An articled clerk, who had taken a B.A. degree, and had been articled for three years to an attorney under the 7th section of the 6 & 7 Vict. c. 73, served two years with the attorney, and eight months with his London agent, after which he went to a special pleader for four months, and was then examined, and passed. The examiners having refused to issue their certificate, on the ground that the clerk had not served the attorney or agent for three years, as required by the act, the Court gave him liberty to enter into further articles for four months, to complete the three years' service, and authorized the examiners, at the expiration of the time, to issue their certificate without further examination. *Ex parte Earle*, 1 Bail C.C. 180.

(b) *Premium and Enrolment of Articles.*

A clerk was articled to a solicitor at a premium of 150*l.*, and the articles contained a receipt for and a release from the money. Contemporaneously the clerk gave an I O U for, and agreed to execute a mortgage of certain property for securing the money. The clerk voluntarily left the master seven months after the date of the articles. The master brought an action on the I O U, to which the clerk pleaded never indebted, payment and release, and the master abandoned the action. He then filed his claim to enforce the mortgage security and for foreclosure. One of the Vice Chancellors dismissed the claim, on the ground that the Court would not set aside the plaintiff's own legal bar, but without costs, the defendant undertaking to pay 21*l.* as the proportion of the premium for the time his service lasted. The plaintiff

appealed, but it appearing that he had not, in compliance with the provisions of the Attorneys and Solicitors' Act, 6 & 7 Vict. c. 73, made or caused to be made the necessary affidavit to enable the defendant to enrol the articles, the Court dismissed the appeal, without costs, without (under the authority of the 62nd section of the statute 15 & 16 Vict. c. 86.) sending the parties to law; and it appearing upon the affidavits of the defendant that there was matter impertinent to the issue between the parties, the Court ordered the defendant (under the authority of the 17th section of the same statute and the 30th Order of the 7th of August 1852), to pay the plaintiff 20*l.* for such impertinent matter, and refused to relieve him from his undertaking to pay the 21*l.* *Dufaur v. Sigel*, 22 Law J. Rep. (n.s.) Chanc. 678; 4 De Gex, M. & G. 520.

(B) ADMISSION AND RE-ADMISSION.

[See Reg. Gen. Hil. Term, 1853, 22 Law J. Rep. (n.s.) (i.); 1 E. & B. App. lvii. And as to admission in Counties Palatine, see Stat. 16 & 17 Vict. c. 59. s. 7.]

A Court of equity will neither admit a solicitor nor restore him to the rolls without his first having been admitted or restored to the rolls by a Court of common law; and this Court refused to make an order to issue a certificate to allow a solicitor to practise where two applications, having a similar object, had been refused by a Court of common law, but the petition was ordered to stand over, and leave was given to apply. *In re Barber*, 23 Law J. Rep. (n.s.) Chanc. 874; 19 Beav. 378.

A solicitor who had been struck off the roll for misconduct was restored after a lapse of ten years, during which, amidst great privations and suffering, he had maintained an irreproachable character, the application being supported by a memorial signed by a very large number of solicitors, and not opposed by the Law Institution, though opposed by one individual solicitor only. *Anonymous*, 17 Beav. 475.

[See *Ex parte Howard*, post, (D) CERTIFICATE (a).]

(C) CHANGE OF NAME ON THE ROLL.

On the application of an attorney to be allowed to substitute the name of J Heaton D on the roll of attorneys in the place of J D, the Court directed the Master to enter on the roll opposite the name of J D a memorandum that by rule of this Court J D was now known by the name of J Heaton D, and that the Master should make such indorsement of such alteration of the name on the Admission of the applicant. *In re Dearden*, 20 Law J. Rep. (n.s.) Exch. 80; 5 Exch. Rep. 740; 1 L. M. & P. P.C. 666.

Upon the application of a solicitor, who had assumed the name of Chamberlain in addition to his own, the Court, being satisfied with the reasons, ordered an entry of the change of name to be made upon the roll of solicitors. *Ex parte John Matthews*, 22 Law J. Rep. (n.s.) Chanc. 22; 16 Beav. 245.

(D) CERTIFICATE.

[See Reg. Gen. Hil. Term, 1853, 22 Law J. Rep. (n.s.); 1 E. & B. App. lxiii.; and as to the stamp duty, see 16 & 17 Vict. c. 63. s. 1.]

(a) *Renewal.*

[See *In re Barber*, ante, (B).]

It is not necessary for an attorney who has ceased to take out his certificate for a year previous to the passing of the statute 6 & 7 Vict. c. 73. to apply to be re-admitted as an attorney, on his desiring to practise again. It is sufficient for him to obtain a rule to renew his certificate: *Ex parte Howard*, 20 Law J. Rep. (N.S.) Q.B. 27; 1 L.M. & P.F.C. 710.

(b) *Effect of acting without.*

Under the statute 6 & 7 Vict. c. 73, if an uncertificated attorney acts as an attorney, his acts are valid as regards other persons, though he cannot maintain any action or suit for the costs of business done while he is without a certificate. So held in the case of an attestation to a warrant of attorney by an uncertificated attorney. *Holdgate v. Slight*, 21 Law J. Rep. (N.S.) Q.B. 74; 2 L.M. & P.F.C. 662.

(E) RIGHTS AND PRIVILEGES.

[See ARREST—PARTNERS.]

A country solicitor, who is authorized to institute a suit, is justified in employing a London agent for that purpose, in whose name, as agent, the bill may be filed. *Solley v. Wood*, 16 Beav. 370.

Where two solicitors, who are not then in partnership, are employed in the same matter for a client, as in the defence of an action, the *prima facie* inference of law is, that they are partners as to that particular matter, and entitled to an equal share of the joint profits, irrespective of the quantity of work performed by each. Where the contrary is alleged, the burden of proof is on him alleging it. *Robinson v. Anderson*, 20 Beav. 98.

(F) DUTIES AND LIABILITIES.

[Registering name and address, see Reg. Gen. Hil. Term, 1853, r. 165; 22 Law J. Rep. (N.S.) xviii; 1 E. & B. App. xxvii.]

(a) *In general.*

A solicitor was entrusted with money by his client to be invested upon good securities. The money was invested on insufficient securities, and the greater part of it was lost. The client was not informed of the actual nature of the investments, but was assured they were ample and safe. The solicitor died, and a claim was made against his estate for the loss sustained by the client:—Held, that the client had a good claim against the estate for the money so lost; that this was not a matter for an action at law, but for an account in equity; and that the Statute of Limitations would not apply to a question of account arising between principal and agent. *Smith v. Pockocke*, 23 Law J. Rep. (N.S.) Chanc. 545; 2 Drew. 197.

A bill of exchange received by a partner in a solicitor's firm from a client is, *prima facie*, to be deemed to be received on behalf of the firm; and if the solicitors allege the contrary, they are bound to prove it by clear evidence. By the decree the plaintiff's costs (319*l.*) had been ordered to be paid to her solicitors out of a fund in court, in which she was interested; but the plaintiff having, in the course of the proceedings, given to one of the firm of solicitors a bill for 300*l.*, which they had passed

away, the order for the payment of the 319*l.* was stayed. *Moore v. Smith*, 14 Beav. 393.

Distinction between misrepresentations giving a legal and those giving an equitable remedy. *Whitmore v. Mackeson*, 16 Beav. 126.

The Court, assuming that the plaintiffs had lent A B money on the security, first, of the leasehold, secondly, of a policy, and thirdly, of the written representation of his solicitor as to his solvency, held that the plaintiffs could not make the solicitor liable for misrepresentation, without shewing that they had taken proper steps to make the other securities available. *Ibid.*

The plaintiffs lent A B money on mortgage on the application of his solicitor, who assured them in writing that, in his opinion, he would be able to pay the amount. The plaintiffs, alleging this to be a false and fraudulent misrepresentation, instituted a suit in equity to make the solicitor personally liable:—Held, that their remedy, if any, was at law. *Ibid.*

A solicitor from whom a sum was found due, was ordered to pay all the costs of proceedings to compel payment. *Re Dufaur*, 16 Beav. 113.

Whether it is necessary in demanding payment by attorney to leave a copy of the power of attorney. *Semble*—not. *Ibid.*

By an order for taxation, the solicitor was ordered, on payment, to deliver over the papers. Having made default, he was ordered to pay the costs of a motion to compel him, though he had delivered them up after the notice of motion, but before it had been heard. *Re Minter*, 19 Beav. 33.

A solicitor is bound to deliver up as part of the papers of a client all original letters received by him which exclusively relate to the client's business; he may, however, retain copies, though he cannot charge for them: but he is entitled to retain copies of all letters written by him on behalf of such client, and the client is entitled to copies of such copies on payment of the charge of making them. *In re Thomson*, 24 Law J. Rep. (N.S.) Chanc. 599; 20 Beav. 545.

If an attorney or agent can shew he is entitled to purchase property, notwithstanding his character of attorney or agent, yet if, instead of openly purchasing it, he purchases it in the name of a third person, as his trustee or agent, without disclosing the fact, such purchase is void. *Lewis v. Hillman*, 1 H. L. Ca. 607.

Under a will 2,910*l.* stock was vested in a testator's three unmarried nieces, who were his executrices, for themselves for life, then for children, with ulterior trusts. Their confidential solicitors were a firm of two persons, of whom the senior under his own advice was associated as their co-trustee, and a declaration of trust prepared by the firm was executed by the four persons in 1822. Subsequently, on the advice of the senior solicitor, the fund was sold out, and paid to him alone, but he on the same day paid the precise amount to the credit of the banking account of the firm. In 1824 the senior partner untruly represented that the money had been laid out on specified freehold security, but in 1825 a sufficient freehold mortgage was taken by the senior partner to himself alone, and was treated by him as the security for the trust fund, less a very small balance which was divided among the three

ladies. The interest was duly paid to the ladies until 1828, when the senior partner realized that security without their privity, and again untruly alleged that he had laid out the amount on another specified security. The firm dissolved partnership in 1834, and each partner practised separately; the senior partner continued regularly to pay sums as the interest to the ladies until 1844, when he became bankrupt, and afterwards died abroad uncertificated. In a suit by the three ladies against the junior partner, charging him as liable to make good the amount:—Held, that a sufficient investment having been made in the name of the senior partner, and communicated to the parties, and adopted, the duty of the firm was discharged, and the subsequent loss was a breach of duty by the senior partner alone, and not by the partnership, and the suit was dismissed with costs. *Coomer v. Bromley*, 5 De Gex & Sm. 532.

(b) *Summary Jurisdiction over.*

(1) *At Law.*

(i) *Attachment.*

[See ATTACHMENT—Reg. Gen. Hil. Term, 1853, 22 Law J. Rep. (N.S.) i.; 1 E. & B. App. iii.]

(ii) *Striking off the Roll.*

Where a rule had been obtained to strike an attorney off the roll of this Court, founded solely on an order of the Lord Chancellor striking him off the roll of solicitors for alleged misconduct in the Court of Chancery, but which order was subsequently reversed and the party restored to the roll of solicitors, on payment of costs, but he was ordered to be suspended for six months from practising in the Court of Chancery, this Court discharged the rule on payment of costs. *In re Smith*, 22 Law J. Rep. (N.S.) Q.B. 123; 1 E. & B. 414.

A rule *nisi* to strike an attorney off the roll after he has been struck off the rolls of the other courts must be served personally. *In re Anon.*, 23 Law J. Rep. (N.S.) Exch. 24.

(2) *In Equity.*

(i) *Orders to pay over Money.*

A, a defendant in a suit, employed B, C & D, who carried on business in partnership as solicitors, to act for him as solicitors in the suit. A, having been ordered to pay a sum of money into court, sent a cheque for the amount in a letter addressed to B alone at the place of business of the firm. A had, throughout the whole business, addressed all letters relating to it to B alone, at the place of business of the firm. B applied the money received by him to his own use, and did not pay it into court. Motion by A, that the Court, under its summary jurisdiction over C & D as officers of the court, might order C & D to pay this sum into court to the credit of the cause, was refused, on the ground of A's having dealt with B solely instead of the firm. *In re Lawrence*, 23 Law J. Rep. (N.S.) Chanc. 791; 2 Sm. & G. 367.

By an order of the Court the costs to be incurred by a married woman, suing by her next friend, in a future proceeding, were ordered to be paid to A B, her solicitor. Pending the proceedings A B was discharged, and C D appointed solicitor. A B received the whole costs:—Held, that the Court had juris-

diction on petition to order A B to pay over to C D his share of such costs; and, secondly, that A B could not set off, as against the amount, a debt due to him from the next friend. *Ex parte Bailey, in re Barnard*, 14 Beav. 10.

A purchased an estate from B, and on the completion one solicitor acted for both parties and the purchase-money was paid into his hands. Afterwards the purchaser was defeated by C, who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase-money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed with costs, the Court holding, first, that it had no jurisdiction to award compensation or damages in such a case; and, secondly, that the money having come to the hands of the solicitor as agent of the vendor, and not of the petitioner, it could not interfere. *Tylee v. Webb, in re Hinton*, 14 Bea. 14.

As to the summary jurisdiction of the Court over solicitors, where monies are paid to them by clients in that character. *Ibid.*

A solicitor who has received and has in his hands the money of his client will be summarily ordered to pay over the amount. A solicitor received monies for his client, an administratrix:—Held, that he could not set up proceedings by the next-of-kin, of whose rights he had notice, as a defence for not paying the administratrix. *Re Becke*, 18 Beav. 462.

A solicitor professionally concerned in a transaction for A, received on his account, in the course of that transaction, a sum of money. Afterwards it was arranged between A and B and the solicitor, that the same should remain in the solicitor's hands as a security for the payment of the expenses of certain proceedings taken in parliament by B to obtain an act for a divorce. The application to parliament having failed, and the costs of it not having exhausted the fund,—Held, that under the summary jurisdiction of the Court over the solicitor, it could order the repayment to A of the balance. *Ex parte Wortham*, 4 De Gex & Sm. 415.

(ii) *Striking off the Roll.*

A solicitor of the court who, without the authority of his client, had instructed counsel to consent to a petition, praying the payment out of court of a fund belonging to the client, was ordered to shew cause why he should not be struck off the roll. Having shewn cause, and the same being held insufficient, he was ordered to be struck off the roll. *In re Collins; Wheatley v. Bastow*, 24 Law J. Rep. (N.S.) Chanc. 732.

(c) *To conduct Suit to its Termination.*

An attorney or solicitor retained in a suit at law or in equity is bound to carry it on to its termination, unless he gives a notice that he shall discontinue if he be not paid or supplied with the necessary funds, or the client dies; and the Statute of Limitations does not begin to run against his right to sue for his bill of costs until the happening of one of those events. *Whitehead v. Lord*, 21 Law J. Rep. (N.S.) Exch. 289; 7 Exch. Rep. 691.

The plaintiff had, prior to 1840, been retained by A (whose administratrix the defendant was) to appear for her in a suit in equity to which she had

been made defendant by bill of revivor. In 1840 the suit was heard, and a supplemental bill ordered to be filed to make certain next-of-kin parties, but such bill was not filed nor any other step taken in the cause prior to the death of A, which took place in June 1851:—Held, that the Statute of Limitations did not begin to run until the death of A. *Ibid.*

(d) *Care of Client's Papers.*

It is the duty of an attorney to keep and deliver up his client's papers reasonably arranged. *North-Western Railway Company v. Sharp*, 24 Law J. Rep. (N.S.) Exch. 44; 10 Exch. Rep. 451.

(e) *Negligence.*

The plaintiff employed the defendant, an attorney, to sue W for a debt. W, to induce the plaintiff to forbear to sue, offered to give him a mortgage on some freehold property in which he had a reversionary interest. The plaintiff agreed to accept it under the advice of the defendant, who was accordingly employed by him to act as his attorney in respect of the mortgage transaction, and to prepare the mortgage deed. The defendant stated to his clerk that he must write to his town agents to make the necessary searches, to see whether W had taken the benefit of any of the Insolvent Acts. No such letter appeared to have been written, but he sent his clerk to inquire personally of W whether he had ever been insolvent. W denied that he had, and the mortgage was executed, and the proposed action was dropped. The plaintiff afterwards discovered that W had previously petitioned the Insolvent Court, and had obtained an order for his protection. He thereupon sued the defendant for negligence and want of skill in ascertaining W's title in not making searches to ascertain whether W had been insolvent:—Held, that the action was maintainable, for that whenever the attorney of a proposed mortgagee has reason to suspect that the intended mortgagor has been bankrupt or insolvent, it is the duty of the attorney to make proper searches to ascertain the fact; and that there was some evidence of negligence in this case, since the defendant by his own language and conduct shewed that he had a suspicion on the subject, and felt that it was his duty to make a search, which he had not done. *Cooper v. Stephenson*, 21 Law J. Rep. (N.S.) Q.B. 292.

Execution on a judgment at the suit of M having been issued against S a trader, S petitioned the Court of Bankruptcy for protection under the 12 & 13 Vict. c. 106, and the Court under section 213. made an order, directing that his "estate and effects should be possessed and received by the official assignee, and be taken possession of by the messenger." The attorney to the execution creditor, with knowledge of this, and on a representation by the defendant, who was also a creditor of S, that if M would withdraw his execution all the other creditors would concur in an arrangement with S, advised that S should make an assignment of his estate and effects for the benefit of all his creditors, upon which the defendant desired the attorney to prepare the assignment, and it was prepared accordingly; some of the creditors having refused to sign the deed it became useless, and S was subsequently made a bankrupt. The attorney having sued the

defendant for the costs of preparing the deed,—Held, that the effect of the order of the Court of Bankruptcy under the 213th section was not to vest the estate of S in the official assignee nor in the messenger, and that the attorney was not guilty of ignorance in advising the defendant that S should make the assignment, as it would have been operative had all the creditors concurred, notwithstanding the order of the Court of Bankruptcy. *Lewis v. Collard*, 23 Law J. Rep. (N.S.) C.P. 32; 4 Com. B. Rep. 208.

A solicitor is personally responsible for neglecting to prosecute the decrees of the Court with diligence. The Master, under the 15 & 16 Vict. c. 80. ss. 7, 8, 9, having certified such neglect, the solicitor for the plaintiff was ordered to pay the costs of the report, and of the consequent application and the order thereon; and the decree made in the cause was ordered to be prosecuted before the Judge in chambers, instead of before the Master. *Ridley v. Tiplady*, 24 Law J. Rep. (N.S.) Chanc. 207; 20 Beav. 44.

Where a solicitor has been retained for and has undertaken a particular business, his bill of costs for carrying that business through to its conclusion is but one bill; and where the business in question is the prosecution of a suit, and the solicitor has by his *crassa negligentia* in the conduct of the suit caused the suit to be lost, he cannot recover any portion of his bill. *Stokes v. Trumper*, 2 Kay & J. 232.

In a cause commenced by information, the relators' solicitor intending to cross-examine two defendants who had previously been examined in chief on behalf of a co-defendant, such defendants were by mistake examined upon interrogatories for the examination of witnesses in chief on the part of the informant, and by reason of this mistake the information was dismissed with costs:—Held, that the mistake was *crassa negligentia* on the part of the solicitor, and disentitled him to recover any portion of his bill of costs. *Ibid.*

(f) *On Undertakings.*

A, an attorney, on obtaining from B, another attorney, the papers belonging to a former client of B, wrote to B as follows: "Out of any monies which I may receive on this or any other proceeding on her account, I will hand you such balance as may remain due of your bill of costs as settled at 91."—Held, that A was bound upon this undertaking to pay over to B the amount of the costs due to him from the first monies he should receive on account of the client, without deducting therefrom any costs that might be due to himself for recovering such monies, or otherwise. *Tharrett v. Trevor*, 21 Law J. Rep. (N.S.) Exch. 59; 7 Exch. Rep. 161.

A sale of certain property seized by the assignees of a bankrupt being about to take place, the plaintiff gave notice to the assignees of a claim to a portion of the property under a bill of sale by way of mortgage, and thereupon the defendants, who were the attorneys of the assignees, on the 26th of August, wrote to the plaintiff's attorney a letter, stating that in consideration of the plaintiff consenting to the sale, they thereby on behalf of the assignees consented that the net proceeds of the effects included in the bill of sale should be paid over to the plaintiff to the extent of the balance due

for principal and interest. This letter was written by the authority of the trade assignee, who had the management of the sale of the bankrupt's effects, but without the authority of the official assignee. In answer, the plaintiff's attorney, the next day, wrote, saying "that in compliance with the undertaking given by you herein," he, on behalf of the plaintiff, consented to the sale. The sale took place, and on the 2nd of December the defendants wrote again to the plaintiff's attorney, referring to the former letter of the 26th, and stating that unless informed within two days of the course the plaintiff intended to pursue, "we shall consider ourselves absolved from our promise, and shall contest the validity of the bill of sale":—Held, first, that as the letter of the 26th and 27th August constituted a complete contract, the subsequent letter of the 2nd of December could not be looked at in construing such contract, and that the contract upon the face of it shewed that the defendants contracted merely as agents. Secondly, that the defendants had no authority to bind the official assignee to the undertaking. Thirdly, that although the defendants had no such authority, still they were not liable to be sued in an action upon the contract as principals. *Lewis v. Nicholson*, 21 Law J. Rep. (n.s.) Q.B. 311; 18 Q.B. Rep. 503.

(g) *Expenses of executing Process.*

The attorney who issues a writ of *fi. fa.* and lodges it with the sheriff is himself liable, and not the client, to the bailiff who executes the writ, although the attorney does not name the bailiff to whom the warrant is to go, nor give any specific directions as to its execution. *Brewer v. Jones*, 24 Law J. Rep. (n.s.) Exch. 143; 10 Exch. Rep. 655.

(G) RETAINER AND AUTHORITY TO INSTITUTE PROCEEDINGS.

[See COMPANY.]

Case by one attorney against another for falsely representing that defendant was authorized by J F to employ plaintiff to bring an action as attorney of J F, and that defendant did so employ him; whereby plaintiff was compelled to discontinue the action and pay costs. Plea, that plaintiff was not employed *modo et formâ*. Replication, that plaintiff's bill of costs in the action was referred by Judge's order to be taxed by the Master, with liberty to defendant to dispute the retainer; that the Master allowed 192*l.*, and plaintiff brought an action against defendant for that sum, and the question of retainer was referred to Master W, who certified that the retainer had been proved to the amount of 120*l.*, and that plaintiff signed judgment for that amount. The replication then identified the action in respect of which that claim was made, with that mentioned in the declaration:—Held, upon demurrer, that the replication was bad; the finding of the Master being no estoppel to the defendant in the present action. *Callow v. Jenkins*, 2 L. M. & P. P.C. 403; 6 Exch. Rep. 666.

If a suit be commenced by a solicitor without the authority of his client, it will be dismissed on motion, with costs as between solicitor and client, including the costs of the motion to dismiss. *Crossley v. Crouther*, 21 Law J. Rep. (n.s.) Chanc. 565; 9 Hare, 354.

Where a solicitor files a bill, the onus lies upon him to shew that he had the plaintiff's authority for doing so; and if he fails to shew such authority or a subsequent acquiescence on the part of the plaintiff, the plaintiff is entitled to have his name removed from the record, with costs to be paid by the solicitor. *Maries v. Maries*, 23 Law J. Rep. (n.s.) Chanc. 154.

A solicitor obtained a retainer to proceed against executors, who had, after a long lapse of time, neglected to prove the will and had rendered no account, to compel probate of the will, and to take such other proceedings for obtaining an account as might be necessary. He instituted a suit to compel probate and obtained in it an account which was insufficient. He took no other steps for three years, and then, without further consulting the client, filed a bill for an account; he had no other authority than that retainer, and the client denied any parol authority to file a bill:—Held, that the retainer did not justify the solicitor; and the bill was dismissed with costs to be paid by the solicitor, as in *Allen v. Bone*, 4 Beav. 493. *Atkinson v. Abbott*, 3 Drew. 251.

(H) CHANGE OF.

The 18th of the General Orders of October 1842 is not applicable to the case of a deceased solicitor; therefore, where the solicitor of a party dies pending the suit, another solicitor may be appointed without order. *Whalley v. Whalley*, 22 Law J. Rep. (n.s.) Chanc. 632.

A country solicitor, employing a London agent in a cause upon a special contract, is not entitled to obtain an order of course to change the agent without stating the agreement; and an order so obtained was discharged for irregularity, with costs. *Richards v. the Scarborough Market Co.*, 22 Law J. Rep. (n.s.) Chanc. 759; 17 Beav. 83.

A dispute having arisen as to the mode and extent of a solicitor's remuneration, he refused to proceed in the cause until it had been settled. The solicitor was ordered to deliver up the papers in the cause to the new solicitor, upon his undertaking to proceed with due diligence and to hold them subject to the existing lien thereon. *Wilson v. Emmett*, 19 Beav. 233.

An order of course had been obtained at the Rolls to change the solicitor of two of the defendants. The solicitor was a mortgagee of certain sums of money to which these defendants were entitled in the cause; and by the mortgage deed there were special powers given to him to conduct the suit on their behalf. On motion, the order of the Rolls was discharged with costs. *Jenkins v. Bryant*, 3 Drew. 70.

(I) DEALINGS WITH CLIENT.

A deed of settlement, whereby the settlor is delivered bound hand and foot as to the property settled into the power of his trustee, cannot be maintained in equity without the clearest proof that it was made at and with the request, consent, knowledge or instance of the settlor; and a solicitor who takes upon himself to prepare such a deed for execution by his client, without the clearest evidence of the concurrence of the latter, does so subject to all the consequences and liabilities of the deed being set aside, notwithstanding the solicitor may have been influenced by motives for the benefit of his client, in

preparing the settlement. Therefore, where the plaintiff, alleged by the defendant to be young and extravagant, applied to a solicitor to raise a certain sum on mortgage, and the latter, with a view to prevent the former from dissipating his fortune, tied up the whole of his property and constituted himself sole trustee, the Court, on bill filed by the plaintiff, alleging that the deed of settlement had been prepared without his authority, consent or knowledge, and there not being any evidence to the contrary, declared the deed void in equity, and directed a reconveyance of the trust property by the trustee. *Moore v. Prance*, 20 Law J. Rep. (N.S.) Chanc. 468; 9 Hare, 299.

A trustee cannot refuse to reconvey trust property merely because the *cestui que trust* declines to apologize for an alleged imputation on the trustee; and if a suit for a reconveyance of the property is occasioned by such refusal, and upon such grounds, the trustee will be saddled with all the costs. *Ibid*.

The mere fact that the relation of solicitor and client exists between a devisee and legatee and the testator, in respect of a will prepared by the solicitor, is not sufficient to render the devisees or legacies void. *Hindson v. Weatherill*, 23 Law J. Rep. (N.S.) Chanc. 820; 5 De Gex, M. & G. 301; 1 Sm. & G. 604.

If the will, in such a case, be in such language and made under such circumstances as that the heir in an issue *devisavit vel non*, or the next-of-kin by *caveat* against probate, could not impeach the dispositions, this Court will not, on the above ground, fix a trust of the property on the solicitor for their benefit. *Ibid*.

Whether it be or be not a general rule that a solicitor who establishes a gift from his client does not obtain the costs of the investigation, still, where a party contesting the gift has full knowledge of the real facts, and then files a bill to set it aside, imputing unfairness and insolvency to the solicitor and drunkenness to the testator, and fails in proving the charges, the bill will be dismissed with costs. *Ibid*.

In 1846 the defendant acted as the solicitor of A B in the sale of real estate in lots by auction. One lot only was sold at the auction, and the defendant was engaged in completing that sale, and in preparing abstracts of title for the other lots. In 1848 A B, in company with H, a land agent, called at the defendant's office and pressed him to purchase part of the unsold lots, when it was agreed that the consideration should be 260*l*. and an annuity of 40*l*. for the life of A B. The contract for purchase was prepared by the defendant, who charged A B with a moiety of the costs. In 1850 the defendant, on the offer of A B, purchased the remainder of the property for an annuity of 26*l*. a year for the life of A B. In February 1852 A B died intestate. The value of the annuities had been calculated according to the tables; but it was proved that at the times of the respective purchases, A B was of intemperate habits, and that his was not an ordinary average life. In a suit instituted by the heir of A B,—Held, upon appeal, confirming the decree below, that the relation of solicitor and client continued; and that the purchases must be set aside on the ground of inadequate consideration. *Holman v. Loynes*, 23 Law J. Rep. (N.S.) Chanc. 529; 4 De Gex, M. & G. 270.

By an indenture made between a client and his

solicitor, the client, in consideration of 100*l*., conveyed certain land to his solicitor. The solicitor, who had himself prepared the conveyance, alleged that it was a voluntary deed, and that no consideration had passed, the 100*l*. being introduced to save the amount of stamp duty upon a voluntary instrument:—Held, that the transaction could not be maintained; and the solicitor was declared a trustee for the representatives of the client. *Tomson v. Judge*, 24 Law J. Rep. (N.S.) Chanc. 785; 3 Drew. 306.

In proceedings to recover an estate A became greatly indebted to his solicitor. An agreement was entered into between A and his brother B, by which A agreed to relinquish his interest in the estate to B, in consideration of B undertaking to pay the costs already incurred with interest:—Held, that the solicitor, being no party to the agreement, could derive no benefit from it. *Moss v. Bainbrigge*, 18 Beav. 478.

In the course of a protracted litigation B had become indebted to his solicitor in 9,377*l*. (as was alleged), of which 4,696*l*. had been paid out of pocket. The solicitor agreed to accept 3,500*l*. in full for his costs, unless the client recovered the estate, in which case the client agreed to pay the full sum of 9,377*l*. The client did not dispute the validity of the agreement until seven years after, when the litigation had been successful. The Court upheld the agreement. *Ibid*.

A client by letter undertook to pay his solicitor interest on the balance appearing against him from time to time, upon the principle of annual rests:—Held, that the agreement was unilateral and not binding, and that even if it had been duly signed by both parties, it was not such an agreement as could be enforced between solicitor and client, being entered into while that relation was subsisting between them. *Ibid*.

A client signed an agreement, by which he charged his estate with the bill of costs due to his solicitor, with lawful interest, on the principle of annual rests:—Held, first, that it was voluntary; and, secondly, that having regard to the fiduciary relation between the parties it could not be maintained. *Ibid*.

The necessary requisites stated for supporting such an agreement, assuming it not to be usurious. *Ibid*.

The Court looks with jealousy upon a transaction between a solicitor and his client, and throws the burden of proving that it is proper on the solicitor. *Ibid*.

After a long unsuccessful litigation to recover an estate, a younger brother of the unsuccessful party, and the next to him in an entail claimed in the estate, entered into an agreement with him to pay what should be due in respect of the solicitor's bills of costs, with interest on the principle of annual rests, and to commence a new litigation, at his own risk, in the name of the elder brother, who agreed on these terms to relinquish the estate to the younger brother. Shortly afterwards an agreement was entered into between the solicitor, who was also to conduct the new litigation, and the elder brother, that the solicitor should be paid in respect of the old costs a specified sum, being less than the costs out of pocket, unless the brothers, or one of them, came into possession of the estate; in which event the elder brother agreed that he or the younger brother would pay in respect of the old costs another specified sum, being the full amount of the bills, with interest cal-

culated on the principle of annual rests. The bills had not been taxed, but had been examined, though not minutely, by a friend of the client, who had been a solicitor. The new litigation was conducted by the solicitor with his own capital. It succeeded, and the brothers came into possession of the estate. Seven years after the agreement with the solicitor had been entered into they sought to set it aside on the ground of undue influence and insufficient advice:—Held, that the agreement ought to be upheld. *Moss v. Bainbrigge*, 6 De Gex, M. & G. 292; 18 Beav. 478.

Before the new litigation was completely closed, but after a successful verdict in it, the younger brother, on the eve of making an antenuptial settlement, signed a memorandum of agreement between himself, the elder brother and the solicitor, whereby the brother charged the estate with payment of all sums of money and bills of costs owing to the solicitor by both or either of the brothers, with lawful interest, on the principle of annual rests. At that time the relation of solicitor and client, though not dissolved, had been loosened by differences between the solicitor and the brothers, and the influence arising from that relation did not subsist in its full force. The solicitor made no attempt to prevent the brothers from consulting other solicitors; and in fact the solicitor of the intended bride intervened, though not as the solicitor of the intended husband:—Held, first, that the agreement was not usurious; secondly, that it was not merely voluntary, and that whether the term as to annual rests could have been maintained or not, the solicitor was entitled to abandon it, and enforce the rest of the agreement; thirdly, that the former agreement as to the old costs was binding on the younger brother under the latter agreement; and that interest was payable on the old costs for the interval between the dates of the two agreements, as well as during the rest of the time. *Ibid.*

The solicitor and confidential friend of a father and son being a large creditor of the father on a mortgage of his life estate, with certain policies of assurance on the father's life, induced the son, who was immediate tenant-in-tail in remainder, to concur in executing a disentailing deed a month after the son came of age, and to execute a mortgage charging this debt of the father on the inheritance, the policies of assurance being at the same time assigned for the benefit of the son. The counsel employed to prepare the deeds cautioned the solicitor that the transaction might be impeached, and by his advice another solicitor was consulted on behalf of the son, who declined to advise the son to enter into the transaction:—Held, that the son was entitled to set aside the mortgage, on the terms of restoring the policies of assurance. *King v. Savery*, 1 Sm. & G. 271.

Held also, that one of the policies having been sold by the son by advice of the solicitor, to pay the premiums on the others, the restoration of the money produced by that sale was sufficient. *Ibid.*

There were three subsequent mortgages, one to the solicitor and the two others to strangers, the monies advanced on which were applied or invested in land of which the son had the benefit:—Held, not to be a sufficient confirmation. *Ibid.*

Four years after the first mortgage the solicitor, after an ineffectual attempt to sell on behalf of the

father and son, himself became the purchaser of the family estate, on an appointment of a part of the purchase-money to the son, which was less than the fair value of his remainder in fee:—Held, that the sale was invalid, and that the conveyance as against the son could only stand as a security for the amount of purchase-money appointed to the son. *Ibid.*

(J) BILL OF COSTS.

(a) Delivery of.

The defendant was a member of the provisional committee of the Northampton, Lincoln and Hull Railway Company. The plaintiff, an attorney who had been employed by the company, delivered his bill of charges, headed "Northampton, Lincoln and Hull Railway to R. H. Daubney, debtor":—Held, that it sufficiently charged the defendant within the meaning of the statute 6 & 7 Vict. c. 73. s. 33. *Phipps v. Daubney* (in error), 20 Law J. Rep. (n.s.) Q.B. 273; 16 Q.B. Rep. 514; 2 L.M. & P. P.C. 180; affirming *Daubney v. Phipps*, 18 Law J. Rep. (n.s.) Q.B. 337.

It is not a sufficient delivery of a bill of costs within the statute for the attorney to shew it to the party charged, and then to take it away again, unless the attorney shewing it intends to leave it with the party, and merely takes it back at his request. *Ibid.*

If an attorney deliver his bill of costs to the person intended by him to be charged inclosed in an envelope addressed to the person on the outside, it is a sufficient delivery of the bill within the meaning of the statute 6 & 7 Vict. c. 73. s. 37, though there be no heading to the bill and the name of the party does not appear anywhere on it as the debtor. *Lucas v. Roberts*, 24 Law J. Rep. (n.s.) Exch. 227.

A gross sum was paid to a solicitor in discharge of his claim, but no bill of costs was delivered:—Held, that the client was entitled to have a bill of costs delivered. *In re Blackmore*, 13 Beav. 154.

The solicitor of trustees and executors received payment of his bill of costs out of the estate:—Held, that a residuary legatee was entitled to have a copy of the bill delivered on payment of the costs of it. *Ibid.*

A solicitor who delivers an unsigned bill of costs is bound by it, but his client may either treat it as a nullity or waive the want of signature and adopt it; though, after such waiver, the client cannot treat the bill as non-delivered. *In re Gedye*, 20 Law J. Rep. (n.s.) Chanc. 410; 14 Beav. 56.

(b) Headings and Contents of.

The defendant, who was an attorney, wrote to the plaintiff, also an attorney, a letter inclosing a writ of summons in a cause of *P. v. B.*, requesting the plaintiff to serve it, and to send the defendant an account of his charges. The plaintiff, in answer, sent a letter headed "*P. v. B.*" informing the defendant of the service of the writ, pursuant to his instructions, and that his charges, enumerating the items, were 1*l.* 0*s.* 6*d.*:—Held, that the plaintiff's letter was a compliance with the 6 & 7 Vict. c. 73. s. 37, and gave the defendant sufficient information, by reference to the writ, of the court in which the business was done. *Cozens v. Graham*, 21 Law J. Rep. (n.s.) C.P. 206; 12 Com. B. Rep. 398.

Where an attorney's bill of costs, delivered under

the 6 & 7 Vict. c. 73. s. 37, contains items applicable to proceedings in the superior courts of law, but does not contain any statement from which it can be inferred in which of those courts the business was transacted, the bill is to be presumed to be a compliance with that act, unless the party charged thereby proves that any further information was practically required for the purpose of taxation, or shews that the name of the court in which the business was done would have been of use to him. *Cooke v. Gillard*, 22 Law J. Rep. (N.S.) Q.B. 90; 1 E. & B. 26.

The reason for requiring the name of the court to be stated, which prevailed under the 2 Geo. 3. c. 23, does not exist since the 6 & 7 Vict. c. 73, and since the scale of allowances has become uniform in all the superior courts of law. *Ibid*.

Semble—that a bill of costs which is defective as to part of the items contained in it, may be good as to the residue, so as to entitle the attorney to recover the amount as to which a sufficient bill of costs has been delivered. *Ibid*.

[And see *Phipps v. Daubney*, ante, (a).]

(c) *Taxation of.*

(1) *In general.*

The defendant, in June 1853, retained the plaintiff, an attorney, to conduct an action for him, and in July obtained an order to sue *in forma pauperis*. On the 8th of December an order for dispaupering him was obtained from the Master of the Rolls, who ordered it to relate back to the 31st of October, at which time the defendant became possessed of property on the death of his father. The defendant whilst the pauper order was in force had stated to the plaintiff that he would pay his costs on his father's death:—Held, that as the dispaupering order only related to the litigating parties and not to their attorney, the plaintiff was not entitled to claim from the defendant payment of the costs incurred between the 31st of October and the 8th of December; that the defendant's promise to pay the same was *nudum pactum*, and that the plaintiff was not entitled to be paid his charges for copying, nor for counsel's fees which he had not paid. *Holmes v. Penney*, 23 Law J. Rep. (N.S.) Exch. 132; 9 Exch. Rep. 584.

Messrs. S, solicitors, promised, by letter, to conduct the professional business in which F might be concerned "personally or otherwise," upon the terms of receiving agency charges. F was a solicitor, but he had omitted to take out his certificate; at that time he was interested in a suit which he had procured to be instituted against himself, for the purpose of administering the estate of a testatrix, whose executor he was, and in whose estate he was beneficially interested. Upon the completion of this business, Messrs. S obtained the whole of the money belonging to F out of court; they repudiated the letter, and insisted upon their right to costs as between solicitor and client; they also refused all accounts, and never delivered any bills of costs. Upon a bill by F,—Held, that the letter was a valid agreement; that Messrs. S were not entitled to higher charges because F was uncertificated; that his being uncertificated was immaterial, as such an agreement was legal if made with any client; that the transaction was such that it could not be taxed under the common order; and that it was necessary to file a bill and abandon the

common order which had been obtained for taxation; and a reference was directed to the taxing Master to tax the bill of costs as between principal and agent. *Foley v. Smith*, 20 Law J. Rep. (N.S.) Chanc. 621.

F had also mortgaged his interest to Messrs. S to secure a sum of 150*l.*, which they were to pay for F; but though they omitted to make the payment, and retained that with other money in their hands, the Court treated it as an ordinary sum of money in hand, and declined to direct the taxing Master to allow the plaintiff interest upon those sums, though the mortgage, which was to include them, was bearing interest. *Ibid*.

A solicitor, who sold his business, but who continued to conduct a suit in Chancery in the office as the agent of one of the plaintiffs, independently of the solicitor who had purchased the business, will not be allowed to deny his agency, or to strike from the bills of costs of such solicitor the costs of proceedings which had been incurred by a mistake made in conducting the cause; and a petition for the taxation of the bills of costs under special circumstances was dismissed, with costs. *In re Gedy*, 20 Law J. Rep. (N.S.) Chanc. 410; 14 Beav. 56.

In the taxation of costs the taxing Master has authority, under the statute 6 & 7 Vict. c. 73, to disallow the charges for an action which he in his discretion considers to have been improperly brought. *Ibid*.

The statute 14 & 15 Vict. c. 83. constituting the Court of Appeal, not pointing out what is to be done as to costs, where, in consequence of the Judges differing in opinion, the decision of the Court below is affirmed, such costs follow the result of the appeal. *In re Clarke*, 21 Law J. Rep. (N.S.) Chanc. 20; 1 De Gex, M. & G. 43.

Solicitors in London were appointed to a projected company. Other solicitors were appointed as local solicitors, and were directed to prepare the notices to landowners, and other matters connected with the local board. Errors were discovered in these, and the scheme was ultimately abandoned. The London solicitors in their bill of costs charged for the preparation of these notices, and the taxing Master allowed them. The Master of the Rolls disallowed the claim, and "directed" the solicitors to establish their right at law, on the ground that the facts were disputed, and that on the facts, so far as they were ascertained, there were questions of law to be decided. On appeal the claim was disallowed until it should be established at law, and the solicitors "were to be at liberty" to bring such action as they might be advised. *In re Burchell*, 21 Law J. Rep. (N.S.) Chanc. 236.

J F, a writer to the Signet in Edinburgh, employed P, a solicitor, as his agent in London, and introduced to him business of some importance, which a client of his had in England. P, by letter, promised to allow J F one half of the profits of all such business, so long as he should retain the same, directly or indirectly. Upon the discovery of this by the client, who had obtained an order for the taxation of P's bills of costs, he presented a petition, asking that the taxing Master might disallow all such share of the charges as P had promised to pay to J F:—Held, that if the agreement was illegal, it could not be enforced by J F; that the 22 Geo. 2. c. 46. s. 11, being a penal act, must be construed

strictly; that the business having been done, the solicitor was entitled to payment, and that the client could not avail himself of the letter to refuse payment, or insist upon deducting from the bills of costs what P had promised to allow to J F, and that the production of the documents, relating to the bills of costs, ought to be left to the discretion of the taxing Master; and the petition was dismissed, with costs. *Gordon v. Dalzell*, 21 Law J. Rep. (N.S.) Chanc. 206; 15 Beav. 351.

A claim filed by a solicitor to enforce a security for costs pending taxation of one bill, and before the delivery of other bills, will be dismissed, with costs; but without prejudice to other proceedings after the amount due is ascertained. *Wagh v. Waddell*, 22 Law J. Rep. (N.S.) Chanc. 612; 16 Beav. 521.

A married woman gave her solicitors a written paper, charging her separate estate with former and future bills of costs incurred in respect of her separate estate. She afterwards discharged them, and upon her applying that they might deliver their bills, she was opposed and ordered to give further security for payment of what should be found due on taxation. Upon delivery of one of the bills, she obtained an order to tax it, but before the amount was ascertained the solicitors filed a claim to enforce generally the security she had given to them:—Held, that the claim must be dismissed, and that it could not be retained until the amount of the costs was ascertained. *Ibid*.

A solicitor was separately retained by more than one defendant to a suit, and upon the application of one of such defendants his bill of costs was ordered to be taxed; the taxing officer allowed, as against the defendant on whose application the taxation was ordered, only a proportionate part of the charges of proceedings which were common to all of those defendants, although those charges were not increased by the proceedings having been taken on behalf of all such defendants. Upon appeal, first, to one of the Vice Chancellors, and secondly to this Court, the certificate of the taxing Master was affirmed; but as the second appeal was made at the suggestion of the Vice Chancellor, it was dismissed without costs. *Ex parte Ford, in re Colquhoun*, 23 Law J. Rep. (N.S.) Chanc. 515; 5 De Gex, M. & G. 35; 22 Law J. Rep. (N.S.) Chanc. 484; 1 Sm. & G. App. 1.

A solicitor, one of three trustees, appointing another solicitor to act for him on agency terms, does so for the benefit of the trust, although it be done with the consent of his co-trustees; and any advantage which may arise to him by the contract is for the benefit of the trust estate:—Held, therefore, that a taxation of the solicitor's costs was properly made as between principal and agent, instead of solicitor and client. *In re Taylor*, 23 Law J. Rep. (N.S.) Chanc. 857; 18 Beav. 165.

A mortgagor is not liable to pay the costs of business unnecessarily done in respect of the mortgage on behalf of the mortgagee; neither is the mortgagee bound to pay the costs of such business when done by his solicitor of his own mere motion under a general authority, but without the particular authority of his client. *In re Barrow*, 24 Law J. Rep. (N.S.) Chanc. 126; 17 Beav. 547.

An agreement by a solicitor with his client for the payment of a fixed sum in lieu of costs, will, although

no bill be delivered, be enforced, and the intention of the parties carried into effect, and that although the agreement contained mistakes not only in name, but also as to the rights of the client, which, if construed strictly, would deprive the solicitor of all right to relief. In the present case, the agreement made the sum payable upon a future contingent event; it was obtained without fraud or pressure; the defendant had received the full benefit of it; and it was impossible to restore the parties to the position they respectively held at the time it was entered into. *Stedman v. Collett*, 24 Law J. Rep. (N.S.) Chanc. 113; 17 Beav. 608.

Under an order to tax, the Master may take an account of the receipts of the solicitor on account of interest received by him, but he cannot charge him with the profits made from monies of his clients in his hands. *In re Savery*, 13 Beav. 424.

A sum of money having, on taxation, been found due from a solicitor to his client, the solicitor was ordered to pay the costs of the application for the second order for payment. *Re Bainbrigge*, 14 Beav. 645.

On taxation a solicitor cannot be charged with interest on balances in hand; but a solicitor having debited himself with interest in his cash account rendered,—Held, that the Master ought to have charged him. *In re Savery*, 15 Beav. 58.

An agreement pending a litigation that a solicitor shall be entitled to compound interest on his demand cannot be supported. In 1851 A and B agreed to charge their real estates with the amount of costs due to their solicitor with annual rests. The solicitor instituted a suit to enforce the lien, and the client presented a petition for taxation. The Court made the usual order for taxation, with a direction to the Master to ascertain the amount due in 1851, but held itself incompetent on this occasion to deal with the question of lien. *In re Moss*, 17 Beav. 346.

Principles and practice in the taxing Master's office and before the Court in cases of taxation. *Ibid*.

The Court will only determine questions on items in a bill of costs which involve some principle, and not those relating to quantum only. *Re Catlin*, 18 Beav. 508.

A solicitor, in 1849, agreed to charge sums out of pocket only, provided the client was unable to recover the proper costs in the business. A taxation was ordered of a bill for business in 1853, in the usual terms, and without determining any question as to the agreement. *Re Ransom*, 18 Beav. 220.

An agreement to charge only costs out of pocket does not preclude taxation. *Ibid*.

A client, when he retained a solicitor, expressed himself dissatisfied with the usual mode of remunerating solicitors, but no definite arrangement was made as to any other mode of remuneration. Subsequently, the solicitor, in a letter to the client, stated that, "Until I have the pleasure of seeing you and of finally making some general and well-understood arrangement with you on the subject of costs, it shall be understood on my part that, beyond costs out of pocket, I have no claim upon you personally." No arrangement was ever made, though the subject was often alluded to by the solicitor:—Held, that this did not amount to a concluded agreement by the

solicitor to claim nothing as of right but costs out of pocket. *Wilson v. Emmett*, 19 Beav. 233.

Costs of a journey to Paris to obtain the execution of a deed disallowed, beyond the expense of doing it through an agent. *In re Beavan*, 20 Beav. 146.

By error and mistake some items were omitted from and others undercharged and overcharged in a bill of costs referred for taxation. On a petition by the executor of the solicitor, liberty was given to insert the omitted items and increase those undercharged, but he was not allowed to decrease the overcharges, and the costs of the application were ordered to be paid by the petitioner. Pending a taxation both the solicitor and client died, the reference was revived, and the taxation continued between the representatives. *Re Whalley*, 20 Beav. 576.

(2) What Bills are Taxable.

A married woman having separate estate is within the 6 & 7 Vict. c. 73. with respect to the taxation of costs. *Wagh v. Waddell*, 22 Law J. Rep. (n.s.) Chanc. 612; 16 Beav. 521.

A Court of equity has jurisdiction to direct the taxation of the bill of costs of a solicitor acting as agent for a person in the court of a revising barrister, and at an election for the purpose of promoting his return as a member of parliament. *In re Andrew*, 23 Law J. Rep. (n.s.) Chanc. 129; 17 Beav. 510.

(3) Order of course for under 6 & 7 Vict. c. 73.

A solicitor, acting on behalf of mortgagees, sold the mortgaged premises, and on the 27th of June 1850, he retained the amount of his bill of costs out of the proceeds of the sale. On the 29th of June 1850 he sent a copy of the bill to the solicitor of the mortgagor, and on the 27th of June 1851 the mortgagor applied for an order for taxation:—Held, that the taxation might have been had upon the common order; that the petition was presented in time; that it could scarcely be considered a payment of the bill of costs until the petitioner had the means of knowing the amount of the surplus, and that he was entitled to taxation, but that he must pay the costs beyond the costs of the common order. *In re Steele*, 20 Law J. Rep. (n.s.) Chanc. 562.

An order of course to tax solicitors' bills of costs obtained by a married woman without the intervention of a next friend,—Held, irregular, and though the solicitors held some security from her for costs, it was discharged, if further security was not given. *In re Wagh*, 21 Law J. Rep. (n.s.) Chanc. 567; 15 Beav. 508.

The non-compliance with an order, made upon terms at law, to tax a solicitor's bill of costs, and the failure of other proceedings at law to obtain renewed orders, are facts which ought to have been stated when applying for an order of course to tax a solicitor's bill of costs in equity; and the omission to state those facts is a ground for discharging the order, though the party might be entitled to an order upon a special application. *In re Gedye*, 21 Law J. Rep. (n.s.) Chanc. 430; 15 Beav. 254.

How far a judgment signed at law for default will prevent the obtaining an order of course in the Court of Chancery: and whether such order, if granted, will not stay execution on such judgment—*quære*. *Ibid*.

A party applying for an order of course should state everything which can have a bearing on the matter, otherwise the order will be discharged. *In re Walker*, 14 Beav. 227.

A B employed a solicitor in the matter of a mortgage, and there was a dispute between them whether he was not also liable for the costs of legal proceedings taken in the name of a third party. A B obtained *ex parte* at the Rolls an order for taxation; he stated, however, the mortgage transaction alone, and suppressed the other matters. The order was discharged on the ground of the suppression. *Ibid*.

After payment an order of course for taxation is irregular. *Re Winterbottom*, 15 Beav. 80.

The rule that on application for orders of course all material facts must be stated, is to be strictly adhered to. *Ibid*.

Upon an arbitration between A and B, A's costs were directed to be paid by B, and were moderated by the arbitrator and paid. A afterwards obtained an order of course to tax his solicitors' bills of costs, suppressing these facts. The order was discharged. *Ibid*.

An order of course for taxation was refused at the Secretary's office, but the Court, on a special application, thought that it was a proper case for an order of course:—Held, that the costs ought to follow the result of the taxation. In a doubtful case the client should apply to the solicitor for his consent to an order of course. *Re Taylor*, 15 Beav. 145.

An order of course was obtained for the taxation of two bills of costs. One had been paid, and the fact had been suppressed. The Court discharged the order altogether. *In re Hinton*, 15 Beav. 192.

Where a solicitor is retained by two persons jointly, an application for taxation by one, in the absence of the other, should not be made as of course. *Re Lewin*, 16 Beav. 608.

The taxation under the 38th section, or the "third party liable clause," is by order of course: but under the 39th section, or "third party interested clause," the application is special. *Re Straford*, 16 Beav. 27.

A solicitor entered into a special agreement with his client for interest on his bill with annual rests, and for a charge on the estate recovered:—Held, that this was not a proper case for an order of course for taxation, and such an order was discharged. *Re Moss*, 17 Beav. 59.

A solicitor ordered to pay the costs of a special petition rendered necessary by his refusal to consent to the common order for delivery of his bill, and for its taxation. *Re Adamson*, 18 Beav. 460.

Variation in common form of the order of course to deliver and tax a solicitor's bill. *Re Smith*, 19 Beav. 329.

In December an account was signed by a client, one item of which was the amount of a bill of costs previously delivered. The balance was paid over a month after. Four months afterwards the client, suppressing the settlement, obtained an order of course to tax. The order was discharged. *Re Holland*, 19 Beav. 314.

A, the next friend of infants in a suit, employed B as solicitor therein and in other matters. An order was made in the suit for the taxation and payment to B of his costs of suit. Before this had been done,

A obtained *ex parte* an order to tax B's bill in all the matters in which he had been employed for A:—Held, that the order was regular. *In re Fluker*, 20 Beav. 143.

(4) *Upon Special Circumstances after Expiration of a Year.*

After more than twelve months from the delivery of *unsigned* bills the client applied for their taxation:—Held, that he was not entitled, except on shewing sufficient "special circumstances." *In re Gedye*, 20 Law J. Rep. (n.s.) Chanc. 410; 14 Beav. 56.

The possession of the papers in a cause is not a sufficient special circumstance to warrant the taxation of a bill delivered more than twelve months. *Ibid.*

A client having withdrawn from a litigation his solicitor agreed to take one-third of his bill in full discharge if the suit (which was to be carried on for the benefit of another party) failed, and the client agreed to pay the remaining two-thirds if it succeeded. The Court refused, eight years afterwards, when the suit had succeeded, to open the transaction by ordering a taxation of the bill. *In re Moss*, 17 Beav. 340.

Taxation ordered of an unpaid bill of costs, eighteen months after its delivery, "the special circumstances" being that it was delivered long after application for it, on the eve of the client going abroad, and contained substantial overcharges not acquiesced in. *Re Williams*, 15 Beav. 417.

Where special circumstances are relied upon as a ground for taxation after the prescribed time, they must be such as the client could not have reasonably availed himself of sooner. *In re Barnard, Ex parte Wetherell*, 2 De Gex, M. & G. 359; overruling 16 Beav. 5.

Seemle—that mere overcharge is not a special circumstance within the meaning of the act. *Ibid.*

A solicitor delivered to the directors of an abortive railway company his bill of costs No. 1. It was perused by an experienced solicitor named by the solicitor retained at the request of the directors, and items were taxed off, leaving 27*l.* 5*s.* 5*d.* as the amount due. The directors paid 20*l.* on account, leaving a balance of 7*l.* 5*s.* 5*d.* due. An order to wind up the company under the Winding-up Acts was obtained, and the solicitor claimed a lien on the papers for his costs. He delivered a bill of costs No. 2, commencing with the balance of 7*l.* 5*s.* 5*d.*, amounting to 23*l.* 9*s.* 10*d.* On the petition of the official manager seeking the taxation of the solicitor's bills of costs No. 1. and No. 2, it appeared that the bill of costs No. 1. had been duly delivered more than twelve months before the date of the petition to tax:—Held, that No. 1. bill could not be taxed except upon special circumstances which did not exist in this case, and the Court ordered bill No. 2. to be taxed, directing the Master not to investigate the accuracy of the balance of bill No. 1. with which bill No. 2. commenced, further than to ascertain that that balance had not in fact been paid. *Ex parte Quilter, in re James*, 4 De Gex & Sm. 183.

(5) *Upon Special Circumstances after Payment.*

Where a Judge at chambers has made an order, under the 6 & 7 Vict. c. 73. s. 41, referring an attorney's bill for taxation after payment of the amount,

the Court will not review that decision where the Court is not informed of the amount. *In re Dearden*, 23 Law J. Rep. (n.s.) Exch. 14; 9 Exch. Rep. 210.

Where an attorney's bill is paid in order to obtain possession of deeds, and an intention is at the same time expressed to have the bill taxed, an order will be made to refer the bill for taxation—*per Martin, B.* *Ibid.*

The rule laid down in *Re Harrison* (16 Law J. Rep. (n.s.) Chanc. 170.) cannot be supported. *Ibid.*

A solicitor to a railway company, provisionally registered, brought an action against three of the managing directors, for the amount of his bill of costs, and recovered judgment. An order was afterwards obtained for winding up the company under the act, and a petition was then presented by the official manager for taxing the solicitor's bill under the statute 6 & 7 Vict. c. 73, on the ground of excessive charges:—Held, that the Court could not be called upon to examine the items of a bill to ascertain their correctness, and that an allegation of excessive charges was not such a special circumstance as to bring the case within the 38th section of the act. Petition dismissed with costs. *In re the Shrewsbury and Leicester Rail. Co., in re Vardy*, 20 Law J. Rep. (n.s.) Chanc. 325.

A receiver in a suit assigned dividends to which she was entitled for life, to her sureties as security for their bond. The receiver paid the balance found due from her into court, and the recognizances were ordered to be vacated. The sureties refused to re-assign the dividends. The solicitors of the sureties delivered bills of costs incurred by them in the suit. The receiver had borrowed money for her support, and for the support of her children, and had executed a warrant of attorney, upon which judgment was entered up. The creditor threatened execution, and in order to obtain the dividends the receiver paid the bills of costs out of the dividends which had accumulated in the hands of the trustees of the settlement, but gave notice that she did so under protest, and without prejudice to her rights. A correspondence had taken place between the solicitors of the parties respecting taxation; which ended in the receiver agreeing to pay the costs of it. The payment was made on the 14th of August 1850, and on the 7th of June 1851 the receiver petitioned at the Rolls for an order under the statute 6 & 7 Vict. c. 73, for the taxation of the bill, alleging that it was paid under pressure, and with protest, but the petition was dismissed; and on appeal the decision below was affirmed, but without costs, the authorities being conflicting. *In re Brown*, 21 Law J. Rep. (n.s.) Chanc. 442; 1 De Gex, M. & G. 322; 15 Beav. 61.

A solicitor to assignees delivered his bill of costs to the registrar who taxed it, and the same was then paid by the official assignee, and the amount was allowed in his account. After more than a year, the bill was ordered by the Commissioner to be taxed by the taxing Master, but, on appeal, the order was discharged. "Special circumstances" in Lord Langdale's Act (6 & 7 Vict. c. 73.) mean circumstances of fraud; and if none can be shewn, a bill is not taxable after a year,—*per Lord Cramworth. Ex parte Pemberton, in re Tyther*, 23 Law J. Rep. (n.s.) Bankr. 76; 2 De Gex, M. & G. 960.

Solicitors for mortgagees delivered their bill of costs to the mortgagor, who was about to pay off the

mortgage, the costs amounting to 18*l*. An appointment was made for the completion on the next day but one, on which day the mortgage-money and interest and 10*l*., part of the costs, were paid, but the solicitors refused to give up the deeds until the remaining 8*l*. was paid. Subsequently, the 8*l*. was paid, and the deeds were delivered up to the mortgagor. The mortgagor alleging pressure and overcharge, petitioned for taxation, under the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), but the petition was dismissed, with costs. *Ex parte Barton, in re Finch*, 22 Law J. Rep. (N.S.) Chanc. 670; 4 De Gex, M. & G. 108: affirming 16 Beav. 585.

The solicitor of a mortgagee, at a meeting to execute the mortgage deeds, by directing the solicitor of the mortgagor to draw cheques on account of the money to be advanced for the payment of divers bills of costs owing to him, across which he required the mortgagee to sign her name at the back, at once withdraws his protection, and subjects the client and mortgagee to constraint and undue influence amounting to pressure, which, notwithstanding payment, will render the bills liable to taxation. *In re Abbott*, 23 Law J. Rep. (N.S.) Chanc. 955; 18 Beav. 393.

A solicitor delivered his bill to his client, and by letter informed him that payment might be postponed if taxation were intended. The client gave the solicitor security for the bill, but no money was paid in respect of it:—Held, that this was payment within the meaning of the 41st section of the 6 & 7 Vict. c. 73. *Ex parte Turner, in re Boyle*, 24 Law J. Rep. (N.S.) Chanc. 71; 5 De Gex, M. & G. 540.

The client joined in the transfer of the security so given, and in the commencement of other matters employed the same solicitor, and in their completion employed another solicitor, and paid the second bill of costs:—Held, that these were not special circumstances to justify the taxation of the bill of costs. *Ibid*.

Unless overcharge amount to fraud, the Court will not refer bills of costs for taxation after payment. *Ibid*.

The transaction of unnecessary business by a solicitor on behalf of a client is a ground for directing the taxation of his bill of costs, although it has been paid. *In re Barrow*, 24 Law J. Rep. (N.S.) Chanc. 126; 17 Beav. 547.

The Court, notwithstanding there was not such pressure or such allegations and proof of overcharges as have been usually relied on in such cases, ordered the taxation of a solicitor's bill after payment. *In re Blackmore*, 13 Beav. 154.

Taxation of a bill, paid under protest, on the ground of overcharges, and that the solicitor had refused to part with the title-deeds until payment, refused, with costs, it not appearing how long the bill had been delivered before payment. *Re Mash*, 15 Beav. 83.

The principle of payment after taxation is not to be extended. *Ibid*.

The rule of the Court is, that, to obtain a taxation after payment, there must be both overcharge and pressure, or overcharge so gross as to amount to fraud: *Re Hubbard*, 15 Beav. 251.

A solicitor is not bound to do that on the under-

taking of the opposite solicitor which the latter is not entitled to as of right. *Ibid*.

The cases of taxation after payment on the ground of pressure are not to be extended. *Ibid*.

A, the mortgagor's solicitor, sent a re-conveyance to B, the mortgagee's solicitor, for execution unstamped. On the 23rd of August B delivered his bill of costs, which was objected to; and on the 10th of September A applied to B for the loan of the deed to get it stamped, on his undertaking to return it, which was refused, and on the 18th of September the mortgage and bill were paid. The mortgagor afterwards applied for a taxation, and the pressure relied on was that he had been compelled to pay the bill in order to get the re-conveyance stamped, and avoid the penalties; and, secondly, that no taxation could be had in the long vacation. He also alleged overcharges, which were not clearly made out. The application was refused with costs. *Ibid*.

A bill of costs was delivered on the day appointed to complete the transfer of a mortgage. It was objected to, but the solicitor of the mortgagee refused to complete until payment. The mortgagor paid it, but it was afterwards ordered to be taxed. *Re Philpotts*, 18 Beav. 84.

Upon paying off a mortgage, the bill of the mortgagee's solicitor, though objected to, was paid in full, the solicitor undertaking "to refund" so much of "the mortgagee's law charges as might be found to be in excess of what they were entitled to receive":—Held, that the Court would enforce the undertaking, upon petition, by ordering a taxation, and that it was to be as between the mortgagor and mortgagee. *Re Fisher*, 18 Beav. 183.

A mortgagee's solicitor's bill was delivered at the completion of the mortgage transaction, and the amount retained after objection. A petition, presented eleven months afterwards for taxation, was refused, although the bill contained an objectionable item of 20*l*. for procuration-money. *Re Bayley*, 18 Beav. 415.

A solicitor, who was the chief acting executor of a client, retained the amount of his bill of costs, as solicitor of the testator and of the executors, out of the assets received by him, and died. A suit was instituted for the administration of his estate. Twelve years after his death and twenty years after the solicitor had ceased to act professionally for the executors of the testator, the testator's representative sought against the representatives of the deceased solicitor an order for the delivery and taxation of the solicitor's bills, under the 6 & 7 Vict. c. 73:—Held, that, whether the act gave jurisdiction to make such an order or not, such an order ought not to be made. *In re Vines, ex parte Shackell*, 2 De Gex, M. & G. 842.

Executors retained the son of one of them to act as their solicitor in the administration of the estate, and the solicitor's bills, or some of them, were paid by credit being given to the son in accounts between him and his father:—Held, that this fact was not such a special circumstance as would warrant an order for the delivery and taxation of the son's bills of costs, upon a petition presented under the 6 & 7 Vict. c. 73, ten years after the payment, even if that interval did not exclude the jurisdiction to make such an order. *Ibid*.

(6) *Upon Terms.*

A party, not admitting his liability upon a bill of costs, and not submitting to pay the amount of the bill when taxed, ought to bring his case before the Court upon a special petition, instead of obtaining the common order for taxation. A common order, however, having been obtained, in conformity with the practice existing since the 6 & 7 Vict. c. 73, an order was made with consent as upon a special application, to refer the whole matter to the taxing Master, and to allow the petitioner to dispute the retainer, he undertaking to pay what was due upon such taxation; or otherwise the order obtained by him was to be discharged, without costs. *In re Thurgood*, 23 Law J. Rep. (n.s.) Chanc. 952; 19 Beav. 541.

An order for taxation was to be void, unless the Master made his report in a fortnight or certified that further time was necessary. The time elapsed without such certificate, and the parties afterwards attended several times before the Master without objecting:—Held, that the irregularity had been waived, and an order was made for the Master to proceed in the taxation. *Re Field*, 16 Beav. 593.

In an action brought by an attorney against his client upon his bill of costs, the client obtained an order for taxation on the terms of withdrawing all his pleas, except *nunquam indebitatus*. Afterwards he withdrew all his pleas and applied to the Judge for an order of taxation under the 6 & 7 Vict. c. 73, which was refused, for want of jurisdiction:—Held, that the client could not obtain an order for taxation from the Court of Chancery, there being no special circumstance beyond overcharge. *In re Barnard, Ex parte Wetherell*, 2 De Gex, M. & G. 359, overruling 16 Beav. 5.

Semble—That where judgment has been given in the attorney's action, the special jurisdiction given by the 6 & 7 Vict. c. 73. s. 37. does not exist. *Ibid*.

(7) *Filing Certificate of Taxation.*

Where a solicitor, whose bill on taxation had more than five-sixths taken off, but the certificate thereof was not filed in time, brought an action for the whole bill, notwithstanding tender by the representative of the client of payment of what was on taxation shewn to be due, he was restrained from proceeding in the action and ordered to deliver up the deeds and papers of the client. *In re Campbell*, 22 Law J. Rep. (n.s.) Chanc. 865; 3 De Gex, M. & G. 585.

A taxation is not rendered invalid by reason of the non-filing of the Master's certificate in the Report Office within the time directed by the Order of 1692. *Ibid*.

Semble—that it is a high contempt to bring a certificate of taxation made by an officer of this court under the cognizance of a Court of law. *Ibid*.

(8) *Costs of Taxation.*

A Judge's order, referring an attorney's bill to taxation, reserved to the client the right of disputing his liability to the whole or any part of it, on certain specified grounds. The order did not contain any direction to the Master to tax the costs of the reference, as required by the statute 6 & 7 Vict. c. 73. s. 37. The Master taxed off less than a sixth of the

whole bill, and taxed the attorney the costs of the reference:—Held, that the client was liable to pay the costs of the taxation, whatever might be the event of the questions reserved. *In re Shaw*, 20 Law J. Rep. (n.s.) Q.B. 280; 2 L. M. & P. P.C. 214.

Under the Solicitors' Act items struck out of a bill of costs on taxation, as not chargeable against the person to whom the bill is delivered, must be taken into account in determining the costs of taxation. *In re Clarke*, 21 Law J. Rep. (n.s.) Chanc. 20; 1 De Gex, M. & G. 43.

(9) *Practice.*

A sum being, on taxation, found due from a solicitor to his client, the first order fixing a day for payment must be obtained on notice; but the second or four-day order is made *ex parte*. *In re Stevenson*, 14 Beav. 27.

To obtain a four-day order against a solicitor for the non-delivery of his bill, it must appear that the previous order has been personally served. *Re Wisewold*, 16 Beav. 357.

Personal service on a solicitor of proceedings under a taxation dispensed with, and service by placing under his door substituted. *Re Templeman*, 20 Beav. 574.

(K) LIEN FOR COSTS.

On the reference of an action (the costs to abide the event), the arbitrator ordered the defendant to pay the plaintiff a certain sum. The plaintiff afterwards became insolvent. His attorney, whose bill of costs exceeded the amount awarded, and the costs taxed under the award, claimed a lien in respect of his bill on such amount and taxed costs, and called upon the defendant to pay them to him for his own use, and in satisfaction of his lien:—Held, that the plaintiff's attorney was not entitled to a rule calling upon the defendant to pay him the money. *Lloyd v. Mansell*, 22 Law J. Rep. (n.s.) Q.B. 110; 1 Bail C.C. 130.

A contracted to buy the equity of redemption of the L estate, and immediately contracted to sell part. He then mortgaged the other part and his other estates to B for securing 10,000*l*. He then mortgaged the part of L he had before mortgaged, to C for securing 3,000*l*. and the same part to D for securing 1,000*l*. The legal estate in L was then conveyed by the vendor to a trustee for A, and a term of years was assigned to another trustee to attend the inheritance, the original mortgages affecting the same being paid off. Before the mortgage for 10,000*l*. was created, A was indebted to solicitors in a bill of costs, and became indebted to them for the conveyance of the legal estate. On the occasion of that conveyance, the title-deeds of the L estates were handed over by the vendor to the solicitors, as solicitors for A. Subsequently one of the firm of solicitors, having no notice of the mortgage for 10,000*l*., took an assignment of the 3,000*l*. and 1,000*l*. mortgages, and made a further advance on the same security:—Held, that the deeds, if in the hands of A, would be subject to the right of B, and they were so subject in the hands of the solicitor. Held, also, that the deeds being delivered by the vendor to the solicitors and not to A and by him to the solicitors, made no difference. Held, also, that there was no distinction between the costs due before the mortgage

to Band the costs of getting in the legal estate, the solicitors in that matter being employed by A, and he alone being responsible for them. *Pelly v. Wathen*, 21 Law J. Rep. (N.S.) Chanc. 105; 1 De Gex, M. & G. 16.

A client cannot give a lien to his solicitor of a higher nature than the interest which he himself has in deeds. *Ibid*.

A solicitor had prepared a deed for a client upon which he had a lien for his costs of preparing it. In a suit between other parties the solicitor was served with a *subpoena duces tecum* to produce this deed:—Held, affirming an order at the Rolls, that his lien did not protect the solicitor from producing the deed as evidence on the issue raised between the parties to the suit; but this order was without prejudice to the question, whether the deed could be produced without notice to the parties to whom, subject to the lien, the same belonged. *Hope v. Liddell*, 24 Law J. Rep. (N.S.) Chanc. 691; 20 Beav. 438.

A solicitor has no lien for his costs upon real estate recovered in an action of ejectment; such costs are not similar to the costs due to a solicitor for recovering a fund which is in court. Under the 1 & 2 Vict. c. 110, the 2 & 3 Vict. c. 11, and the 3 & 4 Vict. c. 82, the registration of the Master's allocatur does not create any lien for the costs taxed. Orders of Court, &c. can alone be registered to create a lien; but registration every five years is necessary to prevent other securities from obtaining priority. *Shaw v. Neale*, 24 Law J. Rep. (N.S.) Chanc. 563; 20 Beav. 157.

A firm of solicitors prepared and engrossed a conveyance from a mortgagee to their client, the mortgagor, in consideration, stated in the deed, of 398*l*. This deed was sent by the firm to the mortgagee's solicitors with a letter desiring that it might be held by them on the account of the senders, who had a lien upon it for costs. The 398*l*. was not paid, and the mortgagee's solicitors retained the deed. The firm of solicitors received a promissory note, upon which part of the costs were paid. The land was sold, subject to the mortgage. The firm of solicitors filed a bill against the mortgagee and the purchaser for the delivery up of the deed:—Held, that the lien was not lost by the delivering over of the deed; that the plaintiffs were entitled to redeem the mortgage of 398*l*.; that they were entitled to hold the deed against the mortgagor; and that the taking of the promissory note for part of the debt due to them did not affect their lien for the money not covered by it. *Watson v. Lyon*, 24 Law J. Rep. (N.S.) Chanc. 754.

A widow and executrix of a testator was entitled, under his will, to a residue for life. The person entitled in remainder to the residue filed a bill against her for the administration of the estate. The executrix died, at which time title-deeds of the testator's estate were in the hands of her solicitor. She was insolvent, and it was not clear that she was not indebted to the estate. The suit was revived against the administrator *de bonis non*, and a common administration decree was made. The administrator *de bonis non* filed another bill against the solicitor of the executrix for the delivery up of the title-deeds, upon which he claimed a lien for his costs:—Held, overruling a decision of the Master of the

Rolls, that the solicitor had a lien on the deeds for the costs of the suit, inasmuch as the executrix had herself such lien for costs incurred by a trustee in the execution of the trust. That the deeds ought to have been brought into court in the administration suit, subject to any lien of the solicitor, and the Court could have appointed some party under the 4th section of the statute 15 & 16 Vict. c. 86. to represent the estate of the executrix. The Court of appeal directed that the solicitor should have leave to bring the deeds into court in the administration suit, subject to his lien, if any, and not to be delivered out without notice to him. The Court would not determine the question of the executrix being a debtor to the estate in the absence of her personal representative. *Turner v. Lettis*, 24 Law J. Rep. (N.S.) Chanc. 638; 20 Beav. 185.

A and B, solicitors in partnership, had a bill of costs against C. On their dissolution of partnership the costs were transferred to A. Afterwards A, at the request of the client, paid a debt, for which she had deposited title-deeds, and took possession of and afterwards retained the title-deeds. He afterwards continued to act as her solicitor, and costs were increased:—Held, that as to the joint bill of costs there could be no lien in favour of A, if otherwise there would have been a lien; and as to his separate bill of costs, he had taken the deeds as mortgagee and not as solicitor, and therefore had no lien for costs. *Vaughan v. Vanderstegen*, 2 Drew. 409.

A trustee under a will committed a breach of trust by lending trust monies to his co-trustee upon a mortgage for a term of years. An administration suit was instituted, and he was ordered to pay the money into court. He sold part of the mortgaged property under a power of sale in the mortgage, and on the application of two of the *cestuis que trust*, the proceeds were paid into court subject to an order that they were not to be paid out without the consent of the purchaser. The trustees' solicitors refused to give up the mortgage-deeds unless upon payment of their bill of costs:—Held, first, that the circumstances of the realization of the trust fund by the trustees' solicitors, and of the *cestuis que trust* availing themselves of that realization, did not entitle the trustees' solicitors to a lien on the deeds or on the fund in court as against the *cestuis que trust*, but that they could have no higher claim against the deeds or the fund than that of their client the trustee. Secondly, that by instituting an administration suit and obtaining an order against the trustee personally for payment of the trust monies into court (which order had not been obeyed), the *cestuis que trust* had not waived their right to pursue the trust money into the unauthorized investment. *Francis v. Francis*, 5 De Gex, M. & G. 108.

AUTREFOIS ACQUIT.

[See PLEADING IN CRIMINAL CASES.]

AUCTION AND AUCTIONEER.

[See LICENCE—SALE.]

BAIL.

[Affidavits to hold to bail, see ARREST. As to bailable proceedings, bail, and bail in error, see Reg. Gen. Hil. Term, 1853, rr. 81—111; 22 Law J. Rep. (n.s.) xv.; 1 E. & B. App. And as to execution to fix bail, see 17 & 18 Vict. c. 125. s. 90.]

- (A) DEPOSIT OF MONEY IN LIEU OF BAIL.
- (B) BAIL IN ERROR.
- (C) ON REMOVAL OF CAUSES BY HABEAS CORPUS.
- (D) ON REVERSAL OF OUTLAWRY.
- (E) IN CRIMINAL CASES.

(A) DEPOSIT OF MONEY IN LIEU OF BAIL.

Where a defendant is arrested under 1 & 2 Vict. c. 110, and released on depositing with the sheriff the amount indorsed upon the writ, with 10*l.* for costs, which sums are afterwards paid into court, the plaintiff is entitled to have the money paid out of court to him (subject to taxation) if the defendant neglects to pay an additional 10*l.* into court, pursuant to 7 & 8 Geo. 4. c. 71. s. 2. *Nyssen v. Ruyssenaers*, 20 Law J. Rep. (n.s.) Exch. 33; 5 Exch. Rep. 857.

The defendant, who had been arrested on mesne process, in an action for a debt, deposited with the sheriff the amount claimed, together with 10*l.* for costs, in lieu of bail, and the sheriff paid the amount into court. The defendant afterwards put in and perfected bail, but not in due time:—Held, on an application to the Court by the defendant, supported by an affidavit of merits, that the defendant was entitled to have the money paid out to him, and that the plaintiff was not entitled to elect whether he would take the security of the bail or of the money. *Brook v. Brook*, 22 Law J. Rep. (n.s.) Q.B. 81; 1 Bail C.C. 120.

Where a plaintiff replies taking issue on a plea and also demurring to it, pursuant to the Common Law Procedure Act, the defendant on putting in bail before issue is joined on the demurrer, is in time to apply to take out of court money paid in in lieu of bail, which, by the statute 7 & 8 Geo. 4. c. 71. s. 3, he may take out "at any time during the progress of the cause before issue joined in law or fact." *Alcenius v. Nygren*, 23 Law J. Rep. (n.s.) Q.B. 267.

When the money has been paid in by a third party, on the bail being put in and perfected the Court will pay it out to him, if the attorney who gives instructions for the application swears that he is the attorney of the defendant and acts for him, though the defendant himself is abroad. *Ibid.*

(B) BAIL IN ERROR.

[See 15 & 16 Vict. c. 70. s. 151.]

A plaintiff in error who is also plaintiff below is not bound, under the 151st section of the Common Law Procedure Act, to give bail in error, the law as to that point established by preceding statutes not having been altered by that section. *James v.*

Cochrane, 23 Law J. Rep. (n.s.) Exch. 126; 9 Exch. Rep. 552.

(C) ON REMOVAL OF CAUSES BY HABEAS CORPUS.

[See Reg. Gen. Hil. Term, 1853, r. 116; 22 Law J. Rep. (n.s.) xvi.; 1 E. & B. App. xxi.]

The general rule that, where an action against an executor is removed from an inferior court, the defendant is not bound to put in special bail, does not extend to the case of an inferior court, where a custom of foreign attachment exists, which can only be dissolved on putting in special bail. *Bastow v. Gant*, 21 Law J. Rep. (n.s.) Q.B. 377; 13 Q.B. Rep. 807, n.

(D) ON REVERSAL OF OUTLAWRY.

The defendant, who had been outlawed in an action of assumpsit for a debt of 20*l.*, brought a writ of error to reverse the outlawry on matter of fact. He still remained abroad, and appeared on the writ of error by attorney. After verdict in his favour, he obtained a rule for judgment, absolute in the first instance, and signed judgment of reversal of the outlawry, without putting in special bail to the action. The Court, at the instance of the plaintiff, set aside the judgment as irregular, on the ground that the defendant was bound to have put in special bail on signing judgment of reversal, he having appeared by attorney, and the action being brought for a debt exceeding 20*l.* *Commerell v. Beauclerk*, 21 Law J. Rep. (n.s.) Q.B. 137; 1 Bail C.C. 1.

Where a defendant contracted a debt in this country during her residence here, and afterwards *bond fide* resided abroad for many years, and was so residing at the time of outlawry issued against her:—Held, that the outlawry ought to be reversed on the terms of the defendant paying all costs and entering a common appearance. *Boddington v. De Melfort*, 22 Law J. Rep. (n.s.) Exch. 245; 8 Exch. Rep. 671.

(E) IN CRIMINAL CASES.

[As to staying execution of judgment for misdemeanours after giving bail in error, see 16 & 17 Vict. c. 32.]

Where a person has been committed upon a charge of wilful murder, found by a coroner's jury, upon evidence sufficient to support the finding, this Court will not admit him to bail, especially where the accused has made a statement admitting his participation in the affair out of which the charge of murder arises. *Ex parte Baronnet and Re Barthelemy*, 22 Law J. Rep. (n.s.) M.C. 25; 1 E. & B. 1; 1 Dears. C.C.R. 51—60.

BAILMENT.

[See FRIENDLY AND BENEFIT SOCIETIES.]

BANK OF ENGLAND.

[Privileges of, see FRIENDLY AND BENEFIT SOCIETIES.]

BANKERS AND BANKING COMPANY.

(A) JOINT-STOCK BANKING COMPANY.

(a) Powers of Directors and Constitution of Deed of Settlement.

(b) Liability of Members of the Company.

(1) Husband for Wife's Shares.

(2) Shares not transferred according to the Deed of Settlement.

(3) Deceased Partner.

(4) To Proceedings in Bankruptcy.

(5) Liability of Executors for Calls.

(6) *Scire Facias*.

(c) Public Officer—Pleas in Actions by.

(B) BANKERS.

(a) Powers, Liability, and Duty of.

(b) Failure of.

(A) JOINT-STOCK BANKING COMPANY.

[Shares in, see MORTMAIN.]

(a) Powers of Directors, and Constitution of Deed of Settlement.

An action was brought upon an instrument, in the following form, dated the 1st of August 1846:—"We, directors of the Royal Bank of Australia, for ourselves and the other shareholders of the said company, jointly and severally promise to pay to G W, or bearer, on the 1st of August 1851, 200*l*. for value received on account of the company," signed by three directors. The defendants were two directors, one of whom had signed the instrument in question, and four of the shareholders of the company, which was an unregistered joint-stock company:—Held, that, assuming the directors to have authority to bind the company by such an instrument, the whole of the defendants were jointly liable upon it, notwithstanding that it purported also to bind them severally, which it could not do, and notwithstanding that the note was not given in the name of the partnership firm. *MacLae v. Sutherland*, 23 Law J. Rep. (N.S.) Q.B. 229; 3 E. & B. 1.

Annexed to this note were coupons for the payment of half a year's interest on the amount secured by the note in each successive half year subsequent to the date of the note until the period there specified for payment:—Held, that these coupons could not affect the legality of the note. *Ibid*.

The Royal Bank was established for the purpose of carrying on the business of bankers in London and in other parts, including Australia. By the deed of settlement their business was declared to include "the borrowing or taking up monies at interest on receipts or promissory notes, debentures," &c., and the management of the business of the company, and the regulation, investment, and application of its properties, funds, securities, and monies were exclusively vested in the court of directors. The directors, at a regular court, made the above-mentioned instrument and borrowed money upon it to be used as capital for the purpose of remitting it to Australia to be there lent at interest in manner authorized by the deed:—Held, that the directors had no implied authority to issue the note and raise the money in the ordinary course of banking business, but that this was a borrowing or taking up money at interest within the express provisions of

the deed of settlement; and that the directors had, consequently, authority to make such a note upon which a *bonâ fide* holder for value was entitled to recover. *Ibid*.

The plaintiff became possessed of the note by giving its amount and that of the then due and unpaid coupons to A, who acted as agent of the bank, and to whom several notes of the same kind had been sent by the directors for the purpose of raising money, and the amount so received from the plaintiff by A was accounted for by him to the directors. A note of this transaction between A and the plaintiff termed it a "purchase":—Held, that it, nevertheless, amounted to a loan by the plaintiff on the security of the note, and might be recovered as money lent. *Ibid*.

A clause in the deed enabled the directors to issue at any of the banking houses where the business of the company should be carried on, notes or bills payable after date, on demand or otherwise, which it should be lawful or competent for the company to issue under or consistently with the laws for the time being in force in relation to bankers or banking companies:—Held, that this applied only to dealing as a bank of issue, and did not extend to the borrowing of money to be employed in trade upon such an instrument as before mentioned. *Ibid*.

Other clauses in the deed provided for the appointment of trustees in whose names all contracts were to be entered into; and the directors and trustees were enabled to give to the manager or any other person all such powers in regard to signing, &c. promissory notes, &c. on account of the company as the directors should think fit; and no note, &c. signed, &c. in any other manner than by the person so authorized should be binding on the company, and each of the proprietors thereby renounced his right of signing, &c. any note, &c. so as to bind the company, unless he were so authorized:—Held, that this did not interfere with the authority of the directors to borrow money on promissory notes or debentures, the object being only to disable any shareholders from signing, &c. such securities unless previously authorized by the trustees and directors. *Ibid*.

Held, also, under the circumstances of the case, that if there were any irregularity in the original transaction, the defendants had rendered themselves liable by subsequent ratification. *Ibid*.

(b) Liability of Members of the Company.

(1) Husband for Wife's Shares.

The defendant's wife, before marriage, was possessed of, and registered as the owner of, some shares in a joint-stock banking company. After her marriage, her maiden name remained on the list of shareholders; and she then, though without her husband's knowledge, received dividends and paid calls in respect of these shares. The defendant never did any act to take to himself the benefit of the shares, or to have them transferred into his own name, or to sell them; on the contrary, he refused to have anything at all to do with them. The company's deed of settlement provided, that the husband of a female shareholder should not be a member of the company in respect of the shares of his wife vested in him by the marriage; but that he might either sell them, or on complying with certain provisions of the deed,

have them transferred into his own name, and then become a member of the company:—Held, that on a judgment recovered against the public officer of the company, a *scire facias* to levy execution under stat. 7 Geo. 4. c. 46. s. 13. can only issue against those who are members of the company according to the provisions of the deed of partnership; and that as the defendant had not complied with those provisions, he was not liable to a *scire facias* as a member of the company in respect of his interest in his wife's shares. *Dodgson v. Bell* (in error), 20 Law J. Rep. (N.S.) Exch. 137; 5 Exch. Rep. 967; 1 L. M. & P. P. C. 812.

(2) *Shares not transferred according to the Deed of Settlement.*

Scire facias issued on the 24th of January 1848, against the defendant, as a member for the time being of a banking copartnership, on a judgment obtained against their public officer. Plea, that at the time of the issuing of the writ the defendant was not a member of the copartnership. The facts were as follows:—In July 1847, the defendant, who was an original shareholder, agreed, through a broker, to sell his shares to one T. The broker accordingly went to the bank and there delivered to a clerk a notice, dated the 21st of August 1847, of the defendant's intention to dispose of his shares. On the notice paper were printed three clauses, extracted from the copartnership deed of settlement, one of which stipulated that no person should be registered as a shareholder without the consent of the board of directors, who might testify the same by a certificate signed by three directors, a form of which was given. Another clause provided that before such certificate should be given, the price to be received for the shares proposed to be transferred should be sent in writing by the vendor to the board of directors. The third clause stipulated, that in case the board of directors should refuse their consent, they should, at the request of the holder, be compelled to buy the shares. The broker also delivered to the clerk the defendant's certificate of his shares, and inquired if the transfer would be allowed. The clerk went into the manager's room, and returned stating that the transfer of the shares would be accepted. On the 25th of August T paid the defendant for the shares, and on the next day received a certificate, signed by three directors, certifying that he was the proprietor of these shares, and that they stood in his name in "The Share Register Book." No consent to the transfer was ever given by a board of directors; but the certificate, which was not in the form prescribed by the above clause, was signed first by the managing director, and afterwards by two others separately, at their private houses. T, on receiving this certificate, signed a receipt, which was delivered to and kept by the Bank, in which T stated that he was the holder of these shares, and that having executed the deed of settlement, he agreed to abide by the rules and regulations of the company. The managing directors shortly afterwards caused the transfer to be entered in "The Share Register Book." On the 14th of January 1848, a board of directors having met, directed an entry to be made, declaring the transfer to T null and void. All transfers of shares for four or five years past had been made in the manner above stated. Between August and January, seven

ral circulars were sent by the board to shareholders, including T; but previously to the 7th of January 1848 none had been sent to the defendant:—Held, that there was no such consent by a board of directors to the transfer, as was required by the deed of the company; and therefore that the defendant continued liable as a shareholder. *Bosanquet v. Shortridge*, 20 Law J. Rep. (N.S.) Exch. 57; 4 Exch. Rep. 699.

Quære—whether, if three directors had given a certificate, pursuant to the 144th clause in the deed, the parties transferring and receiving the shares might not have treated that certificate as conclusive evidence of a due consent by the board. *Ibid.*

(3) *Deceased Partner.*

In April 1847, a joint-stock banking company, carrying on business under the provisions of the 7 Geo. 4. c. 46. of which A was a member, became indebted to B in the sum of 5,000*l.* A continued to be a partner until his death, and died in December, 1847. In April 1848, B recovered judgment against the public officer of the company. In December 1848, the usual decree for accounts was made in a suit for the administration of the estate of A. B presented a petition for liberty to go in before the Master and prove, as a creditor against A's estate, for 5,000*l.* and interest. The petition did not state that the bank had ceased to carry on business, or that any proceedings had been taken to enforce the judgment against the existing partners. The petition was dismissed. *Heward v. Wheatley*, 21 Law J. Rep. (N.S.) Chanc. 854; 5 De Gex & Sm. 552.

(4) *To Proceedings in Bankruptcy.*

A member of a banking company, established under 7 Geo. 4. c. 46, cannot be proceeded against in bankruptcy for a debt due from the company, no judgment for such debt having been recovered against the public officer of the company, although the company may have ceased to carry on business, and an order has been obtained for winding it up under 11 & 12 Vict. c. 45, prior to such proceedings in bankruptcy. *Ex parte Wood*, 1 Mont. D. & D. 92; s. c. 9 Law J. Rep. (N.S.) Bankr. 20, overruled. *Davidson v. Farmer*, 20 Law J. Rep. (N.S.) Exch. 177; 6 Exch. Rep. 242.

(5) *Liability of Executors for Calls.*

In a suit for the administration of the estate of a deceased shareholder in a joint-stock banking company, the registered public officer presented a petition praying leave to prove as a creditor for the amount of a call made since the death of the shareholder in respect of the shares:—Held, overruling the decision of the Court below, that the deceased shareholder, having covenanted to pay all calls, and the shares having vested in his executors, as part of his estate, they by law became entitled to the benefit of the deed, and were liable for the calls, there being nothing in the deed of settlement of the company overruling the rule of law. *Heward v. Wheatley*, 22 Law J. Rep. (N.S.) Chanc. 435; 3 De Gex, M. & G. 628.

(6) *Scire Facias.*

The rule for a *sci. fa.* against members for the

time being of banking companies under the 7 Geo. 4. c. 46. is absolute in the first instance; and is not moved in open court. *Harrison v. Tysan*, 1 Bail C.C. 111.

(c) *Public Officer, Pleas in Action by.*

In an action by the public officer of a banking co-partnership, the Court allowed a plea denying that the co-partnership were, at the commencement of the suit, carrying on the business of bankers, in addition to pleas of non-assumpsit and accord and satisfaction. *Roe v. Fuller*, 21 Law J. Rep. (N.S.) Exch. 104; 7 Exch. Rep. 220.

(B) BANKERS.

(a) *Powers, Liability, and Duty of.*

[See AMENDMENT (K), and see **BILLS AND NOTES; CHEQUES.**]

A bill of exchange drawn by A was accepted payable at a bank. A, who was a customer of the bank, discounted the bill with them, and the bank re-discounted it and indorsed it over to a third party. On the day when the bill became due it was presented at the bank for payment by the holder, and there being no funds of the acceptor then in their hands, the bank, having paid it, instead of debiting the acceptor's accounts with the amount, carried it to a separate account as an unpaid bill. The acceptor not having provided funds in the course of the day, the bank sent notice of its dishonour to the drawer on the next morning, and debited his account with it. In an action by A against the bank for money lent, in which the defendants set off the amount of the bill, the jury found that the bank paid the bill as indorsers of it, and not as agents of the acceptor:—Held, that the jury were justified in assuming that the bank treated the bill as dishonoured and paid it in their character of indorsers, and not as agents of the acceptor; and that they were entitled to set it off. *Pollard v. Ogden*, 22 Law J. Rep. (N.S.) Q.B. 439; 2 E. & B. 459.

The local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account, that higher interest might be obtained for her money if she purchased two houses for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a fresh deposit note for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss:—Held, in an action against them, that they were liable, the jury having found that the manager inteded and induced the lady to believe that he was acting as the agent of the bank, and also that as local manager he had authority from the bank to make an assignment of an equitable mortgage. *Thompson v. Bell*, 23 Law J. Rep. (N.S.) Exch. 321; 10 Exch. Rep. 10.

(b) *Failure of.*

M W deposited certain country bank notes, payable in London, representing 80l. in value, with a banking company, and received the following memorandum, signed by the manager:—"Received of M

W 80l., for which we are accountable. 80l., at 3l. per cent. interest, with fourteen days' notice." The notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and refused payment. They were re-transmitted by that night's post to the banking company, who on the following day gave notice of dishonour to M W, and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M W made the deposit with the banking company, but neither M W nor the banking company were then aware of this:—Held, that, under the above circumstances, M W could not maintain an action, either for money lent or for money had and received, against the banking company. *Timmis v. Gibbins*, 21 Law J. Rep. (N.S.) Q.B. 403; 18 Q.B. Rep. 722.

BANKRUPTCY.

[Submission to arbitration by bankrupts, see title **ARBITRATION (B) (a).**]

- (A) JURISDICTION OF THE COURT OF BANKRUPTCY AND COMMISSIONERS.
- (B) PERSONS LIABLE TO BE BANKRUPT.
- (C) ACT OF BANKRUPTCY.

- (a) *Fraudulent Execution.*
- (b) *Fraudulent Transfer.*
- (c) *Trader Debtor Summons.*

- (D) PETITIONING CREDITOR.

- (a) *Who may be.*
- (b) *What Debts will support the Petition.*
- (c) *Proof of Debt, in Actions.*

- (E) ADJUDICATION.

- (a) *Petition for.*
- (b) *Time for contesting.*
- (c) *Defective Proceedings.*
- (d) *Annulling.*

- (F) PROOF OF DEBT.

- (a) *Annuity.*
- (b) *Covenant.*
- (c) *Promissory Note.*
- (d) *Judgment.*
- (e) *Award.*
- (f) *Calls.*
- (g) *Costs.*
- (h) *Contingent Debts and Liabilities.*
- (i) *By Partner.*
- (j) *By Savings Bank.*
- (k) *By Surety.*
- (l) *By Servant.*
- (m) *Priority.*
- (n) *Amount proveable.*
- (o) *Effect of.*

- (G) MORTGAGES AND LIEN.

- (H) ASSIGNEES.

- (a) *Official Assignee.*
- (b) *Removal of.*
- (c) *Rights and Liabilities.*
- (d) *What Property passes to.*
 - (1) *In general.*
 - (2) *Order and Disposition and reputed Ownership.*
- (e) *Actions and Suits.*
 - (1) *When maintainable.*

- (2) Damages.
- (3) Pleading and Evidence.
- (f) Allowance of Costs.

- (I) TRANSACTIONS PROTECTED BY STATUTE.
- (J) WARRANTS OF ATTORNEY, JUDGES' ORDERS, AND EXECUTIONS.
- (K) OF THE BANKRUPT.
 - (a) Surrender.
 - (b) Examination.
 - (c) Allowance to.
 - (d) Arrest and Discharge.
- (L) ARRANGEMENT WITH CREDITORS.
 - (a) Under the Control of the Court.
 - (b) By Deed.
- (M) CERTIFICATE OF CONFORMITY.
 - (a) Grant of, in general.
 - (b) Opposing.
 - (c) Form of.
 - (d) Concealment of Property and withholding Information.
 - (e) Gaming.
 - (f) Conduct of Bankrupt as a Trader.
 - (g) Effect of, as a Discharge.
 - (h) Reference back by Court of Appeal.
 - (i) Conditional Certificate.
- (N) PRACTICE IN GENERAL.
- (O) INSPECTION OF DOCUMENTS.
- (P) SOLICITOR.
- (Q) MESSENGER AND OTHER OFFICERS.
- (R) COSTS IN.
- (S) DIVIDENDS.

(A) JURISDICTION OF THE COURT OF BANKRUPTCY AND COMMISSIONERS.

[See 14 & 15 Vict. c. 52. as to Commissioners' power to grant warrants for arrest of absconding debtors.]

The statute 12 & 13 Vict. c. 106. has transferred all questions as to the discharge of a bankrupt to the Court of Bankruptcy. *Walker v. Edmundson*, 20 Law J. Rep. (n.s.) Q.B. 186; 1 L. M. & P. P.C. 772.

The primary jurisdiction in Bankruptcy being, by the 12th section of the statute 12 & 13 Vict. c. 106, transferred to the Commissioners, and the jurisdiction of the Vice Chancellor under that act having been exclusively appellate and transferred to the Court of Appeal by the statute 14 & 15 Vict. c. 83, the Court of Appeal cannot order the payment of money out of the Bankruptcy Court, unless the application be made by way of appeal from a Commissioner. *In re Cheetham*, 21 Law J. Rep. (n.s.) Bankr. 5.

The Commissioner has jurisdiction to annul an adjudication for equitable invalidity. *Ex parte Johnstone*, in *re Johnstone*, 4 De Gex & Sm. 204.

In a case in which, under the Bankrupt Law Consolidation Act, the Commissioner had jurisdiction to make an order, the Court declined interfering in the first instance. *Ex parte Cheetham*, in *re Cheetham*, 2 De Gex, M. & G. 223.

The Registrar of a district, where there are two Commissioners, may, during vacation time, sit as the Court. *Ex parte Barnett*, in *re Barnett*, 20

Law J. Rep. (n.s.) Bankr. 3; 4 De Gex & Sm. 54, *nom. Ex parte Barnett*.

Whether the Court of appeal has any discretion as to annulling an adjudication of bankruptcy, or whether it is not bound to decide the legal question of its validity or invalidity, *quære*. *Ibid*.

Quære, whether an order of transfer of a petition for adjudication and of the proceedings thereunder, made by a registrar as deputy for a Commissioner (the Senior Commissioner being absent), there being no case of urgency shewn, and the order being made *ex parte*, is regular. *Ex parte Bilson*, in *re Steele*, 24 Law J. Rep. (n.s.) Bankr. 25.

A petition to annul an adjudication after advertisement in the *Gazette*, must be presented to the Vice Chancellor sitting in Bankruptcy. After the advertisement, the Commissioner has no jurisdiction to entertain a petition to review his adjudication—stat. 12 & 13 Vict. c. 106. ss. 12, 104, 233. *In re Carter*, *ex parte Carter*, 21 Law J. Rep. (n.s.) Bankr. 23.

Where, under the 5 & 6 Vict. c. 122, the Commissioner has refused the bankrupt his certificate, he has no jurisdiction to review his decision. The 12 & 13 Vict. c. 106. does not enable the Commissioner to review his decision, except upon the special grounds set forth in the 207th section of that act. *Ex parte Higginson*, in *re Higginson*, 22 Law J. Rep. (n.s.) Bankr. 11; 1 De Gex M. & G. 204.

Power of Commissioner to make order for sale of goods in the reputed ownership of the bankrupt after an actual sale by a mortgagee. *Ex parte Barlow*, in *re Marygold*, 22 Law J. Rep. (n.s.) Bankr. 15; 2 De Gex, M. & G. 921.

A junior Commissioner of the London Court of Bankruptcy, after the senior Commissioner had transacted all the business before him, and left the court for the day, made an order for the transfer of a petition for adjudication and all proceedings thereunder from a country district to London. The bankrupt resided and had his property in the country district, but the great majority in value of his creditors lived in London, and elsewhere out of the country district. The senior Commissioner treated the order of transfer as a nullity, as being *ultra vires*, his absence not being an "unavoidable absence" within the 20th section of the statute, and ordered the proceedings to be re-transferred to the country district:—Held on appeal, first, that the junior Commissioner had, in such absence of the senior Commissioner, jurisdiction to make the order of transfer; secondly, that the order of the junior Commissioner was properly within the 90th section of the statute; and, thirdly, that the order of the senior Commissioner to remove back the proceedings while the order of the junior Commissioner was undischarged, was *ultra vires*. *Ex parte Sewell*, in *re Shaw*, 22 Law J. Rep. (n.s.) Bankr. 29; 3 De Gex, M. & G. 508.

(B) PERSONS LIABLE TO BE BANKRUPT.

[As to who is a scrivener, see *Harman v. Johnson*, ATTORNEY AND SOLICITOR.]

A solicitor was adjudicated bankrupt as a scrivener on evidence clearly establishing the fact; on appeal against the adjudication, he was examined, and the Court being satisfied that upon the additional evidence, he was not a scrivener within the meaning of the bankrupt law, annulled the adjudication; Lord

Justice Knight Bruce expressing his agreement in the decision only on the authority of cases determined by Lord Eldon and Lord Chief Justice Gibbs. *Ex parte Dufaur, in re Dufaur*, 21 Law J. Rep. (N.S.) Bankr. 38; 2 De Gex, M. & G. 246.

Quære—whether a person who sells goods for another on commission, but does not buy, is a trader within the Bankruptcy Law Consolidation Act, 1849. *Hernemann v. Barber*, 23 Law J. Rep. (N.S.) C.P. 145; 14 Com. B. Rep. 583.

A man farming 271 acres kept cows, never more than six in number, and regularly sold milk, and sometimes butter. His intention in keeping the cows was to sell milk, and if he had not done so, the keeping of so many would have been unprofitable. It would not have been bad farming if he had kept no cows, but cows, to the extent he kept them, were the most profitable stock:—Held, that he was not a trader liable to be made a bankrupt as a “cow-keeper” within the bankrupt laws—confirming *Ex parte Dering, re Cramp. Bell v. Young*, 24 Law J. Rep. (N.S.) C.P. 66; 15 Com. B. Rep. 524.

(C) ACT OF BANKRUPTCY.

(a) *Fraudulent Execution.*

A trader, who was indebted to several creditors in a sufficient sum to form a petitioning creditor's debt, caused his goods to be taken in execution by the plaintiff, another creditor, with intent to defeat or delay his creditors, and the plaintiff obtained the goods by bill of sale from the sheriff, by way of fraudulent preference; after which the defendant took them as a distress for rent. The trader subsequently filed a declaration of insolvency, and on this a fiat was obtained before the Bankruptcy Consolidation Act, 1849, came into operation, and he was adjudged a bankrupt on his own petition. The plaintiff then sued the defendant, alleging, in the first count, that the latter had maliciously distrained for more rent than was due, and in the second, that he had taken an excessive distress. A third count was in trover. After the commencement of the action the assignees gave notice to the plaintiff that they intended to treat the execution as void, and they also gave notice to the defendant claiming the goods and damages from him for the illegal distress:—Held, that the first count was bad, affirming *Tancred v. Leyland*, and that the insertion of the word “maliciously” could not make that actionable which was no legal injury without it. *Stevenson v. Newnham*, 22 Law J. Rep. (N.S.) C.P. 110; 13 Com. B. Rep. 285.

Held, also, that as the fiat and adjudication proceeded on the bankrupt's own petition, the title of the assignees could not relate back further than to the act of bankruptcy on which the fiat proceeded, and, therefore, that it did not relate back to the time of the fraudulent execution; but that the case would have been otherwise had the fiat been obtained on the petition of creditors, and possibly so if the adjudication had proceeded on their petition, though the fiat had issued on the petition of the trader. *Ibid.*

Held, further, that the assignees had a right to disaffirm the fraudulent execution and claim the goods, as the transaction was voidable but not void, but (*dissentiente Erle, J.*) that such disaffirmance had no relation back, and that the goods, at the time of the seizure by the defendant, and until the assignees assumed their rights, were the plaintiff's property,

and, consequently, that he was entitled to maintain an action for the illegal taking. *Ibid.*

(b) *Fraudulent Transfer.*

Semble—that an assignment, though made *bond fide*, of the whole of a trader's stock for the price of a part, not because the trader is obliged under pressure to sell his stock for less than its value, but because an old debt is taken as part of the price, though the moving cause of the transfer may be a new advance, is a fraudulent transfer, constituting an act of bankruptcy within the 12 & 13 Vict. c. 106. s. 67. At all events, such assignment is an act of bankruptcy, even without fraud in fact, if it conveys all the trader's property including the sum advanced, and professes to give the assignee a right to take the trader's future-acquired property upon non-payment of his debt within a certain time.—*Siebert v. Spooner, Lindon v. Sharpe*, and *Whitwell v. Thompson* considered. *Graham v. Chapman*, 21 Law J. Rep. (N.S.) C.P. 173; 12 Com. B. Rep. 85.

Y, a trader, agreed to make an assignment of all her property in business to C, in consideration of his paying a debt then due by Y to L. The debt was paid by C directly to L, and an assignment of all Y's property to C afterwards executed to secure the repayment of the amount of such debt, with interest. The assignment contained a covenant, that in default of repayment by Y in the manner specified in the deed, it should be lawful for C to possess himself of, as well all the property assigned, as also all other property that might afterwards, during the continuance of the security, be upon the premises in which Y carried on her business, and to sell and dispose of the same, and reimburse himself the debt and interest and all expenses, and to pay the residue to Y. The assignment also provided that Y should continue in possession of the property until default in repayment; and, subsequently, Y, being unable to pay, sold the property, and out of the proceeds repaid the sum advanced by C, and afterwards became bankrupt:—Held, in an action by the assignees of Y to recover back the sum repaid by her to C (the jury having expressly found that the assignment was not made to delay creditors nor in contemplation of bankruptcy), that the assignment was to be considered as made in consequence of and to secure a present advance by C to the bankrupt, of which the bankrupt had the full benefit at the time, and did not, therefore, in itself, amount to an act of bankruptcy, although it contained a covenant enabling C to take and dispose of future-acquired property. *Hutton v. Crutwell*, 22 Law J. Rep. (N.S.) Q.B. 78; 1 E. & B. 15.

G, a farmer, who became liable to the bankrupt laws, as a trader, by possessing two shares in a joint-stock bank, worth less than 20l. each, conveyed all his other property, worth about 3,000l., to a creditor to secure his debt of 900l.:—Held, that the conveyance might be an act of bankruptcy as a fraudulent grant with intent to defeat or delay creditors, although the two shares, which were G's only trading property, were not conveyed, and although the conveyance did not stop G's trade as a banker. *Smith v. Cannan* (in error), 22 Law J. Rep. (N.S.) Q.B. 290; 2 E. & B. 35.

Held, further, that the conveyance being of property worth three times the amount of the debt

which it was given to secure, did not prevent the deed being an act of bankruptcy; for, though the grantee would be a trustee for G as to the amount beyond his own debt, the property could not be taken in execution; and as the common law remedies of the other creditors against their debtor's property would thus be barred, they might consequently be defeated or delayed. *Ibid*.

Where a trader assigns part of his property by way of mortgage, the question under the bankrupt laws is, not whether putting the deed in force will put an end to his business, but whether it will make him insolvent. *Young v. Waud*, 22 Law J. Rep. (n.s.) Exch. 27; 8 Exch. Rep. 221.

A manufacturer assigned all his machinery by way of mortgage to secure the amount of certain bills drawn by him and accepted by the consignees of his goods, which had been discounted by the mortgagee, and also of such other bills as should from time to time be discounted in like manner.

The mortgagee was empowered, after three days' notice, to enter and take possession of all the machinery, and, after the sale of the same, to pay the amount of the expenses and the bills then due or running, and to pay the surplus to the mortgagor. At the time of the execution of this deed, the machinery was worth 1,500*l.*, and the mortgagor's property consisted of goods 1,100*l.*, and good debts 900*l.*, while his whole liabilities were 2,900*l.*:—Held, that this deed was no evidence of an act of bankruptcy, although, had it been acted upon, the mortgagor could not have carried on the particular business in which he was engaged. *Ibid*.

A trader whose goods had been seized under a *fi. fa.* executed a bill of sale of them to the defendant, who paid out the sheriff; the jury found that the object of the transaction was not merely to relieve the trader from a forced sale, but to protect the goods from other creditors:—Held, that the sale was void under the 13 Eliz. c. 5, and an act of bankruptcy. *Graham v. Furber*, 23 Law J. Rep. (n.s.) C.P. 51; 14 Com. B. Rep. 410.

Semble—That it was void also as to persons who became creditors subsequent to the transaction, if they were thereby delayed or defrauded. *Ibid*.

The creditors of a bankrupt having assented to a composition of 3*s.* 6*d.* in the pound, to which the plaintiff, who was a creditor, was not a party, the same creditors afterwards signed a petition for annulling the adjudication of bankruptcy, which the plaintiff refused to sign unless the defendant would give him his guarantee for 167*l.*, in part payment of his debt. The defendant accordingly, without the knowledge of the other creditors, gave the plaintiff the guarantee, whereupon the latter signed the petition:—Held, in an action on the guarantee, that the same was not in contravention of the Bankrupt Law Amendment Act, 12 & 13 Vict. c. 106. s. 268, and was not fraudulent. *Smith v. Saltzman*, 23 Law J. Rep. (n.s.) Exch. 177; 9 Exch. Rep. 535.

In August 1853, and for some months following, a retail draper, who afterwards became bankrupt, bought large quantities of goods on credit, and in November, and for some months subsequently, sold them, from time to time, to the defendant, who was a job-dealer, at prices considerably below their real value:—Held, that in the absence of proof of the bankrupt's intention to decamp with the money, or

otherwise defraud his creditors, and of the buyer's knowledge of such intention, such sales were not of themselves acts of bankruptcy as amounting to a "fraudulent transfer," within the Bankrupt Act. *Lee v. Hart*, 24 Law J. Rep. (n.s.) Exch. 71; 10 Exch. Rep. 71.

A trader assigned to particular creditors, by a deed dated the 20th of December, at their instance, and on their threatening proceedings, all his debts, bills of exchange, promissory notes and other securities, and all books of account, as a security for their debt. At this time, although the fact was not known to the trader, writs on two judgments which some time before had been obtained against him, were lodged in the hands of the sheriff. Two days after the deed, the sheriff seized the trader's stock-in-trade and furniture. The next day, the petition for adjudication was presented, and the day following the trader was adjudged bankrupt. The particular creditors claimed the property comprised in the deed, but the Commissioner disallowed the claim, and declared the deed void as against the general creditors. On appeal, the decision of the Commissioner was affirmed; the Court holding that the deed being a transfer of so much of his estate and effects as rendered it impossible for him to carry on his trade in the ordinary and usual course, although executed under pressure, and although it was the unwilling act of the trader, was void as against the general body of the creditors; and, *semble*, was also an act of bankruptcy within the 67th section of the Bankrupt Act. *Ex parte Bailey, in re Barrell*, 22 Law J. Rep. (n.s.) Bankr. 45; 3 De Gex, M. & G. 534.

(c) Trader Debtor Summons.

[See *Fairlie v. Danks*, title ACTION (A) (j).

Where a creditor files an affidavit of debt under the Bankruptcy Consolidation Act (12 & 13 Vict. c. 106. s. 78.) he is bound to notice and deduct any sum due to the debtor arising out of the same transaction as that out of which his own debt arises, and to claim for the difference only; and if he omits to do so, he will be held not to have had reasonable or probable cause for making the affidavit in the amount at which it was made. *Marshall v. Sharland*, 20 Law J. Rep. (n.s.) Q.B. 3; 15 Q.B. Rep. 1051.

Where, therefore, in an action for goods sold and delivered the plaintiff sought to recover the price of a cargo of coals, the freight of which he was bound to pay to the captain of the vessel before they could be discharged, and the defendant proved at the trial, as a set-off, payment of the freight, and reduced the verdict for the plaintiff by that amount, it was held, that the plaintiff had not any reasonable or probable cause for making an affidavit of debt in the Bankruptcy Court for the full price of the coals without deducting the amount paid by the defendant for freight; and the Court, under 12 & 13 Vict. c. 106. s. 86, ordered that the defendant should have the costs of the suit. *Ibid*.

Where a creditor has filed an affidavit of a sufficient debt and given his debtor, a trader, notice to pay, and summoned him before the Court of Bankruptcy, and the debtor files an admission that he owes part of the demand, and makes a deposition that he believes that he has a good defence as to the residue, and is excused by the Commissioner of

Bankrupts from entering into a bond to secure it, though the debtor fail for more than seven days after the filing of the admission to pay the admitted portion of the demand, he does not thereby commit an act of bankruptcy within the meaning of the Bankruptcy Consolidation Act, 12 & 13 Vict. c. 106. *Oldfield v. Dodd* (in error), 22 Law J. Rep. (N.S.) Exch. 144; 8 Exch. Rep. 578.

A creditor, a wholesale dealer, issued a summons under the 78th section of the act, demanding payment of money due from a retail dealer in the same line of business, and described the items in the particulars of demand as "goods":—Held, that this described with sufficient certainty the wares supplied, so as to prevent the annulling of the adjudication on the ground of uncertainty. The situation of parties and nature of demand are to be considered in determining what is convenient certainty. *Ex parte Bower, in re Bowers*, 21 Law J. Rep. (N.S.) Bankr. 61; 1 De Gex, M. & G. 468.

Where a creditor has issued a summons to his debtor, and the debtor attends and admits part of the debt and tenders the part he admits, the creditor may by his conduct render it unnecessary for the debtor to actually produce and shew the money in order to comply with the requirements of the 82nd section of the 12 & 13 Vict. c. 106. *Ex parte Danks, in re Farley*, 22 Law J. Rep. (N.S.) Bankr. 73; 2 De Gex, M. & G. 936.

Quære—whether, under the same section, it is necessary that the same proof of tender should be given as would be necessary to support a plea of tender in an action, their Lordships not agreeing upon the point. *Ibid*.

A trader debtor was summoned under the 78th section of the Consolidation Act, 12 & 13 Vict. c. 106, and deposed that upon the merits he had a good defence:—Held, overruling a decision of the Commissioner, that it is not imperative, under the 79th section, to require a bond with sureties to be given as a security for the amount demanded, and costs. *Ex parte Wood, in re Wood*, 23 Law J. Rep. (N.S.) Bankr. 3; 4 De Gex, M. & G. 875.

The trader was indebted to his creditor on a balance of account arising from contracts between them for sale and re-sale of tallow, the whole transactions being effected by the delivery and re-delivery of dock warrants, and the amount of the debt was the excess of the price of tallow at stated times for the completion of contracts on sales by the creditor to the trader over the price of re-sale at such stated times from the trader to the creditor:—Held, that in the particular circumstances of this individual case, the Court was bound to exercise its judicial discretion by declaring that the bond, with sureties, should not be required, and therefore discharged the order of the Commissioner requiring such bond, and dismissed the summons. *Ibid*.

A party claiming to be a creditor took out a summons against his debtor under the 78th section of the statute 12 & 13 Vict. c. 106, and the debtor thereupon appeared and admitted the debt; before the seven days limited by the 81st section for his tender or offer of payment or composition, or security of or for the debt, he filed a petition under the arrangement clauses, 211, &c., and obtained protection from all process until further order. Eleven days after this the creditor filed a petition for adjudication

founded on the admission:—Held, that the creditor (having satisfactorily explained his delay of eighteen days from the taking out of the summons) could not be defeated by the proceedings of the debtor under the arrangement clauses. *Ex parte Walker, in re Haywood*, 24 Law J. Rep. (N.S.) Bankr. 26.

(D) PETITIONING CREDITOR.

(a) Who may be.

Whether a judgment creditor who has taken his debtor in execution is a good petitioning creditor to support a commission of bankruptcy, *quære*. *Walker v. Edmondson*, 20 Law J. Rep. (N.S.) Q.B. 186; 1 L. M. & P. P.C. 772.

(b) What Debts will support the Petition.

A judgment debt is a good debt on which to found a petition in bankruptcy, although the debtor has been taken in execution under a *ca. sa.* and subsequently and before the date of the petition discharged from custody under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, and the debt duly inserted in the schedule. *Watson v. Humphrey*, 24 Law J. Rep. (N.S.) Exch. 190; 10 Exch. Rep. 781.

Where the petitioning creditor had before petitioning for adjudication arrested the bankrupt for the petitioning creditor's debt, and detained him in custody till he was discharged on his petition to the Insolvent Debtors Court, the Court of Appeal refused to annul the adjudication on that ground, until its validity had been tried at law. *Ex parte Watson, in re Watson*, 5 De Gex, M. & G. 396.

P & B were engaged in partnership, and W being about to join them in the business, stipulated that J B, the father of B, should covenant with him that the debts due to P & B would realize a stated sum, and if not, he would, on demand of W, pay so much as it fell short of that sum to P, B & W; and also should covenant with W that the debts owing by P & B did not exceed a stated sum, and if they did, J B would, on the demand of W, pay to P, B & W, or the person or persons to whom the same might be due, the excess over that sum. The partnership of P, B & W was formed, and the covenants entered into accordingly. W made a demand for payment of a sum which appeared to be due from the firm of P & B, over the stated sum, and not being paid, an adjudication of bankruptcy was pronounced and affirmed against J B, who appealed; and it was held, that the covenant was not to pay a stated or liquidated sum, but that the remedy of it lay in damages, and being so, the demand did not constitute a good petitioning creditor's debt, and the adjudication was, therefore, annulled. *Ex parte Broadhurst, in re Broadhurst*, 22 Law J. Rep. (N.S.) Bankr. 21; 2 De Gex, M. & G. 953.

A trader while carrying on trade gave a bond. The creditor obtained judgment by default after the trader ceased to carry on his business. The creditor then presented a petition for adjudication in bankruptcy, and the Commissioner at first adjudged the trader a bankrupt, but on cause being shewn the Commissioner annulled the adjudication, on the ground that there was not a good petitioning creditor's debt. The petitioning creditor appealed:—Held, that the original adjudication was correct, and must stand. *Ex parte Griffiths, in re Mostyn*, 22

Law J. Rep. (N.S.) Bankr. 50; 3 De Gex, M. & G. 174.

The Court having, under the above circumstances, supported the adjudication, it refused an application by the bankrupt to state at once a special case for the opinion of the House of Lords, under the provisions of the 18th section of the Bankrupt Law Consolidation Act; but deferred the consideration of the application until the proceedings before the Commissioner were completed. *Ibid.*

Landlords who had distrained, and to whom in addition to arrears of rent, a sum was due from the tenant exceeding 50*l.* for goods sold and delivered, petitioned for adjudication in bankruptcy against him:—Held, that they were not bound to forego their distress. *Ex parte Bell, in re Taylor*, 4 De Gex & Sm. 597.

(c) *Proof of Debt, in Actions.*

In an action by the assignees of a bankrupt, if the defendant does not give notice that he will dispute the petitioning creditor's debt, under the 12 & 13 Vict. c. 106. s. 234, he must be taken to admit it for all purposes. *Hernemann v. Barber*, 23 Law J. Rep. (N.S.) C.P. 145; 14 Com. B. Rep. 583.

Therefore, where a defendant had given notice that he would dispute the trading, but no notice that he would dispute the petitioning creditor's debt, and the Judge at the trial nonsuited the plaintiffs on the ground that the petitioning creditor's debt did not exist at the time of the trading proved, the Court set aside the nonsuit—confirming *Porter v. Walker*. *Ibid.*

(E) ADJUDICATION.

(a) *Petition for.*

Where the fiat and adjudication proceeded on the bankrupt's own petition,—Held, that the title of the assignees could not relate back further than to the act of bankruptcy on which the fiat proceeded, and, therefore, that it did not relate back to the time of a fraudulent execution; but that the case would have been otherwise had the fiat been obtained on the petition of creditors, and possibly so if the adjudication had proceeded on their petition, though the fiat had issued on the petition of the trader. *Stevenson v. Newnham* (in error), 22 Law J. Rep. (N.S.) C.P. 110.

(b) *Time for contesting.*

The Isle of Man is not within the United Kingdom; and therefore a person residing there at the time of an adjudication of bankruptcy against him, has three months within which he may contest the validity of the fiat or petition for adjudication, under 5 & 6 Vict. c. 122. s. 24, or 12 & 13 Vict. c. 106. s. 233. *Davison v. Farmer*, 20 Law J. Rep. (N.S.) Exch. 177; 6 Exch. Rep. 242.

Four partners were adjudicated bankrupts. Two resided abroad. The adjudication was made on the 8th of November. On the 13th notice was given of an application, on behalf of the partners abroad, to suspend the advertisement. On the 17th the meeting was held to shew cause against the issue of the advertisement, and the application was then made. The Commissioner refused to suspend the issue of the advertisement on the ground that, as the application was not made within seven days from the

adjudication, he had no authority, under the 104th section of the 12 & 13 Vict. c. 106, to do so:—Held, upon appeal, that "such extended time" mentioned in the section meant "further or longer time" not exceeding fourteen days; and that the notice having been given within the seven days everything was *in fieri*, and the Commissioner had authority to grant the application. The matter was, therefore, sent back to the Commissioner. *In re Castelli*, 21 Law J. Rep. (N.S.) Bankr. 5; 1 De Gex, M. & G. 437.

Where a bankrupt does not contest the validity of an adjudication of his bankruptcy before a Commissioner within the period prescribed by the 104th section of the Act, 12 & 13 Vict. c. 106. for shewing cause against such adjudication, the Commissioner has after that period no authority to entertain an application to review the adjudication, either under that section or under the 233rd section. *Ex parte Carter, in re Carter*, 1 De Gex, M. & G. 212.

The Registrar sitting for the Commissioner extended the time for shewing cause against an adjudication to a specified day. When the time arrived the parties attended, and the Registrar (who has not the power under the Act of reversing an adjudication) again sat for the Commissioner, and further adjourned the time for shewing cause beyond the extended time authorized by the Act:—Held, that the hearing was then commenced sufficiently to authorize the adjournment as of a part heard case, and that the Registrar sitting for the Commissioner could so adjourn it. *Ex parte Washbourne, in re Roberts*, 4 De Gex & Sm. 193.

(c) *Defective Proceedings.*

A fiat issued against the plaintiff, on the 20th of July 1849, upon a debt due from a banking company, in which he was a member, to G, the petitioning creditor, without any judgment having been obtained against the public officer, and a warrant of seizure in the ordinary form was issued to F, the messenger, dated the 30th of July. The creditors' assignee was appointed August 21. The 12 & 13 Vict. c. 106. came into operation October 11, and on the 18th of October a seizure of the plaintiff's goods was made by the messenger F under the said warrant:—Held, that the fiat was invalid, and that either the petitioning creditor or the messenger was liable in trover for the wrongful seizure; but the Court declined to determine which of the two was liable, as it was not required by the case submitted for their opinion. *Davison v. Farmer*, 20 Law J. Rep. (N.S.) Exch. 177; 6 Exch. Rep. 242.

(d) *Annulling.*

A duplicate of an adjudication in bankruptcy against A was served on A personally on the 19th of February. A did not, within fourteen days after such service, shew cause to the Court against the validity of the adjudication. An advertisement of the adjudication was inserted in the *Gazette* on the 28th of February. On the 19th of March, within twenty-one days from the advertisement, A presented a petition to the Commissioner, praying that the adjudication might be annulled:—Held, on appeal, that A was in time, and that the Commissioner was bound to hear and decide on this petition. *Ex parte Carter, in re Carter*, 20 Law J. Rep. (N.S.) Bankr. 19.

Where a creditor petitions against an adjudication within the proper time, and the petition is not heard within the twenty-one days from the adjudication, and when heard it is dismissed, and the creditor appeals within twenty-one days after the Commissioner's decision on his petition, his appeal is in time under the 12th section of the statute. *Ex parte Bean, in re Wilkinson*, 21 Law J. Rep. (N.S.) Bankr. 26; 1 De Gex, M. & G. 486.

A petition to the Commissioner to annul the adjudication is not an appeal within the meaning of that section. *Ibid*.

A doubt on the legal validity of an adjudication is not sufficient ground for annulling it. *Ex parte Bower, in re Bowers*, 21 Law J. Rep. (N.S.) Bankr. 61; 1 De Gex, M. & G. 468.

A duplicate of an adjudication in bankruptcy against T C was personally served upon him, on the 19th of February. He did not, within fourteen days after such service, shew cause to the Court against the validity of the adjudication. An advertisement of the adjudication was inserted in the *Gazette* on the 28th of February. On the 19th of March, within twenty-one days from the advertisement, he presented a petition to the Commissioner praying that the adjudication might be annulled. The Commissioner having refused the application, on appeal, one of the Vice Chancellors held, that he was in time, and that the Commissioner was bound to hear and decide on the petition, but the late Lord Chancellor having reversed that decision, and T C having appealed to the House of Lords, it was held, affirming the decision of Lord Truro, that the Commissioner has no authority after the time specified in the 104th section, to entertain an application to review the adjudication either under that section or under the 233rd section, and also that a petition to annul the adjudication afterwards presented to the Commissioner by T C was not such a "proceeding" as was in the contemplation of the legislature in framing the 233rd section. *Carter v. Dimmock*, 22 Law J. Rep. (N.S.) Bankr. 55; 4 H. L. Cas. 337.

Where a person who has been adjudicated bankrupt does not shew cause against the validity of the adjudication before the Commissioner within the period prescribed by section 104. of the statute 12 & 13 Vict. c. 106, or commence "an action, suit, or other proceeding to dispute or annul the fiat," &c., within the period prescribed by section 233, the Court will not annul the adjudication on a petition of the bankrupt, notwithstanding that at the time of the adjudication the bankrupt was under twenty-one years of age, there being no exception, in the 233rd section of the statute, respecting infants. *Ex parte John West, in re West*, 22 Law J. Rep. (N.S.) Bankr. 71; 3 De Gex, M. & G. 198.

A party was adjudicated bankrupt, and the assignees sold chattels (alleged to have been mortgaged to A B), as being in the order and disposition of the bankrupt. The time had expired within which, by the 233rd section of the Consolidation Act (12 & 13 Vict. c. 106), the bankrupt could have petitioned to annul, but A B presented such petition, and the Commissioner, on the ground of want of trading, annulled the adjudication.—Held, upon appeal of the petitioning creditor, that as, upon the evidence, it appeared that the application to annul was made at the instigation of the bankrupt, the adjudication

must be restored, the Court declining to decide the question of trading. *Ex parte Emery, in re Bradbury*, 23 Law J. Rep. (N.S.) Bankr. 33; 4 De Gex, M. & G. 901.

(F) PROOF OF DEBT.

(a) Annuity.

Declaration in the common form on an annuity bond, dated the 9th of June 1828. Pleas, the Statute of Limitations, and the bankruptcy of the defendant after the making of the bond and the accruing of the causes of action in the declaration mentioned, and before the commencement of the action. Replication joining issue on the latter plea, and as to the former, that the said causes of action did accrue to the plaintiff within twenty years next before the commencement of the action (setting out the bond and condition, and assigning as a breach of the condition, the non-payment of 50*l*. for two years and a half arrears of the annuity). The bond was a joint and several bond of the defendant and M, and was conditioned (after reciting that M had agreed with the plaintiff for the sale of an annuity of 20*l*. to be paid to the plaintiff, his executors, &c., during the joint and several lives of the plaintiff and his wife, for the sum of 150*l*., and that the defendant at the request of M had assented to join in and execute the bond for securing the due and regular payment of the annuity and the receipt by M of the said sum of 150*l*.) for the due payment by M or the defendant, their or either of their heirs, &c. of the said annuity, by two equal half-yearly payments on the 9th of December and the 9th of June in every year, during the joint and several lives of the plaintiff and his wife, and a proportionate part of the half-yearly payment of such annuity in the event of the death of the survivor between the half-yearly days of payment. On the trial, it was proved that the defendant had become a bankrupt in 1836; that the defendant had, down to 1848, paid the half-yearly instalments of the annuity, but on no occasion, until after the days of payment stated in the condition; so that there had been breaches of the bond before the defendant's bankruptcy, and it appeared also, more than twenty years before the commencement of the action; and that arrears were then due in respect of breaches committed since 1848:—Held, that a new cause of action arose with each successive breach of the condition, and that by proof at the trial of breaches committed within twenty years, the plaintiff was entitled to the verdict upon the issue raised by the plea of the Statute of Limitations. *Amott v. Holden*, 22 Law J. Rep. (N.S.) Q.B. 14.

Held, also, (*Wightman, J.* dissenting) first, that the defendant's liability under the above form of bond and condition was that of a surety for M, the grantor of the annuity, and who was alone to be considered as the principal debtor; that the plaintiff, therefore, could not have proved under the bankruptcy of the defendant in respect of previous breaches and a forfeiture of the bond; and consequently that the bankruptcy and certificate of the defendant were no defence to the action. *Ibid*.

(b) Covenant.

A trader about to be married and being, in fact, insolvent, of which insolvency the intended wife was ignorant, entered into a covenant with trustees to pay

them a moderate sum of money, the interest to be paid to the wife's appointment, and, in default, to the intended wife for life for her separate use, then to the husband for life, and the capital to be in trust for the survivor absolutely. Property of the wife was also agreed to be settled upon the same trusts. The husband became bankrupt, and the trustees applied to prove for the amount, which had never been paid, but the Commissioner rejected the proof:—Held, on appeal, that the settlement was good as against the assignees, and that the trustees were entitled to prove. *Ex parte Mac Birnie's Trustees, in re Mac Birnie*, 21 Law J. Rep. (n.s.) Bankr. 15; 1 De Gex, M. & G. 441.

A trader in his marriage settlement, covenanted with trustees to pay them 3,000*l.* "out of the first capital monies or real or capital personal estate or capitalized income of or to which he should be or become possessed or in anywise entitled after the solemnization of the marriage," within six months after he should "have become" so possessed or entitled. The marriage took place, but the money was not paid. The trader was possessed of stock in trade and other effects far exceeding in value the 3,000*l.* down to the time when he became bankrupt, and for a long time, more than six months after the date of the settlement, more than enough to pay all his debts for the time being, including the 3,000*l.* The trustees tendered a proof, but the same was refused; but on appeal,—Held, that as the bankrupt had property six months after the settlement, more than enough to satisfy the 3,000*l.*, and as there was a breach of the covenant by non-payment at the end of six months, the trustees were entitled to prove. *Ex parte Evans, in re Wass*, 22 Law J. Rep. (n.s.) Bankr. 5; 2 De Gex, M. & G. 948.

(c) Promissory Note.

The defendant, being in execution for a debt, signed a blank promissory note in July 1846 and delivered it to the attorney for the execution creditor, and was thereupon released. In 1851 he became bankrupt, and obtained his certificate on the 12th of May. On the 20th of October 1852 the note was filled up and made payable at one month after date, and indorsed to the plaintiff. To an action upon the note, the defendant pleaded that he did not make the note, and his certificate under the bankruptcy. The jury found that the note had been filled up within a reasonable time:—Held, that the defendant was liable, and that the certificate afforded no defence. *Temple v. Pullen*, 22 Law J. Rep. (n.s.) Exch. 151; 8 Exch. Rep. 389.

(d) Judgment.

A trader gave a warrant of attorney, on which, in April 1848, judgment was entered up. In February 1852 an arrangement was attempted with the general body of creditors to avoid a bankruptcy. The trader signed a declaration of insolvency. At a meeting between the judgment creditors and an agent for the other creditors, the former were informed of this, and were asked and made a promise, the terms of which were in controversy, not to take any steps to gain priority; and the meeting was adjourned to a future day. In the mean time the judgment creditors registered their judgment; and on the trader being adjudicated bankrupt, they peti-

tioned the Commissioner that they might be declared equitable mortgagees of the real estate of the bankrupt, but, on the ground of breach of faith, the Commissioner dismissed the petition, with costs. On appeal, the Court decided that what took place at the meeting, even if a promise was generally made, was not enough, on the one hand, to support a bill to restrain the registration of the judgment, nor on the other to support a bill to restrain the filing of the declaration of insolvency, and that the decision of the Commissioner must be reversed. *Ex parte Boyle, in re Boyle*, 22 Law J. Rep. (n.s.) Bankr. 78; 3 De Gex, M. & G. 515.

A judgment on a warrant of attorney, although not executed, may now constitute a lien upon real estate in case of bankruptcy. *Ibid.*

(e) Award.

A creditor brought an action against his debtor for the balance alleged to be due upon an account between them. The debtor consented to a verdict for 100,000*l.*, subject to a reference, the arbitrator to have authority to order a verdict to be entered for either party, with the costs of the suit and of the arbitration. The arbitrator, after more than six years, made an award in favour of the creditor for 11,345*l.* After the date of the award, and before judgment was signed, the debtor committed an act of bankruptcy, and gave notice thereof to the creditor, who afterwards entered up judgment, and subsequently the debtor was adjudicated bankrupt. The creditor claimed to prove for the awarded sum and the costs, which the Commissioner allowed; whereupon the creditors' assignee appealed:—Held, that the creditor was entitled to prove for the debt awarded, interest and costs as a liquidated sum, on the ground that the award was more than a verdict, rendering this sum proveable as a debt, until it could be shewn that the award could be set aside at law. *Ex parte Harding, in re Pickering; Ex parte Thornthwaite, in re Pickering*, 23 Law J. Rep. (n.s.) Bankr. 22; 5 De Gex, M. & G. 367.

(f) Calls.

A B was a shareholder in a joint-stock banking company, which stopped payment. He became bankrupt, and afterwards, before he obtained his certificate, an order for winding up the affairs of the banking company was obtained, and, subsequently, he obtained his certificate. The Commissioner in Bankruptcy declined to permit the official manager to prove for the amount of calls on the bankrupt's shares; but the Court held, that, under the 14th and 30th sections of the Winding-up Act of 1849, the official manager was entitled to go in, and prove for the amount of calls in competition with his separate creditors. *Ex parte Nicholas, in re the Monmouthshire and Glamorganshire Banking Company*, 21 Law J. Rep. (n.s.) Bankr. 64; 2 De Gex, M. & G. 271.

(g) Costs.

The defendant removed an indictment by *certiorari*, and entered into the usual recognizances, with two sureties, under the 5 & 6 Will. & M. c. 11. s. 3. He was convicted, and the judgment was resited upon his paying the costs, which were then taxed at 22*l.* The defendant having become bankrupt, the

prosecutor proved for this sum under the bankruptcy. Judgment was afterwards signed against the defendant, and the ordinary side-bar rule issued, under which the costs of the prosecutor were taxed at 243*l*. Personal service of this side-bar rule and allocatur and a demand of the 243*l*. having been made, and payment refused by the defendant and his bail, a rule *nisi* for an attachment against the defendant, and for estreating the recognizances against the defendant and his bail, was obtained. The Court discharged that part which was for an attachment, but estreated the recognizances. *Regina v. Hills*, 22 Law J. Rep. (N.S.) Q.B. 322; 2 E. & B. 176.

Where solicitors had delivered their bill of costs in September 1850, and after a deduction had been agreed upon, the client accepted a bill of exchange for the amount so reduced.—Held, on the bill being dishonoured, and the client becoming bankrupt in May 1851, that the bill of exchange constituted a proveable debt without the bill of costs being taxed. *Ex parte Webb, in re Dawson*, 4 De Gex & Sm. 366.

(h) *Contingent Debts and Liabilities.*

Debt for railway calls. Pleas, secondly, that the defendant was not a holder of the shares; and thirdly, bankruptcy of the defendant. The defendant, being the holder of shares in a railway company, became bankrupt. No transfer of shares to the assignees had taken place in the mode pointed out by the Companies Clauses Act, 8 Vict. c. 16; but before the fiat a correspondence took place between the official and the trade assignee, in which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares in question, and estimating the amount that would be necessary to work the fiat and pay dividends, and he subsequently wrote suggesting the propriety of selling the shares. Afterwards, and after the fiat, three calls were made.—Held, that the debt was not barred by the certificate, as it was not proveable under the fiat as a debt due *in futuro*, within section 51. of the 6 Geo. 4. c. 16, or as a debt due on a contingency within section 56. *The South Staffordshire Rail. Co. v. Burnside*, 20 Law J. Rep. (N.S.) Exch. 120; 5 Exch. Rep. 129.

The defendant executed a bond, whereby he became liable as a surety to pay to the plaintiff such costs as the plaintiff should in due course of law be liable to pay, in case a verdict should pass for certain defendants in an action of *scire facias*; wherein the now plaintiff sued as a nominal party. The action on the *scire facias* was tried, at the Spring Assizes in 1848, and a verdict was found for the then defendants; after which, in Easter term, a rule *nisi* for a new trial was obtained. In the November following, the defendant in the present action became a bankrupt. In Hilary term 1849, the rule for a new trial was discharged. In May the defendant obtained his certificate; and in August the costs in the action on the *scire facias* were taxed, and final judgment signed against the now plaintiff.—Held, that the plaintiff's claim was not barred by the defendant's certificate, the debt not being a contingent debt within the 6 Geo. 4. c. 16. s. 56, but only a contingent liability. *Hankin v. Bennett*. 24 Law J. Rep. (N.S.) Exch. 326; 8 Exch. Rep. 107.

The defendant, by deed, assigned to the plaintiff three policies of assurance to secure a debt, and thereby covenanted to pay the annual premiums, it being declared that if he should make default it should be lawful for the plaintiff to pay the premiums, which became payable for keeping on foot the said policies, or for effecting and keeping on foot any other policy or policies thereof; and that the defendant would on demand pay to the plaintiff all monies so paid or advanced, with interest. In an action on this covenant the declaration alleged two breaches: first, that the defendant did not pay the premiums which became payable for keeping on foot the said policies; secondly, that although the plaintiff duly paid and advanced the premiums, and demanded payment, the defendant had not paid him the same, but therein made default. The defendant pleaded in bar his certificate of discharge under an adjudication in bankruptcy upon a declaration of insolvency, and petition filed after the making of the deed.—Held, upon demurrer, that the claim in respect of the said breaches of covenant did not come within the meaning of the 178th section of the 12 & 13 Vict. c. 106, and that the certificate in bankruptcy, therefore, was no bar to the action. *Warburgh v. Tucker*, 24 Law J. Rep. (N.S.) Q.B. 317.

Before the filing of a petition for adjudication of bankruptcy a verdict for 1,000*l*. was obtained against a trader, in an action of tort, subject to a reference as to the amount of damages to be paid. Subsequently, the petition was filed and the adjudication was made. The arbitrator afterwards made his award, fixing the amount of damages, the assignees of the bankrupt taking no part in the proceedings. The plaintiff in the action filed final judgment, and applied to prove under the bankruptcy for the amount of certified damages and taxed costs.—Held, overruling the decision of a Commissioner, that this claim was not a "liability to pay money upon a contingency," within the 178th section of the statute 12 & 13 Vict. c. 106, and that proof could not be admitted. *Ex parte Todd, in re Williamson*, 24 Law J. Rep. (N.S.) Bankr. 20.

(i) *By Partner.*

A, B and C, who carried on business in partnership together, were indebted to D. D brought an action against A alone, and recovered judgment against him. During the whole of this time, B and C were resident abroad. A was made a bankrupt, and the Commissioner was directed to keep separate accounts of the estate of A, and of the joint estate of A, B and C.—Held, that notwithstanding the judgment against A, D had a right to prove for his debt against A, B and C. *Ex parte Jones, in re Morrison*, 20 Law J. Rep. (N.S.) Bankr. 5; 4 De Gex & Sm. 199, *nom. Ex parte Waterfall, in re Morrison*.

(j) *By Savings Bank.*

A linendraper was appointed actuary and cashier of a savings bank, the rules of which provided that one or more members of the committee should attend at the cashier's shop to receive the deposits. The committee failed to attend, and permitted the deposits to be received by the cashier.—Held, upon his bankruptcy, that they were not monies in his hands by virtue of his office, and could not be claimed

in full by the savings bank. *Ex parte Fleet, in re Jardine*, 4 De Gex & Sm. 52.

(k) *By Surety.*

Two firms K & Co. and B & Co. had dealings together, during which K & Co. made payments for, and accepted bills for the accommodation of B & Co., and received from B & Co. cash and bills as payment of and security for the outlay and liabilities made and incurred. By the course of dealing adopted by the two firms, the amounts received by K & Co. on the bills deposited with them by B & Co., were credited by K & Co. to B & Co. in a cash account. In July 1812 K & Co. became bankrupt, and B & Co. became bankrupt in the following month, and at the period of the bankruptcies there was a large balance due to K & Co. The bill-holders proved against both estates, having been paid 10s. in the pound out of the estate of B & Co., the principal debtors, and then 10s. in the pound out of K & Co.'s estate, who were the sureties:—Held, affirming a decision of the Vice Chancellor in Bankruptcy, first, that the assignees of the estate of K & Co. were entitled to prove against the estate of B & Co. the amount on the cash balance due at the time of the bankruptcies; secondly, that they were entitled to appropriate the amounts received on the deposited bills to the discharge of their liabilities to the bill-holders; and, thirdly, that they were entitled to the benefit of the proof made by the bill-holders against the estate of B & Co., until they should be recouped the excess paid by the estate of K & Co. to the bill-holders, over and above the sums realized from the deposited bills. *Ex parte Johnson, in re Bulmer*, 22 Law J. Rep. (n.s.) Bankr. 65; 3 De Gex, M. & G. 218.

Where a principal debtor, or his estate, pays part of a debt, and the creditor proves for the remainder, and the surety of the principal debtor pays the remainder of the debt, the latter has, by relieving the estate of the principal debtor from further demand in respect of the debt, placed himself within the meaning of the 8th section of the statute, 49 Geo. 3. c. 121, and is entitled to stand in the place of the creditor in respect of his proof against the estate of the principal debtor. *Ibid.*

(l) *By Servant.*

Where, by the custom of a mining district, a collier when hired brings with him a drawer, and divides with him the wages which are paid by the manager or owner of the mine, although the manager has power to dismiss the drawer, and to interdict the dismissal of the drawer by the collier, on the bankruptcy of the mine owner, owing wages to the collier, there being wages due to the drawer, the latter are not labourers or workmen within the meaning of the 169th section of the Bankrupt Law Consolidation Act, 1849, entitled to payment in full out of the bankrupt's estate of the wages due to them. *Ex parte Eekersley, in re Byrom*, 22 Law J. Rep. (n.s.) Bankr. 27; 3 De Gex, M. & G. 155.

(m) *Priority.*

Where an attorney and solicitor became bankrupt, and, without having obtained his certificate, commenced practice and continued to do so with the knowledge of the creditors who had proved, it was

held, that the subsequent creditors had priority over those who had proved, and that the estate was to be administered in equity and not in bankruptcy. *Tucker v. Hernaman*, 22 Law J. Rep. (n.s.) Chanc. 791; 4 De Gex, M. & G. 395: affirming 22 Law J. Rep. (n.s.) Chanc. 487; 1 Sm. & G. 394.

The official assignee, who appealed from a decree of the Court below, was ordered to pay the costs personally. *Ibid.*

(n) *Amount proveable.*

One of the residuary legatees under a will was the surviving trustee of it; the other was subsequently appointed a new trustee under a power. The trust estate then consisted of 9,000*l.* due from the continuing trustee and of shares in a company valued at 6,000*l.*, which were transferred into the names of the two. After the death of certain *cestuis que trust* who were entitled for life, and when the trust estate constituted a clear fund belonging in moieties to the two residuary legatees, subject only to the payment of legacies which amounted to 4,000*l.*, the continuing trustee became bankrupt, still owing the 9,000*l.* to the trust estate:—Held, that the new trustee was not entitled to prove for this amount and retain the dividends till he should be paid his share in full, but could only prove to the extent of his beneficial interest immediately before the bankruptcy, and that as the bankrupt could then have settled with him by paying 3,500*l.*, that was the amount proveable. *Ex parte Turner, in re Crosthwaite*, 2 De Gex, M. & G. 927.

Incumbrancers on a bankrupt's property under an agreement for security had enforced their lien against the assignees in a Chancery suit, in which the subject of the security had been sold, and the proceeds applied in reduction of the debt:—Held, that in proving for the residue, the mortgagees were entitled to set off the income of the property accruing due after the bankruptcy against the interest upon the debt since the same period. *Ex parte Penfold, in re Barker*, 4 De Gex & Sm. 282.

(o) *Effect of.*

Where the defendant in an action brought for the recovery of a debt, has become bankrupt, and the plaintiff has tendered his claim for proof of the debt under the bankruptcy, and the claim is not allowed, but adjourned, the defendant is not entitled to a stay of proceedings in the action under the 12 & 13 Vict. c. 106. s. 182, the Bankrupt Law Consolidation Act. To entitle him to such stay of proceedings, the debt must be proved under the bankruptcy, or the claim entered upon the proceedings. *Ball v. Bowden*, 22 Law J. Rep. (n.s.) Exch. 249.

(G) MORTGAGES AND LIEN.

[See *Fenn v. Bittleston*, *post*, (H) (e) (1).]

Where an assignment of all a bankrupt's property required for his trade as a security for an antecedent debt, has taken place more than twelve months before the petition for adjudication,—*Semble*, that it is material for the assignees to shew, for the purpose of avoiding the deed, that there still exists a debt which existed at the time of the execution of the assignment. *Ex parte Taylor, in re Taylor*, 5 De Gex, M. & G. 392.

The plaintiffs, creditors of P, purchased goods of P, at a sale by auction, on the 9th of October, to the amount of 86*l.* 9*s.* 11*d.*, being less than their debt. There was a further sum realized at the sale, and received, and more than sufficient to cover the auctioneer's (the defendant's) charges. The plaintiffs removed the goods purchased, without payment of the price or the knowledge of the defendant, and against the will of P, and the defendant immediately sent an invoice to the plaintiffs and demanded payment. On the 21st of October the plaintiffs obtained a judgment in an action against P for the full amount of their debt; and on the 24th of October an *ex parte* order was obtained in the action, under the 61st section of the Common Law Procedure Act, 1854, attaching in the hands of the defendant all debts due to P, and was served on the defendant on the 25th of October. Subsequently, on the same day, P signed a declaration of insolvency, upon which being duly filed, he was on the 26th of October adjudicated a bankrupt, and notice of the bankruptcy was served on the defendant the same day. Under a Judge's order, made on the 28th of October, pursuant to section 64. of the Common Law Procedure Act, 1854, the defendant was proceeded against by writ in this action as garnishee. The official assignee had demanded payment of the price of the goods purchased by the plaintiffs:—Held, that notwithstanding the service of the order of attachment, the debt due from the defendant to P passed to the assignees in bankruptcy; that the plaintiffs had by the order of attachment become creditors of the bankrupt, "having security for their debt" within section 184. of the 12 & 13 Vict. c. 106, but not such a security as could be treated either as a mortgage or lien within the meaning of the exception in the same section, and therefore that the plaintiffs were not entitled to recover the debt due from the defendant to P. *Holmes v. Tutton*, 24 Law J. Rep. (N.S.) Q.B. 346.

Held, also, as to the 86*l.* 9*s.* 11*d.*, that supposing the defendant, the auctioneer, could, under the circumstances, sue the plaintiffs for that sum, it would be a good answer, at all events, by way of equitable defence, to shew that the auctioneer's lien had been satisfied, and that the plaintiffs had a set-off as against P his principal. *Ibid*.

And, further, that though in an action on the contract by the assignees in bankruptcy for the said sum, the plaintiffs might be at liberty to set off the debt due to them, yet that the plaintiffs were liable to an action in tort for the wrongful conversion, nothing having been done either by the auctioneer or the assignees to waive the tort. *Ibid*.

A druggist assigned all the wares, fixtures, shop effects, stock in trade, furniture, goods, chattels, utensils, implements and things in and about and belonging to the dwelling-house, warehouse, offices and estate in his occupation by way of mortgage, to secure 150*l.* then advanced to him. The deed contained a proviso that upon payment of the 150*l.*, or of the interest at the times mentioned in the deed (but as to the interest after notice given) the mortgagee might enter upon the premises, and, if necessary, break or force open the door of any place wherein the goods should be, and might sell the goods and pay the mortgage debt, interest and costs. More than a year after the expiration of the time

appointed for payment of the 150*l.* the mortgagee took possession. On the following day the mortgagor committed an act of bankruptcy, and was a few days afterwards adjudicated a bankrupt. *Seem*—that the mortgagee was not entitled to retain the goods unless it appeared that the mortgagor had at the date of the mortgage other property. *Ex parte Sparrow, re Fowke*, 2 De Gex, M. & G. 907.

(H) ASSIGNEES.

(a) Official Assignee.

A was made a bankrupt, and B was appointed the official assignee, and C was elected the creditors' assignee. An action was brought by D against B and C in respect of some property in the possession of the bankrupt at the time of the bankruptcy, and a verdict was given in favour of D. The result of the action was independent of the bankruptcy, and would have been the same whether the fiat was valid or invalid. C was insolvent. D being about to issue execution against B in respect of the costs of the action, B applied to the Court for protection. The Court, however, declined to interfere. *Ex parte Johnson, in re Cross*, 20 Law J. Rep. (N.S.) Bankr. 20; 4 De Gex & Sm. 279.

The 54th section of the statute having enacted that certain amounts, not less nor greater than specified amounts per cent. on the gross produce, from time to time should be paid by official assignees to the "Chief Registrar's Account," the amount to be fixed by the senior Commissioner, with the approval of the Lord Chancellor; and the chief Commissioner having fixed the sums, with such approval, the Court refused to interfere to alter the same; but the Commissioner having made such allowances to the official assignee as, according to the amount of the bankrupt's estate and the nature of the duties performed, were, in his opinion, just and reasonable, the Court differing from the opinion of the Commissioner, and the official assignee not requesting the Court to fix the amount of allowance, the matter was, on this point, sent back to the Commissioner for re-consideration. *Ex parte Glyn, in re Ashlin*, 21 Law J. Rep. (N.S.) Bankr. 49.

Under the 160th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, the bankrupt is directed to prepare a balance-sheet and accounts, and the Court is empowered to make an allowance to such person as it shall think fit for the preparation of such balance-sheet and accounts. A Commissioner had permitted the balance-sheet and accounts to be prepared in the office of the official assignee, and had allowed 21*l.* for the same, and 20*l.* to the official assignee for examining and auditing the same balance-sheet and accounts. The trade assignee appealed:—Held, that the allowances were, under the 160th section, improper, and must be disallowed, the preparation of such balance-sheet and accounts by the official assignee being inconsistent with the duties of his office. *Ex parte Russell, in re Minnitt*, 23 Law J. Rep. (N.S.) Bankr. 17; 5 De Gex, M. & G. 373.

The same Commissioner had laid down a rule that the balance-sheet should be made out on every occasion of bankruptcy, when the bankrupt required assistance, by the official assignee; but held, *per Lord Justice Turner*, that this rule was contrary to the intention of the 160th section, that section re-

quiring rather that the Commissioner should, in each particular case of bankruptcy, exercise a discretion whether a person should be employed to assist the bankrupt or not in that respect. *Ibid.*

(b) *Removal of.*

Assignees appointed two solicitors, who were related by marriage to the bankrupts. The Commissioner, deeming the appointment objectionable, gave the assignees time to decide whether they would discharge the solicitors, or whether they, the assignees, would themselves retire from their office; at the time appointed the assignees refused to do either, whereupon the Commissioner removed the assignees:—Held, upon appeal, that the removal of assignees is in the entire discretion of the Commissioner, and the Court, refusing to interfere, dismissed the appeal, with costs. *Ex parte Bates, in re Williams*, 21 Law J. Rep. (N.S.) Bankr. 20; 1 De Gex, M. & G. 452.

(c) *Rights and Liabilities.*

Debt for railway calls. Pleas, secondly, that the defendant was not a holder of the shares; and thirdly, bankruptcy of the defendant. The defendant, being the holder of shares in a railway company, became bankrupt. No transfer of the shares to the assignees had taken place in the mode pointed out by the Companies Clauses Act, 8 Vict. c. 16; but before the fiat a correspondence took place between the official and the trade assignee, in which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares in question, and estimating the amount that would be necessary to work the fiat and pay dividends; and he subsequently wrote suggesting the propriety of selling the shares. Afterwards, and after the fiat, three calls were made:—Held, that there was no evidence of the assignees having accepted the shares. *South Staffordshire Rail. Co. v. Burnside*, 20 Law J. Rep. (N.S.) Exch. 120; 5 Exch. Rep. 129.

R became bankrupt, being possessed of some 100l. shares in an incorporated company, which were standing in his name in the company's books. Only 25l. per share had been paid. The shares were of no value at the time of the bankruptcy. R handed the certificates of the shares over to his assignees. For five years after the bankruptcy neither the assignees nor the bankrupt nor the company took any step respecting the shares. At last, the shares having risen in value, the assignees claimed them, and demanded to be registered in the company's books as their owners. This the company declined to do. An action was brought by the assignees; and, on an issue joined on the allegation that the assignees were owners of and entitled to the shares, it was contended for the company that, as the possession of these shares was coupled with a liability to pay the remaining 75l. per share, the property in them did not vest in the assignees until they accepted them; that it was necessary for the assignees to do some act to denote acceptance, and do that act within a reasonable time after the bankruptcy; that the question of reasonable time was a question of law for the Judge; and that five years' delay unexplained was an unreasonable time in law:—Held, that, assuming an acceptance of the shares to be necessary to

give the assignees title, and that the acceptance ought to be within a reasonable time, still that the facts proved were evidence of the plaintiffs' title, and that the question of reasonable time was a question for the jury; but that the Judge ought to direct the jury that the reasonable time for accepting did not begin to run until some party interested in the shares had taken some step respecting them. *Graham v. Van Diemen's Land Co.* (in error), 24 Law J. Rep. (N.S.) Exch. 213; 11 Exch. Rep. 101.

The mortgagor and mortgagee of one undivided moiety, and the owner of the other, joined in a demise of the whole premises to G for twenty-one years; G covenanting with the three jointly and severally to pay (not saying to whom) the reserved rent. G entered, and having become bankrupt, his assignees accepted the lease:—Held, on the authority of *Wakefield v. Brown*, that the assignees were liable in an action, at the suit of the three lessors, for rent due since their acceptance of the lease. *Magnay v. Edwards*, 22 Law J. Rep. (N.S.) C.P. 170; 13 Com. B. Rep. 479.

(d) *What Property passes to.*

(1) *In general.*

A carried on business as a grocer, and was entitled to some stock in trade and furniture, which were on the premises where he carried on his business. A, being so entitled, took B and C into partnership with him in April, and the business was carried on by the partnership until August in the same year, when the firm became bankrupt. B and C did not pay anything to A, or bring any money into the concern, and no deed of transfer of the property of A and no articles of partnership had been executed. After the partnership A ordered goods in the name of the firm:—Held, that, under these circumstances, the stock in trade on the premises at the time of the bankruptcy was partnership property, and not the separate property of A, and that the furniture was the separate property of A. *Ex parte Owen, in re Bowers*, 20 Law J. Rep. (N.S.) Bankr. 14; 4 De Gex & Sm. 351.

To a declaration containing counts for work and labour as a surgeon and apothecary and for goods sold and delivered, the defendant pleaded that before the accruing of the causes of action the plaintiff became bankrupt, and that his assignees claimed the debt from the defendant. The plaintiff replied that the labour was his own personal labour bestowed after the bankruptcy, and done for the present necessary support of himself and his family, and that the goods sold were medicines purchased out of the proceeds of other personal labour and increased in value by the plaintiff's personal labour, and supplied by the plaintiff for the present necessary support of himself and his family, and as a part of, and incidental and necessary to his personal labour. The rejoinder traversed these allegations. It was proved that the plaintiff, a general medical practitioner, was an uncertificated bankrupt, and by an arrangement with a friend who had purchased his stock of medicines, that he had continued in possession of them, and had carried on his business as before, and had also purchased fresh drugs upon credit. The debt in question was contracted by the plaintiff attending the defendant and furnishing medicines compounded by him out of the drugs:—Held, that the replica-

tion was not proved, as this was not merely a demand for personal labour, but that the plaintiff was in substance carrying on his business for profit. *Elliot v. Clayton*, 20 Law J. Rep. (N.S.) Q.B. 217; 16 Q.B. Rep. 581.

Assumpsit on a policy of insurance on goods, alleging an average loss. By the policy a portion of the premium was to be returned if the risk ended in England. Fourth plea, set-off; demurrer. Sixth plea, bankruptcy of plaintiff. Replication, that before the bankruptcy plaintiff transferred the goods and the policy and his right to recover for the loss to F, and that he sued as trustee for F. Rejoinder, that before the bankruptcy the risk ended in England, whereby the plaintiff became entitled under the policy to a return of the premiums. Demurrer:—Held, first, that the fourth plea was bad, as the action was for unliquidated damages. *Bodding-ton v. Castelli* (in error), 23 Law J. Rep. (N.S.) Q.B. 31; 1 E. & B. 879,—affirming *Castelli v. Bodding-ton*, 22 Law J. Rep. (N.S.) Q.B. 5; 1 E. & B. 66.

Held, further, that the rejoinder was no answer to the replication to the sixth plea, because, although the beneficial interest under the policy, so far as related to the return of the premiums, passed to the assignees, and though there was only one contract, yet that the bankrupt was entitled to sue on the policy as trustee for F to recover for the loss, as two separate actions on the policy were maintainable, one for the return of the premium and another for the loss. *Ibid.*

(2) Order and Disposition and Reputed Ownership.

An owner of goods suffered them to be in the possession of C, and died intestate. After his death C retained them in his order and disposition until he became a bankrupt, subsequently to which the defendant sold them at the desire of the bankrupt. The intestate's goods having remained unadministered, and the ordinary having made no claim to them,—Held, that the goods were in the order and disposition of the bankrupt with the consent of the true owner. *White v. Mullett*, 20 Law J. Rep. (N.S.) Exch. 291; 6 Exch. Rep. 713.

Under the 12 & 13 Vict. c. 106. (the Bankruptcy Law Amendment and Consolidation Act) s. 141. a title to the bankrupt's own property passes by the adjudication; but in order to divest the bankrupt's right of property to goods in his reputed ownership, an order of the Court, under section 125, to sell and dispose of the property, is necessary—so held, by the Court, *dubitante Platt*, *B. Heslop v. Baker*, 20 Law J. Rep. (N.S.) Exch. 350; 6 Exch. Rep. 740.

An order by a Commissioner of Bankruptcy for the sale of goods in the possession, order, or disposition of a bankrupt, as reputed owner, under the 125th section of the 12 & 13 Vict. c. 106, must be specific as to the goods to which it is to apply (although it may be made on an *ex parte* application); and, therefore, an order to sell all goods which at the time, &c. were in the possession, &c. of the bankrupt, was held bad. *Per Jervis, C.J.* orders under the 126th, 127th, and 128th sections must also be specific. *Quære*—Whether the order should recite the circumstances necessary to give the Court jurisdiction. *Quartermaine v. Bittlestone*, 22 Law J. Rep. (N.S.) C.P. 105; 13 Com. B. Rep. 133.

Under the 125th section of the Bankrupt Act, 12 & 13 Vict. c. 106, which makes an order necessary for the vesting of property in goods in the order and disposition of the bankrupt, as reputed owner, in the assignees or vendee of the goods, the title of the assignees relates back to the act of bankruptcy in the same manner as the title of the assignees by the general assignment has relation back. *Heslop v. Baker*, 22 Law J. Rep. (N.S.) Exch. 333; 8 Exch. Rep. 411.

An order of the Bankruptcy Court stated that "the said J A (the bankrupt) had, at the time he became bankrupt, by the consent of R H (the owner), who then *claimed* and still *claims* to be true owner thereof in his, the said J A's, possession, order, and disposition, divers goods," &c. (the goods in dispute):—Held, that the order was good, although it did not state in express terms that R H was the true owner of the goods. *Ibid.*

If goods in the possession, order and disposition of a bankrupt at the time of the act of bankruptcy, be taken out of his possession by the true owner after the act, but before the fiat or petition, without notice of the previous act of bankruptcy, the assignees cannot recover them, this being a "transaction" with the bankrupt, protected by the 133rd section of the Bankrupt Law Consolidation Act, 1849; and an order made by the Court of Bankruptcy, under the 125th section, to sell such goods for the benefit of the bankrupt's creditors, is not final or binding against the true owner. *Graham v. Furber*, 23 Law J. Rep. (N.S.) C.P. 10; 14 Com. B. Rep. 134.

Whether goods in the possession of a trader, but not belonging to him, are in his possession, order or disposition as reputed owner under the Bankrupt Act, may depend on the usage of trade for the time being. *Bell v. Hamilton*, 24 Law J. Rep. (N.S.) Exch. 45; 10 Exch. Rep. 545.

B was a clockmaker, and kept clocks in his shop for sale, and also clocks belonging to other people for repair. In July 1853, the plaintiff bought a clock which was in B's shop, but desired it to be kept until he had removed into a new house. In March 1854, he bought two other clocks, and left them with the bankrupt to be cleaned, which might have been done in two or three days. On the 7th of April, a petition in bankruptcy was filed against B, at which time the three clocks were in his shop. The Commissioner in Bankruptcy subsequently made an order for the sale of these clocks, as being in the reputed ownership of the bankrupt:—Held, that they were not liable to seizure by the assignees. *Ibid.*

Two partners had carried on business and dissolved partnership; they gave notice of the dissolution in the *Gazette*, and by circular to the debtors required the debts to be paid to one of the firm; and by the deed of dissolution the plant, &c. was assigned to the same partner, and it was stipulated that he should pay the partnership debts, and pay to the other the value of his share of the plant, &c., to be ascertained by arbitration. The partner who was thus declared entitled to the debts became bankrupt, and he had not paid the price of the other's share of the plant, &c.:—Held, reversing the decision of the Commissioner, that the debts remained the property of the firm, notwithstanding the agreement that they should belong to one. *Ex parte the Assignees of Brewster*

and *West, in re Brewster*, 22 Law J. Rep. (N.S.) Bankr. 62.

Held, also, but affirming the decision of the Commissioner, that the whole plant, &c., was in the use, order, and disposition of the partner to whom they were assigned, notwithstanding that he had not paid the price of the other partner's share which had been awarded on the arbitration. *Ibid*.

The lending securities to enable traders to obtain credit at a specified bank, will not authorize those traders again to deposit those securities to obtain credit at another bank, though the same had been indorsed to the firm. *Sinclair v. Wilson*, 24 Law J. Rep. (N.S.) Chanc. 537; 20 Beav. 324.

Traders, who without notice to the owners deposit securities in their possession to obtain credit, cannot by redeeming them be considered to have given a fraudulent preference to the owner of the securities. *Ibid*.

Negotiable securities in the hands of traders, one of whom was a trustee for other parties, are not in their order and disposition for the benefit of creditors, though such securities had been used by the traders, without the knowledge of the owners, for maintaining their credit. *Ibid*.

A B was the owner of sufficient amount of stock in a dock company and of shares of 500*l.* each in an assurance company to qualify him, as *bond fide* holder, as a director of each company, and he was a director of each. He executed in 1846 an assignment by way of mortgage of such stock and of two such shares (by mistake called 1,000*l.* stock) to C D, to secure the repayment of money lent. The act of parliament of the dock company and the deed of settlement of the assurance company respectively required all transfers to be in a stated form. A B was in a state in which bankruptcy was inevitable, on the 9th of June 1854, when C D gave notice of the assignment to the respective companies, and on the 17th of the same month A B committed an act of bankruptcy, upon which he was adjudicated bankrupt. A B retained his office of director of the dock company down to the end of May 1853, and of the assurance company down to the 9th of June 1854. A Commissioner of Bankruptcy decided, that the stock and shares were in the order and disposition of the bankrupt within the 125th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, and that C D had no title as equitable mortgagee; but upon appeal.—Held, that, there being no evidence of a contract between the bankrupt and C D that notice should not be given to the companies, by which the bankrupt would be disqualified as director, the stock and shares were not in the order and disposition of the bankrupt; and that C D was equitable mortgagee of the stock and of two of the shares, one of the Lords Justices doubting, with regard to the shares, whether they did not remain in the bankrupt's possession with the consent and permission of C D, "the true owner." *Ex parte Little-dale, in re Pearse*, 24 Law J. Rep. (N.S.) Bankr. 9.

A trader was entitled to leaseholds subject to an annuity for lives granted to an insurance company, who, at the instance of the trader, and on his representation that he was in failing circumstances agreed to release it for less than its estimated value. The trader's solicitor afterwards wrote to the company, stating that difficulties had been met with in attempt-

ing to sell the leasehold by reason of a mortgage, and proposing that the annuity should be sold at the reduced price to an auctioneer, who had acted for the trader in attempting to sell the property (at a loss to himself), and he would be "still able to serve the trader in some degree." The company assented, provided the trader signed a written consent. This was done, and the annuity was assigned absolutely to the auctioneer. The trader immediately afterwards became bankrupt:—Held, that the creditors were entitled to the benefit of the purchase on repayment to the auctioneer of the purchase-money and interest, and the latter was ordered to pay the costs of the assignees in a suit instituted by them, in which he insisted that he was entitled to retain the purchase for his own benefit. *Baskett v. Cafe*, 4 De Gex & Sm. 388.

A mortgagee of goods with a power of sale allowed the goods to remain in the order and disposition of the mortgagor, until the latter committed an act of bankruptcy, but took possession before any petition of adjudication was filed. On the mortgagor being found bankrupt the messenger took the goods out of the mortgagee's possession and sold them. The mortgagee brought an action of trover, and recovered on the ground that, under the Bankrupt Law Consolidation Act 1849, the assignees could not sell, without an express order of the Commissioner, goods in the reputed ownership of a bankrupt. The assignees applied to the Commissioner, who made an order retrospectively confirming the sale, and reciting as a fact that the goods were in the order and disposition of the bankrupt at the time of the bankruptcy with the permission of the true owner:—Held, that the mortgagee was not entitled to have the order discharged on his appeal, as being invalid on the face of it; and on the appellant declining to enter into the question whether he had notice of the bankruptcy when he took possession his appeal was dismissed with costs. *Ex parte Heslop, in re Atkinson*, 1 De Gex, M. & G. 477.

Held, also, that the time of the Commissioner signing and delivering out an order, and not the time of his pronouncing it, is its true date with reference to an appeal. *Ibid*.

A dissolution of partnership was advertised in the *Gazette*, and a circular sent in the name of the dissolved firm, requesting debtors to the firm to pay their debts to one partner:—Held, that the notice was insufficient to take the debts out of the reputed ownership of the firm. *Ex parte Sprague, in re Brewster*, 4 De Gex, M. & G. 866.

The plant and stock in trade was taken possession of by the same partner, and used in his separate trade after the dissolution:—Held, that it was in his separate reputed ownership. *Ibid*.

Security given by a trader to a *bond fide* creditor on a *bond fide* pressure set aside under the Bankrupt Act, the trader being either insolvent, or in such circumstances that the enforcement of the security would render him insolvent, and both parties having actual or constructive notice of the state of his circumstances. *Stanger v. Wilkins*, 19 Beav. 626.

A, a trader, being indebted to B, another trader, assigned to him certain property to secure the debt. A was either actually insolvent at the time, or in such circumstances that enforcement of the provisions of the deed would have stopped the business, and both A

and B knew that it was only by preserving the good will and by careful management that A could hope to pay his debts, for which time and the forbearance of B was necessary. A and B also probably knew that the former was insolvent. B's debt was however *bonâ fide*, and the security was executed under *bonâ fide* pressure, and contemplated the continuance of the business by A, and his ultimate extrication from his difficulties by the aid of B:—Held, that the assignment came within the words of the 12 & 13 Vict. c. 106. s. 67. and could not be supported against the claims of the assignee of A, who soon after the assignment became bankrupt, but it was set aside without costs against B. *Ibid*.

(e) *Actions and Suits.*

(1) *When maintainable.*

A, by deed, dated the 28th of September 1845, conveyed certain goods to B absolutely, subject to a proviso that if he should pay to B the sum secured on the 22nd of March 1850 or any earlier day, after receiving from B fourteen days' notice, and should pay the interest meanwhile half-yearly, then the conveyance should be void. By the deed it was also agreed that, until a default in payment of the principal as before specified or until default in payment of the interest after notice to pay, A, his executors and administrators, should be allowed to hold and enjoy the goods. No notice for earlier payment was given to A, pursuant to the power contained in the deed, nor any notice for payment of the interest, and he continued in possession of the goods until the 13th of December 1849, when he became bankrupt, and the defendants, who were his assignees, then took possession of the goods and sold them on the 19th of February 1850. B had previously assigned the goods to the plaintiffs:—Held, that although the right to the possession of the goods was vested in A until the 22nd of March 1850 (defeasible by non-payment of the principal and interest according to the provisions of the deed), yet that the sale of the goods before that day put an end to the term, and that the assignees had thereby been guilty of a conversion for which the plaintiffs were entitled to maintain trover. *Fenn v. Bittleston*, 21 Law J. Rep. (n.s.) Exch. 41; 7 Exch. Rep. 152.

Ten years after a bankruptcy, the assignees filed a bill to set aside securities alleged to be obtained in fraud of the bankrupt law. The case was one of suspicion, but the assignees did not make out their case:—Held, that they could neither have a decree nor further inquiries. The 235th section of the Bankrupt Law Consolidation Act must be construed to require notice ten days after the cause is at issue, and the notice must be specific. *Pennell v. Home*, 3 Drew. 337.

(2) *Damages.*

A contracted to deliver to B certain quantities of iron, payment for which was to be by bills at specified dates, which were accepted by B and dishonoured at maturity. Afterwards B became bankrupt, and his assignees sued A for non-delivery of a portion of the iron:—Held, that the assignees were entitled to recover only such damages as could have been recovered by B at the time of his bankruptcy, namely, the difference between the contract and the market

price of the iron. *Valpy v. Oakley*, 20 Law J. Rep. (n.s.) Q.B. 380; 16 Q.B. Rep. 941.

(3) *Pleading and Evidence.*

To trover for furniture by the assignees of a bankrupt, the defendant justified the seizure under a judgment and execution against the goods of the bankrupt before his bankruptcy:—Held, on demurrer, that the plea was bad as amounting to Not Guilty. *Young v. Cooper*, 20 Law J. Rep. (n.s.) Exch. 136; 6 Exch. Rep. 259.

In trover by the owner of the goods against the bankrupt's assignees, the defence was that the goods at the time of the bankruptcy were in the order and disposition of the bankrupt with the consent of the owner, and that the title to the goods vested in the assignees by virtue of an order of the Court of Bankruptcy:—Held, that such defence was admissible under the plea of not possessed, although the action was brought before the order was applied for. *Ibid*. *Heslop v. Baker*, 22 Law J. Rep. (n.s.) Exch. 333; 8 Exch. Rep. 411.

After the bankruptcy of one of two joint owners of goods, the solvent joint owner may authorize the sale of the goods, and the broker who sells pursuant to such authority may set it up as a defence in an action by the assignees of the joint owner who has become bankrupt, under the plea of *non detinet*. *Morgan v. Marquis*, 23 Law J. Rep. (n.s.) Exch. 21; 9 Exch. Rep. 145.

The circumstance that the broker was in the first instance employed by the bankrupt and had no knowledge of any other person being interested in the goods is immaterial, nor is the broker estopped from setting up the joint ownership by having sent to the assignees an account in which the goods were stated to have been sold for the bankrupt alone. *Ibid*.

A witness, a clerk at a booking office, stated that a bankrupt, before his bankruptcy, sent goods to him, directed by initials only, and that afterwards the bankrupt and the plaintiff called and saw the goods, when the bankrupt told the witness he had sold them to the plaintiff. The point in dispute was the *bona fides* of the sale:—*Semble*, that the witness might be asked, on cross-examination, the following question: "Would you have acted upon the order of the plaintiff as to the delivery of these goods?" *Morgan v. Whitmore*, 20 Law J. Rep. (n.s.) Exch. 289; 6 Exch. Rep. 716.

A receipt and also a delivery order, given by the plaintiff to a witness a month after the sale, but dated on the day of the sale, and not otherwise shewn to be in existence before the sale:—Held, *dubitante Pollock, C.B.*, to be admissible, as affording some evidence of the sale having taken place on the day of the date of the documents. *Ibid*.

(f) *Allowance of Costs.*

The official and creditors' assignees of a legatee and executor who became bankrupt, claimed from the testator's estate a sum of 350*l.*, and refused to concur in a sale unless paid that sum. In consequence of their refusal a bill was filed by the co-executor to administer the assets, and it appearing that nothing remained due in respect of the bankrupt's share, the Court ordered the assignees to pay the costs of the suit. *Pattison v. Graham*, 2 Sm. & G. 207.

Semble—where reasonable evidence of the state of accounts in which a bankrupt is interested is tendered to his assignees, they are not entitled to insist on a judicial decision on their claims. *Ibid*.

(I) TRANSACTIONS PROTECTED BY STATUTE.

A bankrupt, previously to his bankruptcy, deposited timber with the defendants, who were wharfingers, to be kept at their wharf, and delivered on payment of the wharfage. On the 7th of February 1848 a fiat issued against him, and the plaintiff Cannan was appointed official assignee. The bankrupt, after the fiat, sold the timber, and between September 1848 and January 1849 it was delivered to the purchaser by the defendants, who had no notice of the bankruptcy. In February 1849 the other plaintiffs were appointed trade assignees. In trover by the official and other assignees, held, first, that the defendants were not liable for the value of the timber, being protected by the 6 Geo. 4. c. 16. s. 84. Secondly, that the issuing of the fiat was not notice to all the world of its issuing, the fiat not standing on the same footing as the old commission of bankruptcy. *Cannan v. the South-Eastern Rail. Co.*, 21 Law J. Rep. (n.s.) Exch. 257; 7 Exch. Rep. 848.

The words in the 84th section "goods belonging to any bankrupt," mean goods which belonged to the bankrupt at the time they were deposited in the possession or custody of the person delivering them, and which would have continued to be his property unless an act of bankruptcy had occurred. *Ibid*.

Quære—whether there was a variance between the declaration and the facts stated, on the ground that the official assignee was to be considered as alone possessed of the timber at the time of the conversion and not the trade assignee. *Ibid*.

(J) WARRANTS OF ATTORNEY, JUDGES' ORDERS, AND EXECUTIONS.

[See title *EXTENT*.]

The 12 & 13 Vict. c. 106. s. 136. providing that every warrant of attorney which shall not be filed within twenty-one days next after the execution thereof, in manner and form provided by 3 Geo. 4. c. 39. shall be deemed fraudulent and void, refers to the mode of filing provided by that statute, viz., that it should be together with an affidavit of the time of the execution of the warrant of attorney, but it does not incorporate the alternative in section 2. of that act, which renders warrants of attorney given by bankrupts valid if judgment be signed upon them within twenty-one days. Where, therefore, judgment was signed within twenty-one days upon a warrant of attorney given by a bankrupt, and on the same day a copy of it was filed with the clerk of the dockets of the Queen's Bench, but no affidavit of the time of its execution was ever filed,—Held, that the judgment and execution issued upon it were void as against the assignees. *Acraman v. Herriman*, 20 Law J. Rep. (n.s.) Q.B. 355; 16 Q.B. Rep. 998.

The seizure of a trader's goods under an execution in an action commenced adversely, gives the creditor no priority in case such trader is made bankrupt upon a petition for adjudication filed before the sale of the goods, whether the act of bankruptcy is

before or after the seizure. *Hutton v. Cooper*, 20 Law J. Rep. (n.s.) Exch. 123; 6 Exch. Rep. 159.

Harriet D being possessed of 299l. lent it to W, whom she was about to marry. He, as a security for the loan, gave to her and one S a warrant of attorney, in 1837, to confess judgment for 600l. By the defeasance, which stated that the loan was made in contemplation of marriage, W was to hold the money as long as H D and S should please, paying interest to S for her, and on her request S might, on a week's notice, require repayment of the principal. Judgment was to be entered up forthwith, and execution was to issue in default of payment after notice. The marriage took place, judgment was entered up, and in 1845 S, at the wife's request, gave the week's notice demanding payment, and as it was not paid, issued execution and levied on W's goods. W a few days afterwards became bankrupt, and his assignee applied to set aside the judgment and execution, on the grounds, first, that the execution was irregular, the judgment not having been revived by *scire facias*, and being more than a year old; and, secondly, that the marriage between H D and W had discharged the judgment. The Court refused the application. *Dolling v. White*, 22 Law J. Rep. (n.s.) Q.B. 327; 1 Bail C.C. 170.

Debt on bond in the penal sum of 2,800l. First plea: the defendant cravedoyer of the bond, by which it appeared that J O and the defendant and N were jointly and severally bound to the plaintiff in 2,800l. The condition, as set out onoyer, was for payment of 1,400l. by the defendant to the plaintiff on the 12th of August 1851. There was also a memorandum on the bond that the 1,400l. secured by the bond was the same sum as was mentioned in a warrant of attorney given by J O to the plaintiff, upon which judgment was intended to be entered up. Averment, that J O did, after the said 12th of August, and before action, pay the plaintiff 1,400l. and interest. Second plea, that the plaintiff impleaded J O for the monies in the declaration mentioned and in respect of the bond, and obtained judgment for 2,800l.; that the sheriff upon a *fi. fa.* sued out thereon, and indorsed to levy 1,417l. 17s. 8d., took goods of J O of that amount, and thereout paid the plaintiff. Third plea, that J O executed a warrant of attorney for 2,800l. with a defeasance; that the warrant was given for securing payment of 1,400l. to the plaintiff, and as a further security to him for the 1,400l. along with the bond; that the plaintiff impleaded J O for the detention of the sum of 2,800l. in the bond and warrant of attorney mentioned, recovered 2,800l. and sued out a *fi. fa.*; that J O was a trader and liable to the bankrupt laws; that the plaintiff negligently omitted to file the warrant of attorney; that 1,417l. 17s. 8d. was levied out of the goods of J O and paid to the plaintiff in satisfaction of his debt; that the plaintiff thereby suspended the right of action against J O and precluded himself and the defendant from suing J O, whereby the debt as regarded the defendant was extinguished. The plaintiff demurred to the second plea, and also replied to the same, that the warrant of attorney became fraudulent and void as against the assignees, whereby the plaintiff was obliged to pay back to them the debt and damages paid to him. Similar replications were pleaded to the first and third pleas:—Held, on demurrer to the pleas and

replications, first, that the levy under the execution did not amount to payment *post diem* within the statute of Anne; secondly, that the levy of the sum of 1,400*l.* was no answer to an action at law on the bond for the penal sum of 2,800*l.* *Parker v. Watson*, 22 Law J. Rep. (N.S.) Exch. 167; 8 Exch. Rep. 404.

Held, also, that the plaintiff was entitled to judgment on the several demurrers. *Ibid.*

An execution issued upon a Judge's order is an execution obtained by "confession" within the 6 Geo. 4. c. 16, s. 108. Therefore, where a debtor's goods were seized under an execution issued upon a Judge's order, and an act of bankruptcy was afterwards committed by the debtor, and a fiat issued before the sale, the assignees of the bankrupt were held to be entitled to the goods. *Andrews v. Deeks*, or *Diggs*, 20 Law J. Rep. (N.S.) Exch. 127; 4 Exch. Rep. 827.

In the case of an execution founded on a warrant of attorney within the 108th section of the 6 Geo. 4. c. 16, the effect of that enactment is not to render the writ void, and thereby let in an execution at the suit of a subsequent adverse judgment creditor, but only to vary the legal operation of the writ, so as to render a sheriff who executed it liable to tort. *Congreve v. Evetts*, 10 Exch. Rep. 298.

(K) OF THE BANKRUPT.

(a) Surrender.

It is generally for the benefit of the creditors that the bankrupt should be permitted to surrender, although the prescribed period has passed; and where the Commissioner, on the ground that the bankrupt had left England under unfavourable circumstances, had refused to give such permission, the Vice Chancellor, although declining to interfere with the decision of the Commissioner, recommended the assignees to accede to an appeal from this refusal, and upon their consent the permission was given, the bankrupt's friends paying all the costs. *Ex parte Grant*, *in re Grant*, 4 De Gex & Sm. 51.

Semble—that the Commissioner has jurisdiction to accept the bankrupt's surrender after the time fixed by the advertisement; and where the Commissioner considered that he had no such jurisdiction without the leave of the Vice Chancellor, the Vice Chancellor gave the leave, although not impressed with any favourable opinion towards the bankrupt, holding the surrender to be for the benefit of the creditors generally. *Ex parte Atkinson*, *in re Atkinson*, 4 De Gex & Sm. 62.

(b) Examination.

A bankrupt on his examination before a Commissioner, being asked what were his intentions when he went to Southampton, answered that he went to take rest and to make an arrangement for the benefit of his creditors. The Commissioner, from what had previously passed, disbelieving the answer, held it to be unsatisfactory, and committed the bankrupt to prison under the Bankruptcy Consolidation Act, 12 & 13 Vict. c. 106, s. 260, for not answering to his satisfaction:—Held, that, notwithstanding the answer was a categorical answer to the question put, yet inasmuch as, taken in connexion with the preceding portion of the examination, it was not a satisfactory explanation, the Commissioner was justified

in committing the bankrupt. *Ex parte Legge*, 22 Law J. Rep. (N.S.) Q.B. 345; 1 Bail C.C. 163.

Where a bankrupt, on his examination, in answer to a question of the Commissioner, said, that his memory did not serve him as to how a sum of 100*l.*, the proceeds of a cheque drawn by him, was appropriated, the Court held that the answer was sufficiently unsatisfactory to justify the Commissioner in committing him to prison, under the 260th section of the 12 & 13 Vict. c. 106. *Ex parte Bradbury*, 23 Law J. Rep. (N.S.) C.P. 25; 14 Com. B. Rep. 15.

The 261st section provides, that the Court or Judge before whom a bankrupt, committed under the 260th section, is brought up by *habeas* shall, if required, inspect the whole of the examination, in case the whole shall not have been stated in the warrant:—*Semble*, that it is not the practice to grant a *certiorari* under this section to bring up the whole of the examination. *Ibid.*

(c) Allowance to.

A bankrupt, after his bankruptcy, took the benefit of the act for the relief of insolvent debtors, and, after the usual vesting order had been made, and he had been discharged under that act, his estate under the bankruptcy produced more than 15*s.* in the pound, and an allowance of 600*l.* was ordered to be paid to him. On an application by the provisional assignee under the insolvency for payment to him of the allowance, the Vice Chancellor declined making any order except for the petition to stand over, with liberty for the petitioner to take such proceedings as he should think fit, and for the allowance to be impounded in the mean time. *Ex parte Sturgis*, *in re Hemsworth*, 4 De Gex & Sm. 591.

(d) Arrest and Discharge.

When the Court of Bankruptcy has refused to grant a certificate of conformity on the ground that the bankrupt has committed any of the offences enumerated in section 256, of statute 12 & 13 Vict. c. 106, the granting of a certificate to the assignees, or a creditor, upon which a writ of execution may be issued against the body of the bankrupt, in pursuance of section 257, is a ministerial act, and being for the purpose of enforcing payment of the bankrupt's debts, it may be granted from time to time upon the application of the assignees or creditors. *In re Cowgill*, 20 Law J. Rep. (N.S.) Q.B. 300; 16 Q.B. Rep. 336.

The Court has no power to inquire into the grounds upon which a certificate of conformity was refused by the Court of Bankruptcy. *Ibid.*

A writ of execution against a bankrupt, granted upon a certificate under the 12 & 13 Vict. c. 106, s. 257, pending the suspension of the certificate of conformity, cannot be enforced after the certificate of conformity has come into operation. *In re Everard*, 20 Law J. Rep. (N.S.) Exch. 125; 6 Exch. Rep. 111; 2 L. M. & P. P.C. 80.

The plaintiff, having recovered judgment in the Court of Exchequer, took the defendant in execution. The defendant petitioned the Insolvent Court, inserting the plaintiff's debt and costs in his schedule. The plaintiff sued out a petition in bankruptcy, upon which the defendant was adjudged a bankrupt. The plaintiff then, with a view of proving his debt under the commission in bankruptcy, agreed to the

discharge of the defendant. The Insolvent Court afterwards discharged the defendant. Subsequently the Bankruptcy Commissioner granted the plaintiff a certificate, under section 257, of the statute 12 & 13 Vict. c. 106, that he was a creditor for the amount of his debt, minus the costs, upon which the plaintiff sued out a *ca. sa.* in this court, and arrested the defendant. The Court refused to set aside the *ca. sa.* or to discharge the defendant out of custody; and held that sections 40, 90, and 91. of the statute 1 & 2 Vict. c. 110. did not apply so as to entitle the defendant to freedom from arrest; that section 257. of the statute 12 & 13 Vict. c. 106. applied to creditors who had obtained judgment before proof as well as to other creditors; that the voluntary discharge of the defendant from arrest did not preclude the plaintiff from arresting him on the certificate; that even if the plaintiff were not a good petitioning creditor, by reason of his having arrested the defendant, as no proceedings had been taken in the Court of Bankruptcy to supersede the proceedings, the certificate must be considered as valid, and the *ca. sa.* regular; and that the statute 12 & 13 Vict. c. 106. has transferred all questions as to the discharge of a bankrupt to the Court of Bankruptcy. *Walker v. Edmundson*, 20 Law J. Rep. (n.s.) Q.B. 186; 1 L. M. & P. P.C. 772.

(L) ARRANGEMENT WITH CREDITORS.

(a) Under the Controol of the Court.

[See *Lewis v. Collard*, ATTORNEY AND SOLICITOR, (F) Duties and Liabilities, (e).]

The certificate granted to a petitioning trader by the Commissioner of Bankruptcy, under section 221. of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, will not prevent a creditor from suing the trader for a debt, if the creditor has not had notice of both sittings of the Court to consider the trader's proposal of compromise: even if the creditor be the indorsee of a bill of exchange drawn by a third party and accepted by the trader, and the latter at the time of giving the first notice was ignorant that the bill had been parted with by the drawer and had given the drawer due notice of the first sitting, and after the first sitting, learning to whom the bill had been indorsed, had given the indorsee due notice of the second sitting. *Messon or Wesson v. Alcard*, or *Alcard* (in error), 22 Law J. Rep. (n.s.) Exch. 45; 8 Exch. Rep. 260—affirming *Alcard v. Messon*, 21 Law J. Rep. (n.s.) Exch. 281; 7 Exch. Rep. 753.

Quere, whether in a plea relying on the certificate as a bar to an action for a debt due at the time of the petition, it is necessary to allege that the resolution and agreement has been carried into effect, and the creditors of the defendant have been satisfied according to the tenour thereof. *Ibid*.

A presented a petition for protection under the 211th section of the Bankrupt Act, and a day was appointed for a private sitting. On that day A did not appear. The Commissioner, by an order then made, dismissed the petition; and, by the same order, after finding that A had not made a full disclosure of his effects, and was not desirous of making a *bond fide* arrangement with his creditors, adjudicated A to be a bankrupt. The Court of Appeal (these findings not being disproved) declined to reverse the order

made by the Commissioner. *Ex parte Barnett*, in *re Barnett*, 20 Law J. Rep. (n.s.) Bankr. 3; 4 De Gex & Sm. 54, *nom. Ex parte Burnett*.

An order obtained by a debtor under the 211th and following sections of the statute 12 & 13 Vict. c. 106, granting protection until a day certain, exceeding two months from its date, is irregular. *Ex parte Bowers*, in *re Bowers*, 21 Law J. Rep. (n.s.) Bankr. 13; 1 De Gex, M. & G. 460.

A debtor obtained such an order, and before the two months had expired a creditor proceeded against the debtor under the 78th section, and procured a summons returnable within the original two months, and the debt not being discharged within the time limited the debtor was adjudged a bankrupt. The debtor petitioned for the discharge of the order of adjudication, which was dismissed; and on an appeal from that order of dismissal, the petition of appeal was dismissed, with costs. *Ibid*.

The Court declined to give any judicial opinion whether, after an order granting protection under the 211th section, a creditor could proceed under the 78th section. *Ibid*.

Where a trader had petitioned under the arrangement clauses of the statute 12 & 13 Vict. c. 106, and had conformed to the requirements of the statute, the Court, differing from the Commissioner, permitted the petition to be taken off the file, and all proceedings stayed, although the case did not come within the 223rd section of the act. *Ex parte Phillips*, in *re Phillips*, 22 Law J. Rep. (n.s.) Bankr. 80.

A deed of arrangement between a trader and his creditors to be effectual within the 224th section of the 12 & 13 Vict. c. 106. (the Bankrupt Law Consolidation Act) must absolutely and unequivocally give up all his property for the payment of his debts. *Ex parte Wilkes*, in *re Wilkes*, 24 Law J. Rep. (n.s.) Bankr. 6; 5 De Gex, M. & G. 418.

The three-fifths of the creditors required by the 216th section of the Bankrupt Law Consolidation Act to give effect to an arrangement with creditors, may include creditors to whom debts are due from the arranging debtor jointly with others. *Ex parte Heath*, in *re Heath*, 4 De Gex & Sm. 583.

A petition for arrangement under 12 & 13 Vict. c. 106. s. 211, dismissed on the application of the petitioning trader with the consent of the creditors, although he had complied with the statutory regulations. *Anonymous*, 4 De Gex, M. & G. 872.

(b) By Deed.

A deed of arrangement between a trader and his creditor, executed by six-sevenths in number and value of the creditors whose debts amount to 10*l*. is not binding on a creditor not party to the deed, under the Bankrupt Law Consolidation Act, 1849 (the 12 & 13 Vict. c. 106. s. 224.) unless the deed provides for the distribution of the whole of the trader's estate among his creditors. *Tetley v. Taylor* (in error), 21 Law J. Rep. (n.s.) Q.B. 346, 1 E. & B. 521—overruling same case, 21 Law J. Rep. (n.s.) Q.B. 2; and affirming *Drew v. Collins* (next case).

A deed of arrangement by a trader, executed by the number of creditors required by the 12 and 13 Vict. c. 106. s. 224. is not binding upon any creditor not a party to it, unless the deed provides for the distribution of the whole of the trader's estate

amongst his creditors. *Drew v. Collins*, 20 Law J. Rep. (N.S.) Exch. 369; 6 Exch. Rep. 670.

A plea setting up such deed of arrangement should allege that the party was a trader for six calendar months preceding his suspension of payment. *Ibid.*

A deed, by which a trader assigned all his estate to trustees for the benefit of his creditors, contained a provision that the trustees might require the creditors to verify their debts by declaration or otherwise; and that, in the event of any creditor failing or refusing so to verify his debt, he should lose all dividends under the deed, and that such dividends might be paid by the trustees to the debtor:—Held, that this was not such a deed of arrangement as could be binding on creditors not parties to it under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106. s. 224.) as it did not necessarily provide for the distribution of the whole of the debtor's estate among his creditors. *Cooper v. Thornton*, 22 Law J. Rep. (N.S.) Q.B. 145; 1 E. & B. 544.

To assumpsit on bills of exchange, the defendants pleaded that being joint traders, by deed under the 12 & 13 Vict. c. 106. s. 224, they assigned their joint property to M, who undertook to pay their joint creditors 7s. 6d. in the pound; that six-sevenths of the creditors accepted and executed the deed, and the defendants were thereby released from the plaintiffs' claim. The plaintiffs replied, after setting out the deed on oyer, that each of the defendants had separate property. The replication was held good, on the authority of *Teiley v. Taylor*. *Fisher v. Bell*, 21 Law J. Rep. (N.S.) C.P. 228; 12 Com. B. Rep. 363.

A plea to a declaration in debt, after setting out a deed, which it alleged to be a deed of arrangement under 12 & 13 Vict. c. 106, between the defendant and his creditors, stated, that the creditors by whom and on whose behalf the same was sealed, were "more than six-sevenths, to wit, nine-tenths" in number and value of the creditors of the defendant, &c.:—Held (on special demurrer for argumentativeness, and for attempting to raise an immaterial issue, &c.), that the plea sufficiently stated the deed to have been signed "by or on behalf of six-sevenths of the creditors" within the meaning of sect. 225. *Stewart v. Collins*, 20 Law J. Rep. (N.S.) C.P. 79; 10 Com. B. Rep. 634; 2 L. M. & P. P.C. 61.

The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. s. 224, enacts, that every deed of arrangement "now or hereafter entered into between any such trader and his creditors," and signed by six-sevenths of them in number and value, whose debts amount to 10l. shall be obligatory upon all the creditors who shall not have signed the deed, as if they had signed it:—Held, that the section was not retrospective in its operation, and that the plaintiff, a creditor of the defendants, was not barred by a deed of arrangement entered into by six-sevenths of the creditors of the defendants, in 1847, to which he was not a party. *Wagh v. Middleton*, 22 Law J. Rep. (N.S.) Exch. 109; 8 Exch. Rep. 352.

The grant of the certificate by the Commissioner under the 225th section of the same act is a judicial act, and he may look at the nature of the deed to see whether it is of the nature contemplated by the 224th

section, and if it appears not to be so, he may refuse his certificate, although the deed be executed by the required number and value of the creditors. *Ibid.*

Upon the petition of an arranging debtor for a certificate that a deed of arrangement had been duly signed by the requisite majority of creditors, certain creditors attended and applied for permission to examine the debtor, and to produce witnesses to shew that the deed had not been duly executed. The Commissioner refused to grant such permission, and being satisfied of the execution of the deed by six-sevenths of the creditors, certified in the manner required by the 225th section of the Bankrupt Law Consolidation Act:—Held, that the certificate ought not to have been given, and it was discharged on appeal. *Ex parte Lees, in re Morris*, 4 De Gex & Sm. 284.

Quære—whether a deed of arrangement under the 224th section would after three months bind creditors not executing it without any certificate being signed by a Commissioner. *Ibid.*

(M) CERTIFICATE OF CONFORMITY.

[*See ante*, Proof of Debt.—Of the Bankrupt, Arrest and Discharge.—Arrangement, under the Controul of the Court.]

(a) Grant of, in general.

A, who was made a bankrupt at the time when the provisions as to certificates under the 5 & 6 Vict. c. 122. were in force, applied to the Commissioner for his certificate, which the Commissioner refused. After the Bankrupt Law Consolidation Act was passed, A applied to the Commissioner to rehear the case as to the certificate, which the Commissioner refused. Petition by A that the Commissioner might be directed to rehear the case was dismissed. *Ex parte Higginson, in re Higginson*, 20 Law J. Rep. (N.S.) Bankr. 15.

Under the 198th section of the 12 & 13 Vict. c. 106, the Commissioner has a discretion to adjourn generally the sitting held for the purpose of granting the bankrupt's certificate, at the instance of the only creditor desirous of opposing who had omitted to give the three days' notice required by the statute. *Ex parte Woods, re Woods*, 20 Law J. Rep. (N.S.) Chanc. 619; 3 Mac. & G. 269.

A bankrupt, who has been made a bankrupt before, and paid on that occasion less than 15s. in the pound, will not, in the matter of his certificate, be placed in a more favourable position than he would have been in under the 6 Geo. 4. c. 16. *Ex parte Hollingworth, in re Hollingworth*, 20 Law J. Rep. (N.S.) Bankr. 13; 4 De Gex & Sm. 44.

E M and H M purchased a business of their brothers, but it was not paid for. E M attended to the accounts, so far as they were attended to, and H M performed the duties of traveller to the business. E M and H M on various occasions raised money by deposits of goods and paid 60l. per cent. for discount. H M ordered goods one day and pledged them on the next. The brothers, the vendors of the business, sued for the purchase-money and issued execution on a judgment in the action. Both E M and H M were adjudicated bankrupts, and the Commissioner refused them their certificates or protection, on the ground of not keeping proper books of account (as to E M, destruction of books), obtaining goods for the purpose of pledging and pledging

them, and fraudulent preference to the brothers who sold the business. H M appealed, and swore that he pledged the goods to meet a sudden demand for payment of bills falling due; that he believed he was solvent when the goods were bought, and that he had nothing to do with the keeping of the books, and he produced a witness who swore that the goods were ordered because they were wanted in the stock. The Lords Justices were of opinion that there was no wrong intention as to the books or the pawning, and that there was pressure by the vendors, and, acquitting the appellant of fraud, granted him a second-class certificate, to be dated eight months after the adjudication. *Ex parte Martyn, in re Martyn*, 21 Law J. Rep. (N.S.) Bankr. 46; 2 De Gex, M. & G. 225.

The full Court of Appeal (*Lord Justice Knight Bruce dubitante*) held, first, that, under the statute 12 & 13 Vict. c. 106, the Commissioner may refuse protection to a bankrupt for other causes than for the commission of any of the offences enumerated in the 256th section; secondly, that the issue of the certificate of penalty, under the 257th section, depends upon the refusal of protection generally, and is not limited to such refusal for either of the offences enumerated in the preceding section; and thirdly, that the discretion vested with the Commissioner by this statute in granting or withholding protection is very large, excepting in the cases enumerated in the 256th section, in which cases his functions are merely ministerial, and he is bound to refuse protection. *Ex parte Stanton, in re Stanton*, 21 Law J. Rep. (N.S.) Bankr. 7; 1 De Gex, M. & G. 224.

A bankrupt, having had his certificate refused, was taken in execution, and lodged in gaol. The ground of the refusal of the Commissioner was a fraudulent preference within the 256th section of the 12 & 13 Vict. c. 106; but the Court of Appeal being of opinion that such a charge was not sustained, granted a certificate of the third class, and directed the release of the bankrupt from prison on a given day. *Ex parte Hunt, in re Hunt*, 21 Law J. Rep. (N.S.) Bankr. 29.

The Commissioner has authority under the 198th section of the act to appoint a sitting for the consideration of the grant of a certificate to a bankrupt, although the bankrupt does not make the application himself. *Ex parte Sherlock, in re Sherlock*, 21 Law J. Rep. (N.S.) Bankr. 36; 2 De Gex, M. & G. 269.

It is no sufficient reason for delaying the consideration of the grant of a certificate under a separate fiat, that an action is pending, to try whether two out of three other persons against whom and the bankrupt a joint fiat has been issued, are legally bankrupts. *Ex parte Castelli, in re Castelli*, 22 Law J. Rep. (N.S.) Bankr. 77.

It is no sufficient reason for delaying the grant of a certificate under a separate fiat, that during the further proceedings under a joint fiat against the bankrupt and others, matters may be disclosed that may render it proper to refuse this certificate, or grant it with modifications. *Ex parte Braggiotti, in re Braggiotti*, 22 Law J. Rep. (N.S.) Bankr. 76; 2 De Gex, M. & G. 964.

A trader who was not engaged in any business except as the owner of two small sailing vessels, kept no regular accounts. He contracted with a shipbuilder for the repair of one of the vessels, and

the amount claimed for the repair was far beyond the contract price, by reason of some alterations alleged to be beyond the contract. Cross actions were brought and settled by arbitration. The trader left England in a feeling of irritation at the result of the proceedings, and was declared bankrupt on the petition of the shipbuilder. He had on a former occasion compounded with his creditors, paying them less than 15s. in the pound, but had been forced into this proceeding by misfortune:—Held, that the bankrupt's conduct in quitting England was highly censurable, but would be sufficiently punished by suspending his certificate for twelve months, and allowing it as one of the second class. *Ex parte Hodgson, in re Hodgson*, 3 De Gex, M. & G. 547.

Under the present Act the Court will not universally refuse a certificate protecting the bankrupt's property merely because he has on a former occasion compounded with his creditors, and paid less than 15s. in the pound. *Ibid.*

(b) *Opposing.*

Two of the creditors of a bankrupt appeared before the Commissioner, and opposed the granting of his certificate. The Commissioner suspended the granting the certificate for twelve months. The bankrupt appealed from this decision. Notice of the appeal had not been given to the two creditors. The Court held, that they ought to have been served with the petition of appeal. *Ex parte Johnson, in re Johnson*, 20 Law J. Rep. (N.S.) Bankr. 6; 4 De Gex & Sm. 25.

A bankrupt was refused his certificate by the Commissioner for an offence not enumerated in the 256th section of the statute 12 & 13 Vict. c. 106, namely, for systematically buying goods at a small price and short credit and immediately selling the same at still lower prices. He was also refused any protection, except pending an appeal. On an appeal, the Court refused to grant any certificate, but made an order, by consent of the assignees, giving protection for the person of the bankrupt, but leaving his property liable. *In re Holthouse*, 21 Law J. Rep. (N.S.) Bankr. 3.

A creditor who had not given three days' notice of opposition under the 198th section, and who was, therefore, refused a hearing, was not allowed to appear before the appeal Court to discharge the above order of the Commissioner. *Ibid.*

A bankrupt, having been allowed his certificate by the Commissioner, with a suspension for three months, went out of the jurisdiction, and the petitioning creditors, appealing against the allowance of the certificate altogether, were unable to serve him with the petition, which was accordingly dismissed, with costs, as against the assignees, but the petitioners agreeing not to present another petition, without costs as against the bankrupt. *Ex parte Eyre, in re Belton*, 22 Law J. Rep. (N.S.) Bankr. 3; 2 De Gex, M. & G. 946.

The 198th section of the Bankrupt Law Consolidation Act, providing that forthwith after the bankrupt has passed his last examination, the Court shall appoint a public sitting for the allowance of his certificate, and that at such sitting any creditor may oppose who has given three days' notice to the Registrar, leaves it to the discretion of the Com-

missioner to appoint such day as he may think fit after the last examination, and does not preclude him from appointing another day in order to give a creditor an opportunity of giving the required notice of his intention to oppose. *Ex parte Woods, in re Woods*, 4 De Gex & Sm. 278.

(c) *Form of.*

A certificate of conformity to the bankrupt laws granted by Commissioners, under the 6 Geo. 4. c. 16, is void, although allowed by the Lord Chancellor, unless it states expressly or in equivalent terms that there does not appear to them any reason to doubt the "truth or fullness" of the discovery of his estate and effects made by the bankrupt. It is insufficient to state that there does not appear any reason to doubt its fullness. *Wagner v. Imbrie*, 20 Law J. Rep. (N.S.) Exch. 416; 6 Exch. Rep. 882; 2 L. M. & P. P.C. 510.

(d) *Concealment of Property and withholding Information.*

A secreting by a bankrupt of his goods, with intent to cheat his creditors, is a concealment sufficient to avoid his certificate within the 38th section of the Bankruptcy Law Amendment Act, 5 & 6 Vict. c. 122, although a full disclosure of the concealment is made to the Commissioners in Bankruptcy before the bankrupt's last examination. *Courtivron v. Meunier*, 20 Law J. Rep. (N.S.) Exch. 104; 6 Exch. Rep. 74.

The certificate of a bankrupt was suspended by the Commissioner for a stated time, and then to be of the third class, and without protection in the mean time. The judgment was founded on the commission by the bankrupt of offences enumerated in the 2nd, 7th and 9th cases of the 256th section of the 12 & 13 Vict. c. 106. The bankrupt appealed; but it appearing upon the evidence that he had committed the offences mentioned in the 5th case of that section, and his counsel declining to accept the offer of the Court of a discharge of the Commissioner's order and a general refusal of certificate, their Lordships dismissed the appeal on the ground of that offence, although they were of opinion (upon hearing only the bankrupt's counsel) that the evidence did not support the judgment as to the 2nd, 7th and 9th cases. *Ex parte Warwick, in re Warwick*, 24 Law J. Rep. (N.S.) Bankr. 23.

A, a tallor-broker in business with B, became bankrupt, and on application for his certificate had the same suspended for two years, and then to be of the third class. The case of suspension was supported by the Commissioner on two grounds: first, that the bankrupt had fraudulently induced a creditor to forbear enforcing payment of a certain sum by withholding information known to him and not known to the creditor, and which, if known, would have induced the creditor to enforce payment; the other case was for receiving money for goods alleged by the bankrupt to have been purchased, and then re-transferring the goods to the person of whom he bought them, so that the creditor did not receive the goods, and lost his money. The Lords Justices were of opinion that the withholding of information, or the silence of the bankrupt regarding that information, was not dishonestly intended in the one case, and the act by which the goods were re-

transferred and the money lost in the second case was, upon the evidence before the Court, not fraudulent, so far as the petitioner was concerned, and therefore they granted an immediate certificate of the first class. *Ex parte Gull, in re Gull*, 21 Law J. Rep. (N.S.) Bankr. 43.

(e) *Gaming.*

The 201st section of the act enacts, that no bankrupt shall be entitled to his certificate if he shall within one year before his bankruptcy have lost 200*l.* by any contract for the sale or purchase of "any Government or other stock":—Held, on appeal, affirming the decision of the Commissioner, that railway stock is within the meaning of this section. *Ex parte Matheson, in re Matheson*, 21 Law J. Rep. (N.S.) Bankr. 18; 1 De Gex, M. & G. 448.

A bankrupt had, within a year from the date of his petition for adjudication, lost upon a contract and continued contract for the purchase of railway stock, not quite 200*l.*, but the loss with the broker's commission on the continuation of the contract was something more than 200*l.*:—Held, that the word "contract" in the 201st section of the Bankrupt Law Consolidation Act, 1849, is to be read "contracts," and also, that the commission is to be included in the gross amount of the loss, and that the bankrupt having so lost above 200*l.* was within the penalty of that section. *Ex parte Copeland, in re Copeland*, 22 Law J. Rep. (N.S.) Bankr. 17; 2 De Gex, M. & G. 914.

Semble—that railway shares, as distinguished from railway stock, are within the same section; and

Semble—that if the transaction had been brought before the Court, as one of "gaming," it would have been within the same section. *Ibid.*

(f) *Conduct of Bankrupt as a Trader.*

A carried on the business of a wine-merchant for three years, at the end of which time he was made a bankrupt. He had started with a deficiency, and his expenditure and losses during that period had very considerably exceeded his profits, and there never had been, at any time, a reasonable expectation of his getting over his difficulties. At different times in this period he had borrowed considerable sums of B, a person not conversant with business; the loans having been effected by money, bills and notes, which had been given by B to A, in respect of which A deposited with B bills of lading and wine warrants. In the course of these transactions A made misrepresentations to B as to the state of his affairs and the value of the securities given. B alone opposed the granting of A's certificate:—Held, that the above circumstances constituted "conduct as a trader" within the meaning of the Bankrupt Law Consolidation Act, upon which the Court could adjudicate in the matter of the certificate. *Ex parte Dornford, in re Dornford*, 20 Law J. Rep. (N.S.) Bankr. 7; 4 De Gex & Sm. 29.

A trader carrying on business for two or three years with a deficiency of assets, in his application for his certificate ought to explain that circumstance, or give some fair excuse for his conduct, if any creditor has suffered by it. *Ibid.*

A bankrupt, who had twice before compounded with his creditors, made false and fraudulent entries in his books, consisting of fictitious accounts in par-

tical names. He stopped payment, being at the time able to pay 12s. in the pound, and soon after offered 11s. in the pound. The Commissioner refused him his certificate and all protection, excepting for the twenty-one days; and on appeal, the Lords Justices, acting under the discretion given by the 198th section of the act—"a discretion to be exercised on judicial grounds with reference to the nature of the case in general, and on its peculiar circumstances"—dismissed the petition of appeal, with costs, affirming the decision of the Commissioner, and refusing any protection whatever, the conduct of the bankrupt being unfair, untradesmanlike and disreputable. *Ex parte Curties, in re Curties*, 21 Law J. Rep. (n.s.) Bankr. 53; 2 De Gex, M. & G. 255.

Bankers who, upon the evidence before the Court, must be taken to have been, and to have known that they were, deeply insolvent, continued to receive deposits, and to issue notes for a period of eighteen months, during which time their assets would not pay more than 5s. in the pound; on an adjudication of bankruptcy, the Commissioner for this, among other reasons, refused them any certificate or protection. On appeal, the Court affirmed the refusal of the certificate on the above-stated ground, but, upon the consent of the assignees and of the opposing creditors, granted protection to their persons. *Ex parte Rufford, in re Rufford*; *Ex parte Wragge, in re Wragge*, 21 Law J. Rep. (n.s.) Bankr. 32; 2 De Gex, M. & G. 234.

The certificate is a benefit to which a bankrupt may entitle himself by good conduct. *Ibid*.

Whether, after a refusal of a certificate, the grant of protection is of any avail against the common law right of creditors who do not come in under the bankruptcy—*quære*. *Ibid*.

A trader carried on business as a baker, and, before the statute 12 & 13 Vict. c. 106. came into operation, obtained money from J, on pretence that it should be invested on mortgage, which was not done. He also obtained money from F, on a similar pretence, which was not so invested. The trader became bankrupt, and the Commissioner refused him any certificate; and, on appeal, held (dismissing the appeal), that the money of J and the money of F were obtained by fraud and falsehood; that on these grounds he was not entitled to his certificate; that before a bankrupt can ask for his certificate he should have conformed to the bankrupt law since his bankruptcy; that if a trader so obtains money, though not in the course of his trade, or in matters connected with his business, it is, on a question of certificate, conduct as a trader, within the meaning of the act; and that if a case come otherwise within the act, it is not the less so because the conduct complained of took place before the passing of the act. *Ex parte Staner, in re Staner*, 21 Law J. Rep. (n.s.) Bankr. 56; 2 De Gex, M. & G. 263.

A trader, who carried on business without capital, and in the usual course of his transactions purchased goods, and immediately pledged them to raise money for the purposes of his trade, was by the Commissioner refused either certificate or protection; but, it appearing that the buying was not with the mere purpose of pledging, and that the pledging was made in the honest belief of being able to redeem the goods and sell at a profit, the Court of Appeal held, that he had not committed any of the offences enume-

rated in the 256th section of the Bankrupt Law Consolidation Act; and that although the Court was bound to have regard, under the 198th section, to the bankrupt's conduct as a trader, it was not necessary to affirm the judgment of the Commissioner; and therefore granted a certificate of the third class, to take effect at the end of two years from the petition for adjudication, without any protection for two months from the date of the order on the appeal. *Ex parte Manico, in re Manico*, 22 Law J. Rep. (n.s.) Bankr. 41; 3 De Gex, M. & G. 502.

The 256th section is to be strictly rather than loosely construed. But, *semble*, that if only one of the offences therein enumerated is committed, it is not imperative on the Court to award the extreme penalty there imposed. *Ibid*.

A trader owing 6,000*l.* removed from a provincial city to London, where he recommenced business, and incurred new debts, and did not inform his new creditors of the state of his pecuniary circumstances. In less than nine months he became bankrupt; and the Commissioner adjourned the grant of certificate for eighteen months, without protection for six months; but, on appeal, by arrangement, the order was varied by granting the certificate from a day certain, eighteen months from the adjudication, and giving protection at the end of nine months therefrom. *Ex parte Wooldridge, in re Wooldridge*, 24 Law J. Rep. (n.s.) Bankr. 17.

A creditor who had not been permitted to oppose the certificate before the Commissioner, on the ground of his having omitted to give the requisite notice of his intention to oppose, cannot be heard in support of the Commissioner's decision, refusing the certificate and protection, on an appeal from that decision. *Ex parte Holthouse, in re Holthouse*, 1 De Gex, M. & G. 237.

The bankrupt's certificate will be altogether refused, if it appear that he has systematically bought on credit to sell at less than cost price. *Ibid*.

Where a bankrupt has engaged in reckless trading and speculations of a desperate character, the Court will not grant him a certificate; but where a cotton-spinner had engaged in several other trades and undertakings of different kinds, and it was not shewn that he was at the time insolvent,—Held, that the number and variety of these undertakings did not constitute a case of reckless trading. *Ex parte Wakefield, in re Wakefield*, 4 De Gex & Sm. 18.

Breach of trust is not "conduct as a trader," with reference to a bankrupt's certificate. *Ibid*.

A trader is not bound to leave off trading merely because he is in difficulties; the question in each case being whether he has continued trading after there ceased to be any reasonable prospect of his retrieving himself. *Ex parte Johnson, in re Johnson*, 4 De Gex & Sm. 25.

A trader, when in difficulties and when sued, placed himself in the hands of the bulk of his creditors, who defended the action in his name, and in order to gain time for an arrangement, pleaded twenty pleas, without having any substantial defence:—Held, that the bankrupt was not disentitled to his certificate for having vexatiously defended the action. *Ibid*.

A banker, who has pledged a short bill of a customer, is excluded from a certificate. *Ex parte Sturt, in re Gibson*, 4 De Gex & Sm. 49.

(g) *Effect of, as a Discharge.*

By the deed of settlement of a registered joint-stock company, the shareholders covenanted to pay, in manner thereafter mentioned, the calls on their shares, and by a subsequent clause it was stipulated that no assignees of bankrupts should be entitled to become shareholders in respect of the shares held by such bankrupt shareholder in the capital of the company, but that such assignees should be entitled to sell the same upon proof of the bankruptcy and of their title as assignees; and by the next clause a general power was given to the directors to make calls on the holders of shares other than the bankrupt shareholders.—Held, that the bankruptcy of a shareholder was an answer to an action for calls made and due after his certificate, although the assignees had not availed themselves of the power of sale, and the bankrupt still remained the nominal holder of the shares. *Wylam Steam Fuel Co. v. Street*, 24 Law J. Rep. (N.S.) Exch. 208; 10 Exch. Rep. 849.

(h) *Reference back by Court of Appeal.*

Whether the Court of Appeal has jurisdiction to refer back the question of certificate after the Commissioner has refused it—*quære*. *Ex parte Whitaker*, in re *Whitaker*, 21 Law J. Rep. (N.S.) Bankr. 25; 1 De Gex, M. & G. 459.

Whether the grant of the certificate by the Commissioner after he has once refused it would be valid—*quære*. *Ibid*.

(i) *Conditional Certificate.*

A bankrupt in the course of a trading of two years' duration became liable upon accommodation bills to the sum of 59,000*l*. On applying for his certificate the Commissioner (chiefly upon this ground) suspended the same for two years, without protection in respect of such bills, and then to be of the third class, and to have annexed a condition that neither the bankrupt nor his future property should be protected from liability in respect of the bills.—Held, upon appeal, that there being no evidence of fraud or misrepresentation, the bankrupt was entitled to a certificate of the second class; and that such a condition was improper to be annexed to the certificate. *Ex parte Hammond*, in re *Hammond*, 24 Law J. Rep. (N.S.) Bankr. 2.

If a bankrupt has dealt in accommodation bills, that is a circumstance requiring a full and satisfactory explanation, but is not necessarily one affecting his title to a certificate; and although every such transaction must be judged of according to its particular circumstances, the main point for consideration is, how far the bankrupt had reason to believe that he could discharge his liability upon such bills on their becoming due. *Ibid*.

(N) PRACTICE IN GENERAL.

A creditor resident in England may vote by letters of attorney at meetings held, under the 230th section of the Bankrupt Law Consolidation Act, to take into consideration an offer made by a bankrupt to his creditors, with a view to superseding the bankruptcy. *Ex parte Clegg*, in re *Clegg*, 20 Law J. Rep. (N.S.) Bankr. 22; 4 De Gex & Sm. 606.

An affidavit sworn at New York before a magistrate, with the attestation of a notary annexed, cer-

tifying that there was such a person who was a magistrate of that city, received in evidence, under the 243rd section of the 12 & 13 Vict. c. 106. *Ex parte Reid*, in re *Carne*, 22 Law J. Rep. (N.S.) Bankr. 4; 2 De Gex, M. & G. 963, *nom. Ex parte Bird*.

As to the leave to appeal to the House of Lords under the 18th section of the Consolidation Act, 1849, and the 10th section of the 14 & 15 Vict. c. 83, the Court will not give it unless it is of opinion that the point is one both of sufficient doubt and of sufficient importance. *Ex parte Bateman*, in re *Barbary*, 23 Law J. Rep. (N.S.) Bankr. 8; 5 De Gex, M. & G. 258.

A commission of bankruptcy issued in 1817. A B acted as messenger from that time until 1821, and he was paid the greater part of his claim on account. Many years afterwards, monies came to the hands of the official assignee, and the executors of the messenger petitioned for payment out of these monies of the balance remaining due; but the Court, concurring in the view of the Commissioner who had refused the application, declined to make any order. *Ex parte Page*, in re *Hammond*, 23 Law J. Rep. (N.S.) Bankr. 35.

A bankrupt cannot without the concurrence of his assignee or assignees obtain a summons for the examination of a party under the 120th section of the Consolidation Act (12 & 13 Vict. c. 106.) who is suspected of having bankrupt's property. *Ex parte Dimsdale*, in re *Dimsdale*, 23 Law J. Rep. (N.S.) Bankr. 41; 4 De Gex, M. & G. 873.

A Commissioner, in the absence of one of the creditors' assignees, ordered a sale of part of the bankrupt's effects; that assignee appealed, but did not enter his petition until more than twenty-one days from the date of the Commissioner's order.—Held, that the discretion of the Commissioner could not be interfered with, and also that the appeal was too late, the case falling within the 12th section of the act, 12 & 13 Vict. c. 106. *Ex parte Flood*, in re *Ford*, 24 Law J. Rep. (N.S.) Bankr. 1; 5 De Gex, M. & G. 398.

Personal service of a summons, issued under section 78. of the statute 12 & 13 Vict. c. 106, is effected by shewing the original and leaving a true copy containing the copy of the signature of the Commissioner: therefore an adjudication made upon an alleged act of bankruptcy in not, under the 80th section, paying, &c. within "seven days after personal service" of the summons, was annulled, on the ground that the copy served did not contain such signature, and was not a "true copy." *Ex parte Tindal*, in re *Tindal*, 24 Law J. Rep. (N.S.) Bankr. 18.

A trader did not object at the time of the service, but did not appear at the appointed day.—Held, that this was no waiver within the 80th Rule in Bankruptcy. *Ibid*.

Although the assignees delay selling under an order obtained by a mortgagee for sale of the mortgaged property, with liberty for him to bid, the Court will not depart from the rule of not giving to the mortgagee the conduct of the sale. *Ex parte M'Gregor*, in re *Laird*, 4 De Gex & Sm. 603.

The 17th of the Rules and Orders in Bankruptcy does not render it necessary or proper to serve on a mortgagee notice of an application for an order for the sale of chattels alleged by the assignees to be in

the bankrupt's reputed ownership. Such an order should be made on an *ex parte* application of the assignees shewing a *prima facie* case. *Ex parte Young, in re Roebuck*, 4 De Gex, M. & G. 864.

Where an order of reversal upon appeal rested in minutes, and the counsel for the respondents stated that material considerations had not been brought before the Court, the Court acceded to a motion for rehearing, although twenty-one days had elapsed. *Ex parte Turner, re Crosthwaite*, 2 De Gex, M. & G. 927.

Quære—whether such rehearing was a matter of right. *Ibid*.

The Commissioner ought to make an order for the sale of property alleged by the assignees to be in the bankrupt's reputed ownership, on their *ex parte* application, supported by *prima facie* evidence. *Ex parte Wood, in re Sutton*, 4 De Gex, M. & G. 861.

(O) INSPECTION OF DOCUMENTS.

A creditor, who had proved his debt, applied by his attorney, under the 232nd section of the statute 12 & 13 Vict. c. 106, for leave to inspect the affidavit of debt, the proof of the act of bankruptcy, and other proofs filed in court, on which the adjudication was founded, with a view to impeach the adjudication. The officer of the district court refused compliance. The creditor appealed, and it was held, that this was not a "reasonable" request, within the meaning of the statute; that the application was properly refused, and that the appeal must be dismissed, with costs. *Quære*—Whether the above-mentioned documents and proofs are within the language of the 232nd section. *Ex parte Rimell, in re Brewer*, 21 Law J. Rep. (N.S.) Bankr. 27; 1 De Gex, M. & G. 491.

(P) SOLICITOR.

[As to bills of costs, see Reg. Gen. Bankr. May 19, 1854, 24 Law J. Rep. (N.S.) xiii.—xv.]

A solicitor acted for an arranging debtor until the proposal for arrangement was rejected, and the debtor was declared bankrupt. The Commissioner then ordered the official assignee to appoint a solicitor to act in the matter; and a solicitor was accordingly appointed:—Held, that the former solicitor had no right to appeal against the order. *Ex parte Smith, in re Coates*, 4 De Gex & Sm. 287.

(Q) MESSENGER AND OTHER OFFICERS.

[Office of Secretary abolished by 15 & 16 Vict. c. 77; and Registrar appointed to his duties by 17 & 18 Vict. c. 119, ss. 3—8. Charges of Accountant regulated by Reg. Gen. Bankr. May 19, 1854, 24 Law J. Rep. (N.S.) xv.]

A messenger in bankruptcy, under a warrant to seize the goods of A, seized the goods of B, acting *bona fide* with the intention to carry the warrant into execution:—Held, that he was not entitled to the demand of a perusal and a copy of the warrant under section 107, of 12 & 13 Vict. c. 106, and that he was liable in an action of trespass brought against him alone, though no such demand had been made or left at his usual place of abode. The words of the above section "acting in obedience to any warrant," are not satisfied by *bona fides* and intended obedience. *Munday v. Stubbs*, 20 Law J. Rep.

(N.S.) C.P. 59; 10 Com. B. Rep. 422; 1 L. M. & P. P.C. 675.

A creditors' assignee in insolvency under 5 & 6 Vict. c. 116, s. 1. and 7 & 8 Vict. c. 96, s. 4. is not liable for the messenger's fees, except upon an express contract. *Hamber v. Hall*, 20 Law J. Rep. (N.S.) C.P. 167; 10 Com. B. Rep. 780.

(R) COSTS.

[See 18 & 19 Vict. c. 15, s. 10, as to orders for costs not affecting lands unless registered.]

A writ of summons having issued against the defendant, a summons in bankruptcy was afterwards taken out against him, returnable on the 17th, on which day an order was made by the Commissioner, pursuant to the 12 & 13 Vict. c. 85, that the costs of the summons should abide the event of the action. On the 15th of October a summons was taken out before a Judge, returnable on the 17th, for staying proceedings on payment of the debt and costs, and an order for that purpose was made on the 18th. One bill having been taxed in Bankruptcy, and the other in this court, the Master added them together, and judgment was signed for the amount:—Held, that the judgment was regular, as the costs in bankruptcy, when taxed by the Master in Bankruptcy, became part of the judgment of the Court. *Webb v. Hewlett*, 20 Law J. Rep. (N.S.) Exch. 134; 6 Exch. Rep. 107.

A trader, who was in insolvent circumstances, was the owner of leasehold property which was charged with an annuity. He committed an act of bankruptcy, and after that, A B paid off the arrears of the annuity and another sum, making 900*l.*, and with the concurrence of the trader took an absolute assignment of the annuity and arrears. Then the trader was adjudicated bankrupt, and assignees of his estate were appointed, after which A B bought the leasehold property so charged, and the same was assigned to a trustee for him. Upon a bill being filed by the assignees, the sale of the annuity and of the leasehold was set aside as fraudulent and void, with costs to be paid by A B to the solicitor of the assignees. An order was made in the bankruptcy, by which it was declared that the order as to costs in the decree was to be without prejudice to any question between the trader and A B. The trader obtained his certificate, and the leaseholds having been sold and all the debts paid, there remained a surplus. The trader assigned all his effects for value, and the purchaser claimed the surplus, but A B insisted that he was entitled to be repaid out of it such costs of the proceedings in Chancery and Bankruptcy as he had paid to the assignees; but the Court held, that he was not entitled to them as against the trader or his assignee for value, because, if he and the trader were trustee and *cestui que trust*, in the purchase, he had set up an adverse title to the trader; and because, if he and the trader had in the purchase combined to defeat the creditors, it would be against public policy to give him the costs; and held, therefore, that the purchaser from the trader was entitled to the surplus. *Ex parte James, in re Tratt*, 22 Law J. Rep. (N.S.) Bankr. 8; 3 De Gex, M. & G. 493.

Solicitors to the assignees of a bankrupt had their bills of costs taxed in March 1851 by the Registrar of the Birmingham District Court, *ex parte*, without

notice to the assignees, but in the presence of the official assignee, who had since died. In April 1853 the assignees and some of the creditors applied to the district court for a re-taxation of the bills, which, save 100*l.*, had not been paid, and re-taxation was refused by the Commissioner; but upon appeal, held, that such bills must be re-taxed. As to the jurisdiction of the Registrar to tax, Lord Justice Knight Bruce doubted whether he had such jurisdiction prior to the Orders of October 1852, made pursuant to the Consolidation Act, 1849; but he had no doubt that, whether the Registrar had such jurisdiction or not, it was the duty of the Commissioner to review the taxation as a matter of course, and without proof of objectionable items; and Lord Justice Turner, while he considered it to be clear that the Commissioner had authority to review the taxation, held it to be his duty to exercise that authority in a case where the bills contained a series of items *prima facie* unreasonable and entirely unexplained. *Ex parte Bateman, in re Barbary*, 23 Law J. Rep. (N.S.) Bankr. 8; 5 De Gex, M. & G. 358.

Two out of four bankrupts appealed from the adjudication, and the Court of Appeal gave them leave to try the question in an action, upon the undertaking of their solicitors to abide by such order as the Court of Appeal might make as to costs. The adjudication was sustained at law:—Held, that the appeal must be dismissed, but without costs; the solicitors, in pursuance of their undertaking, to pay the costs of the action. *Ex parte Castelli, in re Castelli*, 23 Law J. Rep. (N.S.) Bankr. 42.

Where the stock of a bankrupt had been sold in the country by tender, the Court directed that the taxation of the scale of charges for such sale should be the same as adopted in London, namely, a scale between the charges for sales by auction and sales by valuation. *Ex parte Hunt, in re McKenna*, 23 Law J. Rep. (N.S.) Bankr. 43; 5 De Gex, M. & G. 387.

(S) DIVIDENDS.

Where there was joint estate to the amount of 13*l.*, Held, that the joint creditors could not receive dividends from the separate estate until all the separate creditors were paid in full, although it did not appear that after payment of costs any part of the 13*l.* would remain for distribution. *Ex parte Kennedy, in re Entwistle*, 2 De Gex, M. & G. 228.

BARON AND FEME.

[See ACCOUNT STATED—BIGAMY—DIVORCE—DOWER—MARRIAGE—SETTLEMENT.]

(A) HUSBAND.

(a) *Rights of, in Wife's Property.*

(b) *Right to Custody of Wife.*

(c) *Liability for Wife's Funeral and Necessaries.*

(d) *Liability for Wife's Interest in Shares.*

(e) *Liability for Wife's fraudulent Misrepresentations.*

(f) *Property, and Settlement thereof.*

(B) WIFE.

(a) *Rights and Privileges.*

(b) *Property, and Settlement thereof.*

(c) *Consent.*

(C) SEPARATE ESTATE.

(a) *Power over and Disposition of.*

(b) *Liability in respect of.*

(D) SEPARATION DEEDS.

(E) ACTIONS AND SUITS.

(a) *Actions, when maintainable alone or jointly.*

(b) *Suits.*

(c) *Pleadings and Evidence.*

(A) HUSBAND.

(a) *Rights of, in Wife's Property.*

A sum of money had been paid into court to the account of a female infant, a ward of court. The infant married, and a petition was presented by her and her husband for payment of the money out of court to the husband, upon the authority of two cases cited. The Court disapproved of the principle upon which the previous cases had been decided; but allowed the petition on affidavits that it would be beneficial for the husband to receive the money. *In re Cooke*, 21 Law J. Rep. (N.S.) Chanc. 145.

A testator gave a sum of money to trustees on trust to pay the income to his wife for life, and then to divide the capital between his three daughters; one of the daughters who was married, died; her husband became bankrupt in 1839, and died before the tenant for life. When the tenant for life died, a bill was filed by the assignees of the husband against the defendant, who was the administrator of both husband and wife, claiming to be entitled to a third of the money left by the testator:—Held, that the husband was absolutely entitled in right of his wife to the reversionary interest expectant upon the death of the tenant for life, although that interest was not reduced into possession; and that the assignees had the same right to receive the money as the husband would have had. *Drew v. Long*, 22 Law J. Rep. (N.S.) Chanc. 717.

Held, also, that the late Bankruptcy Act, 12 & 13 Vict. c. 106, did not vary the law in respect of prior bankruptcies, which made an adjudication conclusive unless disputed within a limited period. *Ibid.*

Where a lady was possessed of jewels and ornaments of the person before her marriage, and after her marriage they were in all writings spoken of by her husband as hers, and were deposited with bankers, with whom she, with his consent, kept a separate account, and after her lunacy the husband made his will, giving her the use of his plate, furniture, linen, jewels, and household effects, including the jewels and effects "which belonged to her before her marriage," and which he "had assumed by marital right" during her life; upon the death of the lunatic, who survived her husband, the Court held, that the next-of-kin of the husband were entitled to such of the articles as did not consist of paraphernalia, as their property, but as to such as formed paraphernalia, the next-of-kin of the wife were entitled to elect whether they would take them or the benefits given by the will. *In re Hewson, D'Almaine v. Moseley*, 23 Law J. Rep. (N.S.) Chanc. 256.

A married woman having a reversionary interest in leasehold premises joined with her husband in levying a fine *sur concessit* of the premises, which was declared to enure as to the reversionary interest in trust for the husband absolutely for the residue of the term for which the premises were holden. The existing term expired, and the lease was several times renewed. The wife survived her husband:—Held, that the right of renewal passed by the fine with the term, and the wife having parted with all her interest, the renewed term belonged to the husband's estate. *Dickens v. Unthank*, 24 Law J. Rep. (N.S.) Chanc. 501.

(b) *Right to Custody of Wife.*

Where a wife is voluntarily and without any restraint absent from her husband, a court of common law has no jurisdiction upon his application to issue a writ of *habeas corpus* to bring up her body. *Ex parte Sandilands*, 21 Law J. Rep. (N.S.) Q.B. 342.

(c) *Liability for Wife's Funeral and Necessaries.*

When a wife dies, her husband is bound to provide her with a funeral at a reasonable expense; and if he does not do so, any person who voluntarily employs an undertaker and pays him for performing such a funeral, is entitled to recover the sum so expended, from the husband, in an action for money paid. *Ambrose v. Kerrison*, 20 Law J. Rep. (N.S.) C.P. 135; 10 Com. B. Rep. 776.

By marriage a wife acquires the right to be maintained according to the estate and condition of her husband, of which right she cannot be divested, except by her own misconduct; and, therefore, it is no defence to an action brought against a husband for necessaries supplied to his wife, that at the time they were so supplied, he was confined in an asylum as a dangerous lunatic. *Read v. Legard*, 20 Law J. Rep. (N.S.) Exch. 309; 6 Exch. Rep. 636.

In an action against a husband for goods supplied to his wife, evidence is admissible for the defence that other goods of a like nature have been supplied to her by other tradesmen within the same period. *Renaux v. Teakle*, 22 Law J. Rep. (N.S.) Exch. 241; 8 Exch. Rep. 680.

(d) *Liability for Wife's Interest in Shares.*

[See *Dodgson v. Bell*, title BANKERS AND BANKING COMPANY (A) (b) (1).]

(e) *Liability for Wife's fraudulent Misrepresentations.*

Although a married woman is generally responsible for all torts committed by her during coverture, and the husband must be joined with her as a defendant, yet she is not responsible for, nor can the husband be sued in respect of, a fraud which is directly connected with a contract by her, and which is in fact the means of effecting it. Therefore, an action will not lie against husband and wife for a false and fraudulent representation by the wife that she was sole and unmarried, whereby the plaintiffs were induced to take her promissory note as security for a loan to a third person. *Fairhurst v. The Liverpool Adelphi Loan Association*, 23 Law J. Rep. (N.S.) Exch. 163; s.c. *The Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. Rep. 422.

(f) *Property, and Settlement thereof.*

[See SETTLEMENT.]

Ejectment to recover two undivided third parts of an estate called "Horsecroft." J P, being seised in fee of Horsecroft, before his marriage with M C, executed an indenture of settlement, in 1770, whereby it was witnessed that in consideration of an intended marriage between himself and M C, and of the conveyance and settlement by M C of the estate, money, &c. thereafter mentioned, and of the benefit arising to J P by the marriage, and for settling a jointure and maintenance for M C and her children, and for settling the free estate called Horsecroft belonging to J P, he, the said J P, granted, sold, &c. to trustees and to their heirs, all that freehold estate and right of J P to the said estate and other the premises intended to be released by M C. It was then further witnessed, that in consideration of the marriage and of the jointure, and for settling the freehold estate, together with the other monies, &c. J P bargained, sold, &c. to the trustees, in trust for M C to the use of the first son of the said J P on the body of the said M C lawfully begotten, and to the heirs male of the said son lawfully begotten. J P had four children, John P, who died unmarried and intestate, and three daughters. The two lessors of the plaintiff are the heirs-at-law of two of the daughters, and the female defendant is the other daughter. J P, in 1823, made his will as follows: "Also I give Horsecroft, my estate that I now live in, to my son John P, a lunatic." He then gave the residue of his estate to his daughter, the defendant:—Held, *dissentiente Platt, B.*, that the deed was inoperative; and by the whole Court, that the son John P took under the will an estate in fee in Horsecroft. *Doe d. Pottow v. Fricker*, 20 Law J. Rep. (N.S.) Exch. 265; 6 Exch. Rep. 510.

(B) WIFE.

(a) *Rights and Privileges of.*

[See ante, (A) (b).]

The practice which has prevailed of discharging from custody under an execution a married woman who has no separate property out of which the debt can be satisfied, prevails equally whether the husband be or be not taken in execution with her. *Larkin v. Marshall* dissented from. *Edwards v. Martyn*, 21 Law J. Rep. (N.S.) Q.B. 86; 17 Q.B. Rep. 693.

(b) *Property, and Settlement thereof.*

[See SETTLEMENT.]

By a marriage settlement, in consideration of the intended marriage and of the wife's fortune, certain premises were settled to the use of the husband and wife for life, and after the decease of the survivor, in case there should be only one child then living and no other child should be dead leaving issue, then to the use of such one child in fee; but in case there should be more than one such child living at the decease of the survivor of the husband and wife, or any child or children should be then dead leaving issue, then to the use of all and every one or more of such children of the marriage and such children's children respectively, for such estates, &c. as the husband and wife or the survivor should appoint, and, in default of appointment, to the use of all and every the children of the marriage as tenants in com-

mon in tail, with cross remainders; and for default of all such issue to the use of the wife's brothers and sisters in fee. There were issue of the marriage two children, who both died without issue before the survivor of the husband and wife. No appointment was ever made under the power:—Held, by *Lord Campbell, C.J., Coleridge, J., and Wigham, J.*, that the devise contemplated three contingencies, the first two of which had failed; and that the third, viz., the default of all issue of the marriage at the decease of the survivor of the husband and wife, had taken effect, and that consequently the ultimate limitation to the wife's brothers and sisters took effect. Held, by *Crompton, J.*, that the ultimate limitation to the wife's brothers and sisters was contingent on the event of there being more than one child of the marriage living at the death of the survivor, or of a child or children of the marriage being then dead leaving issue; and that that event having failed, the ultimate limitation never took effect; and that the words "in default of all such issue" did not mean "in the event of there being no child living at the death of the survivor." *Doe d. Lees v. Ford*, 23 Law J. Rep. (N.S.) Q.B. 53; 2 E. & B. 970.

A married woman can do no act to affect her reversionary interest in a sum of money charged upon land, during the lifetime of the tenant for life. *Hobby v. Allen*, 20 Law J. Rep. (N.S.) Chanc. 199; 4 De Gex & Sm. 289, *nom. Hobby v. Collins*.

The husband of a married woman became insolvent, and 140*l.* belonging to her was claimed by his assignees, but upon the application of the wife, the Court ordered the surplus, after payment of the costs of all parties, to be settled for the benefit of the wife and her children. *In re Cutler's Trust*, 20 Law J. Rep. (N.S.) Chanc. 504; 14 Beav. 220.

A lady, who was entitled to certain property for life, married without a settlement, and an order was made by the Court that the dividends should be paid to the husband during her life. The husband afterwards became a bankrupt, and neglected to maintain his wife:—Held, that under these circumstances, the wife was entitled to a portion of the property for her separate use, and the husband's assignees to the rest of the property. *Vaughan v. Buck*, 20 Law J. Rep. (N.S.) Chanc. 335; 1 Sim. N.S. 284.

A wife's equity to a settlement does not depend upon her right of property, but only attaches to and arises upon her husband's legal right to the present possession of the property. Therefore a settlement cannot be claimed in respect of a reversionary interest in property so long as such interest continues reversionary. *Osborn v. Morgan*, 21 Law J. Rep. (N.S.) Chanc. 318; 9 Hare, 432.

A, the husband of B, to whom a share of the residue of a testator's estate had been bequeathed, assigned it to C for valuable consideration. A sum of stock representing this share was carried to the account of B in a suit. The proper terms of a settlement of the part allowed to B, by way of equity of settlement, were held to be to B for life, with remainder to her children as she should appoint, with remainder to the children in default of appointment, and, in default of children, if B should survive A, to B absolutely; but, if A should survive B, to C. *Carter v. Taggart*, 21 Law J. Rep. (N.S.) Chanc. 216; 1 De Gex, M. & G. 286; 5 De Gex & Sm. 49.

The Court has the power of directing that, in

the last event, the fund shall be at the disposal of the wife by will; and that in default of such disposition, it shall go to the next-of-kin of B; but a special case must be made for such a settlement, and the circumstance that B had needy relatives was held not sufficient to justify it. *Ibid*.

Under the will of a testator a married woman was entitled to a sum of 600*l.* and upwards, and a share in a sum set apart to answer a life annuity, amounting to 346*l.* In an administration suit the 600*l.* was paid to the husband, with the consent of the wife. The husband and wife then joined in assigning their reversionary interest in the annuity fund for value, and the assignees procured a stop-order upon the fund. On the death of the annuitant, the wife petitioned for a settlement of the fund:—Held, reversing the order of the Court below dismissing the petition, that the wife was entitled to have the whole fund settled on herself and children, the husband being insolvent and having made no settlement upon her; that the claim of the wife was properly raised by petition; and that the assignees, though no parties to the administration suit, had, by obtaining the stop-order, sufficiently brought themselves before the Court to enable it to deal with the fund upon petition. *Scott v. Spashett*, 21 Law J. Rep. (N.S.) Chanc. 349; 3 M. & G. 599.

Deeds of gift by a wife to her husband of property over which she has a power of appointment are regarded by the Court with jealousy, and inquiries will be directed as to the circumstances under which they were executed. *Nedby v. Nedby*, 21 Law J. Rep. (N.S.) Chanc. 446; 5 De Gex & Sm. 377.

Where a wife makes a deed of gift to her husband of property over which she has a power of appointment, and the deed is afterward impeached by her, the burden lies on her of shewing that the circumstances were such as ought to invalidate it, and the burden does not lie on the husband of shewing that the circumstances were such that it ought to be supported. *Ibid*.

Property was settled on A, a married woman, for her life, with remainder to such uses as she should by deed appoint. A, by deed, dated in 1821, appointed the reversion to B, her husband; and in 1836 filed a bill to have the deed set aside. The circumstances relied on by A were, that the deed had been prepared by B's solicitor, that it had not been read over at the time of the execution, and the evidence of one of the attesting witnesses that she was agitated and distressed at the time of the execution, and signed it in a reluctant manner:—Held, that these circumstances were not such as to invalidate the deed. *Ibid*.

Upon the marriage of an infant the husband by an ante-nuptial settlement covenanted that upon his wife attaining the age of twenty-one he would join and concur with her, if she would consent thereto, in settling upon her and the children of the marriage certain property to which she would become entitled for her separate use. The wife attained her age of twenty-one, and refused to join in settling the property:—Held, that the settlement was inoperative. *In re Waring*, 21 Law J. Rep. (N.S.) Chanc. 784.

After the wife had attained her majority, information was given by her, to the trustees of the will under which she was entitled to the above property, that a bill would be filed against them charging them

with breaches of trust and seeking an account. The trustees, after this notice, paid her share into court, under the Trustees' Relief Act. Upon petition for payment of the money out of court, the trustees were refused their costs. *Ibid*.

A renewable leasehold, the property of the wife, was, upon her marriage, settled upon trust for her separate use during the joint lives of herself and her husband, and in the event of her surviving, upon trust for her absolutely, but in case she died in the lifetime of her husband, then on trust for him for life, with remainder to the issue of the marriage absolutely. The husband and wife joined in executing several deeds purporting to charge all their interest in the leasehold premises under the settlement to secure several sums of money.—Held, on exceptions to the Master's report, that upon the wife surviving her husband such deeds were invalid; that the husband could not dispose of his wife's reversionary interest in the leasehold; that the power of the husband to dispose of his wife's reversionary interest in chattels real depended upon whether it could vest in possession during her coverture, and that this interest was not assignable by the husband, as it could not vest during the coverture; and the exceptions were overruled. *Duberly v. Day*, 22 Law J. Rep. (n.s.) Chanc. 99; 16 Beav. 33: affirmed 5 H.L. Cas. 338.

A married woman, being entitled to a reversionary interest in the residuary estate of a testator, joined her husband in assigning it, as a collateral security, for the payment of 4,000*l.*, &c. He afterwards became utterly insolvent, and unable to maintain his wife and family, three of whom were above twenty-one. A sum of more than 2,000*l.*, part of the fund, fell into possession; and, upon the application of the wife, the Court, after payment of costs of all parties, ordered it to be settled for the benefit of the wife and her children, with liberty to apply upon the remaining part of the fund falling into possession. *Marshall v. Fowler*, 22 Law J. Rep. (n.s.) Chanc. 213; 16 Beav. 249.

A married woman, whose husband was a bankrupt, became entitled to a fund under 200*l.* There was an affidavit of no settlement upon the marriage, and that the wife had no other fund out of which to maintain herself or her children.—Held, that the smallness of the amount did not prevent the wife's right to a settlement, and that the special circumstances were sufficient to induce the Court to settle the whole fund upon her and her children; the husband's assignees being excluded from any share. *In re Kincaid's Trust*, 22 Law J. Rep. (n.s.) Chanc. 395; 1 Drew. 326.

A feme covert will be allowed to revoke a consent to the payment of her fund in court to her husband, when the object of that consent may be defeated by his previous insolvency. *Watson v. Marshall*, 22 Law J. Rep. (n.s.) Chanc. 895; 17 Beav. 363.

The provisional assignee of the Insolvent Debtors Court claimed a fund belonging to a wife, which, upon her consent, had been ordered to be paid to her husband who had been insolvent.—Held, that her consent had not vested the fund in her husband so as to deprive this Court of its jurisdiction to rescind the order and direct the fund to be settled for the benefit of herself and family. *Ibid*.

Where there was a power of advancement in favour of an infant female legatee to whom an interest

for life for her separate use, without power of anticipation, was given, with remainder to her children, the Court, after the legatee had attained twenty-one and married, ordered an advancement to be made for the purpose of enabling the husband to enter into a partnership, upon the husband insuring his life and entering into a bond for the payment of the sum advanced and the premiums on the policy. *Phillips v. Phillips*, 23 Law J. Rep. (n.s.) Chanc. 7; Kay, 40.

A married woman whose husband does not maintain her is not entitled, as against the particular assignee of the husband for value, to maintenance out of the income of real and personal estate to which the wife is entitled in equity for life. *Tidd v. Lister*; and *Bassil v. Lister*, 23 Law J. Rep. (n.s.) Chanc. 249; 3 De Gex, M. & G. 857; 10 Hare, 140.

Distinction between the cases where the wife takes an absolute interest in the estate or fund, and where she takes only for life. *Ibid*.

A married woman being entitled to a freehold and a copyhold estate for life, the husband and wife joined in assigning both estates to A as a security for money advanced to the husband, and afterwards joined in assigning the freehold estate to B for the like purpose.—Held, that, as against the wife, B was entitled to have A's charge satisfied out of the copyhold estate as far as it would extend. *Ibid*.

Whether the wife could be regarded as a surety only in respect of her husband's debts—*quære*. *Ibid*.

A testator gave real estate to trustees upon trust to sell, and to pay the proceeds to the children of A B, upon the youngest child attaining twenty-one. Before the youngest child attained twenty-one, one of the children, a married woman, with her husband, mortgaged her share and interest by an indenture duly acknowledged pursuant to the Fines and Recoveries Act.—Held, that the interest of the married woman passed by the mortgage. *Briggs v. Chamberlaine*, 23 Law J. Rep. (n.s.) Chanc. 635; 11 Hare, 69.

Jewels purchased by the husband and worn by the wife with others belonging to her husband become her paraphernalia, in the absence of evidence to the contrary; but family jewels by being merely worn by the wife do not become part of her paraphernalia. *Jervoise v. Jervoise*, 23 Law J. Rep. (n.s.) Chanc. 703; 17 Beav. 566.

Husband and wife assigned a reversionary legacy of 400*l.* to secure a debt of the husband's, and he afterwards became bankrupt.—Held, on the legacy falling due, that the wife was entitled to have 300*l.* settled out of that and other monies to which she was also entitled. *Walker v. Drury*, 23 Law J. Rep. (n.s.) Chanc. 712; 17 Beav. 482.

A fund was in court belonging to a married woman, she and her husband being both domiciled in Scotland. The husband and wife had, by memorandum, assigned this fund to a creditor of the husband. By the law of Scotland, a husband is absolutely entitled to his wife's personal estate.—Held, that the wife had no equity for a settlement. *M'Cormick v. Garnett*, 23 Law J. Rep. (n.s.) Chanc. 777; 5 De Gex, M. & G. 278; 2 Sm. & G. 37.

Although a legal estate in lands is outstanding in trustees, still a married woman cannot pass a beneficial or any interest in the lands unless the deed is duly acknowledged under the 3 & 4 Will. 4. c. 74.

Field v. Moore, 24 Law J. Rep. (N.S.) Chanc. 161; 19 Beav. 176.

A widow entitled, under a former settlement, to the dividends of 10,000*l.* for her life, which she believed to be settled to her separate use, married an attorney who had seen the former instrument; she had the advice of her own solicitor, and she required all her property to be settled on herself. The new settlement comprised all her property, excepting the dividends of the 10,000*l.*, so that the second husband did not receive any part of her fortune, and she had exclusively of this fund an income of about 450*l.* per annum. A separation took place eight weeks after the marriage, and the wife obtained a sentence of divorce *à mens et thoro* on the ground of adultery, but no alimony was decreed. The wife filed her bill to enforce, among other things, her equity for a settlement:—Held, varying a decree of the Master of the Rolls, who had ordered half the dividends to be paid to the wife, that she was entitled to the whole. *Barrow v. Barrow*, 24 Law J. Rep. (N.S.) Chanc. 267; 5 De Gex, M. & G. 782; 18 Beav. 529.

The fact of a wife living separate from her husband by mutual agreement, will not give her an equity to a settlement out of her future property, where such a provision has already been settled upon her as would have entitled the husband to such future property if they had continued to live together. *In re Erskine's Trusts*, 24 Law J. Rep. (N.S.) Chanc. 327; 1 Kay & J. 302.

A married woman may convey a reversionary interest in a sum of money, the produce of real estate directed to be sold by trustees after the death of the tenant for life. *Tuer v. Turner*, 24 Law J. Rep. (N.S.) Chanc. 663; 20 Beav. 560.

Settlement of the whole of the share of a married woman in the estate of an intestate upon the married woman and her children, with a provision that if there should be no children, and the husband should survive the wife, the assignees of the husband should take the fund, the case being one in which the husband being an uncertificated bankrupt, had married an infant and afterwards abandoned her. *Gent v. Harris*, 10 Hare, 383.

A female infant with a small fortune being persuaded to contract a marriage with a young man without fortune, who, soon after the marriage, separated from her, on a bill by her for a settlement, the Court ordered the whole to be settled on her and her children. *Layton v. Layton*, 1 Sm. & G. 179.

A woman, joint tenant of a reversionary interest in a legacy of 2,000*l.* stock, married, and after the marriage the husband became bankrupt, and then the wife died, leaving the tenant for life of the fund surviving:—Held, that by the death of the wife the other joint tenants of the fund became entitled to her interest therein by survivorship; that that was the elder title to that of the husband, which also accrued after the death of the wife; and that upon the death of the tenant for life the other joint tenants, and not the assignees of the husband, were entitled to what had been the wife's share of the fund. *In re the Trusts of Barton's Will*, 10 Hare, 12.

A husband and wife in America by a deed of separation agreed to live apart, and that the wife should be at liberty to carry on business, &c. and to retain for her own use all her present and future property in any way acquired. Subsequently a

legacy having accrued in right of the wife, was carried to the account of the husband and wife. Nothing having been heard of the husband for fourteen years, on a petition presented by the wife, asking the transfer to her of the stock, the Court directed the stock to be sold, and the proceeds paid to her on her sole receipt. *Whitlow v. Dilworth*, 2 Sm. & G. 35.

A, holding a promissory note from B for a debt, directed B to transfer it in his books to the names of A and his wife, expressing an intention to benefit his wife, and he cancelled the note and took a fresh one to him and his wife. A died, leaving his wife surviving him:—Held, that the debt belonged to the wife, and did not form part of the testator's general personal estate. *Gosling v. Gosling*, 3 Drew. 335.

As between the husband's creditors and the wife, in respect of the wife's equity for a settlement, the Court will, under circumstances, give the wife more than one-half; and where the wife had been at the time of the marriage and long afterwards in circumstances of comfort, and was reduced to distress by the husband's embarrassments, the Court gave the costs of the petitioner and of the husband's assignees out of the fund, which was 681*l.*—400*l.* to the wife, and the remainder to the petitioner; the wife's costs out of her own fund. *Ex parte Pugh*, 1 Drew. 202.

A husband had become an insolvent in the year 1835 and a bankrupt in 1839. The wife became entitled to 1,000*l.* Upon a claim by her, it appeared that she was in indigent circumstances, and had no settled means of subsistence, and that her husband was unable to maintain her in a respectable position; also that there was no settlement, and that the husband had not received any property in right of his wife, and that there was no issue of the marriage:—Held, that the rule to give one-half to the creditors and to settle the other half upon the wife, applied. The fund was, to avoid the expense of a settlement, directed to be brought into court, and the dividends to be paid to the wife for life; in other respects the order was made according to the order in *Carter v. Taggart*. *Bagshaw v. Winter*, 5 De Gex & Sm. 466.

On a claim by a wife against her husband and his assignees in bankruptcy, it appearing that a large portion of her own fortune had been settled on her, but that no property of the husband had been settled; and that after his bankruptcy, her husband had deserted her—the whole of a sum of 1,000*l.*, accrued to her in possession since the bankruptcy, was ordered to be settled to her separate use, with remainder to her children. *Dunkley v. Dunkley*, 4 De Gex & Sm. 570.

A married woman domiciled in France entered into a contract in England respecting her reversionary interest in trust money invested in the English funds, which was substantially valid according to French law, although invalid according to English law; but the contract was not entered into in the manner prescribed by French law, which requires that there should be as many original instruments as there are distinct parties to the contract:—Held, that the French law gave capacity to make the contract; but that the English law regulated the form of it, and that therefore the contract was valid: and it was enforced by decree. *Guepratte v. Young*, 4 De Gex & Sm. 217.

In a conflict of evidence as to the law of France on a point relating to the rights of a married woman in personality in reversion, no presumption can be derived from the law of England. *Ibid.*

Locus regit actum is a canon of general jurisprudence, and must be assumed, in the absence of contrary evidence, to apply to a system of foreign law. *Ibid.*

The Court, under the circumstances of the case, directed the whole of a trust fund claimed by the assignees in bankruptcy of the husband in right of his wife, to be settled for the benefit of the wife and children. *Dunkley v. Dunkley*, 2 De Gex, M. & G. 390.

An Englishwoman married a domiciled Frenchman. Articles were previous to the marriage executed in the English form, by which the wife became entitled to 200*l.* a year. Her husband afterwards separated from her, and subsequently the French court condemned her for adultery:—Held, that the contract of marriage was English, and that the rights of the parties were to be regulated by the English law; and further, property of the wife having fallen into possession, and the moral conduct of both parties being reprehensible, the income of the fund must be equally divided between them. *Watts v. Shrimpton*, 21 Beav. 97.

The Court, under very peculiar circumstances, ordered the whole income of a fund in court belonging to a feme covert, who had committed adultery, to be paid to her, on terms. *In re Lewin's Trust*, 20 Beav. 378.

A sum of 462*l.* stock, to which a married woman, the wife of an insolvent, was entitled in remainder in her own right at the time of the insolvency, having fallen into possession, a settlement of the whole sum, after payment of costs, was directed to be made for the benefit of the wife and children, against a purchaser from the official assignee of the husband. *Francis v. Brooking*, 19 Beav. 347.

A married woman was entitled to 60*l.* in court, but on her marriage she was indebted to the extent of 100*l.* which had been proved under the husband's bankruptcy:—Held, that the assignees were entitled to the whole fund. *Bonner v. Bonner*, 17 Beav. 86.

The release by husband and wife of a sum of money secured by bond to A, and payable to the wife after A's death, held not binding on the wife on her surviving both A and her husband. *Rogers v. Acaster*, 14 Beav. 445.

Where a feme covert is entitled to a reversionary interest in a chose in action, the release of the husband is as inoperative as his assignment to bind his wife's right by survivorship. *Ibid.*

(c) Consent.

Articles made on the marriage of a female infant, recited that it had been agreed that all the real and personal estate to which she was then or thereafter might be entitled should be settled, and the husband covenanted "in case she would voluntarily consent thereto, but not otherwise," that he and she would settle the same:—Held, that the consent applied only to real estate, and that the personal estate must be settled though the wife refused to consent thereto. *In re Daniel's Trust*, 18 Beav. 309.

(C) SEPARATE ESTATE.

(a) Power over and Disposition of.

A testator gave a sum of stock to trustees in trust to pay the dividends to his wife for her separate use for life, and he directed that the fund should remain during his wife's life, and, under the orders of the trustees, he made a duly administered provision for her, and the interest of it given to her, on her personal appearance and receipt by any banker to be appointed in London or elsewhere:—Held, that the testator's widow was not prevented from disposing of her life interest by way of anticipation. *In re Ross's Trust*, 20 Law J. Rep. (N.S.) Chanc. 293; 1 Sim. N.S. 196.

The testator's widow had married a second husband, and had assigned her life interest in the fund. Upon her second husband's death, the trustees paid the money into court under the Trustees' Relief Act, and her assignee presented a petition to have the dividends paid to him during her life. The petition was opposed, on behalf of the widow, on the ground that she had no power of anticipation under the will:—Held, that the widow was not entitled to her costs, but that her assignee's costs must be paid out of the fund in court. *Ibid.*

A sum of stock was vested in trustees upon trust to pay the dividends to A, a married woman, for her life, for her separate use, without power of anticipation, and, after her decease, to pay the capital to B. On the petition of A and B, the Court ordered a transfer of a portion of the stock to B, and a sale of such other portion as would be sufficient to purchase a government annuity equal to the dividends of the two sums of stock, and that the sum thereby produced should be laid out in the purchase of such annuity, to be settled on A for her separate use, without power of anticipation. *Dodd v. Wake*, 21 Law J. Rep. (N.S.) Chanc. 356; 5 De Gex & Sm. 226.

The trusts of a bond debt due to A, a married woman, were declared to be for A for her life, for her separate use, with remainder for such persons as A should by deed, to be executed by her in the presence of two witnesses, appoint, with remainders over. B, the husband of A, was indebted to C. A signed a letter without any attestation, which contained a declaration that she deposited the bond as a collateral security to C for the debt due to him from B, and the letter and bond were given to C. The body of the letter had been written by C and given to B, who placed it suddenly before A, requiring her signature, and, in consequence of his urgent request, she signed it. In a suit to enforce C's lien on the bond, —Held, first, that A's life interest in the bond was bound by the letter; but, secondly, that the Court would not, in C's favour, supply the defect in the execution of the power. *Thackwell v. Gardiner*, 21 Law J. Rep. (N.S.) Chanc. 777; 5 De Gex & Sm. 58.

A promissory note by a husband to his wife for payment of money advanced to him by her out of her separate property, constitutes a sufficient declaration of trust in favour of the wife. *Murray v. Glassey*, 23 Law J. Rep. (N.S.) Chanc. 126.

By a marriage settlement certain freehold, leasehold and personal property was vested in trustees upon trust for the wife during her life for her separate use, and after her decease for such persons as the wife should appoint by will, and in default of ap-

pointment for the benefit of the children of the marriage. The wife survived her husband, and appointed all her property by will to her children. She then privately married a second husband, but continued to pass as a widow; and describing herself as a widow she borrowed money and mortgaged her property to secure the repayment. A second marriage ceremony was afterwards publicly performed:—Held, that the will was revoked as to the freehold estate by the second marriage; that the execution of the power as to the rest of the property did not constitute that property separate estate of the married woman, nor was it liable as such to debts contracted during coverture; but that the concealment of the second marriage amounted to an act of fraud, and the mortgagee was entitled to stand as a creditor upon the general assets, and if they were not sufficient, then the appointed property was liable to supply the deficiency as in the case of a feme sole. *Vaughan v. Vanderstegen*, 23 Law J. Rep. (N.S.) Chanc. 793; 2 Drew. 165, 363.

Real estate was purchased by a husband with savings arising from the separate estate of his wife, and personal estate given to her separate use, was transferred into the name of her husband, who, during his life, received the income for her. The husband made a will devising the whole real and personal estate to his brother, but they were held to be the separate estate of the wife, and the brother was declared to be a trustee for her. *Darkin v. Darkin*, 23 Law J. Rep. (N.S.) Chanc. 890; 17 Beav. 578.

In consideration of a sum of money paid to the husband and wife, the wife concurred with her husband in mortgaging leaseholds settled to her separate use. The husband died, leaving his widow his executrix:—Held, in the absence of evidence that the money was advanced for the wife, that she was entitled to the amount out of the husband's assets to the exclusion of his simple contract creditors. *Hudson v. Carmichael*, 23 Law J. Rep. (N.S.) Chanc. 893; Kay, 613.

A married woman to whom a sum of money was payable for her separate use, received a cheque from the Accountant General and handed it over to her solicitor, who accompanied her. The solicitor was on motion ordered to pay the balance to his client, and it was held that the onus being on the solicitor to shew cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt out of it. *Mawhood v. Milbanke*, 15 Beav. 36.

A gift may be made by a husband to his wife which, though bad in law, will be supported in equity: though the property does not pass at law, yet in equity a husband being the legal owner may become a trustee for his wife, and if by clear and irrevocable acts he has made himself a trustee, the gift to his wife will be conclusive. *Mews v. Mews*, 15 Beav. 529.

To constitute a gift between husband and wife there must either be a clear irrevocable gift to a trustee for the wife, or some clear and distinct act of the husband by which he divested himself of his property and engaged to hold it as a trustee for the separate use of his wife. If a man were to deposit money with bankers, directing them to hold it for his wife, that would probably be sufficient. *Ibid.*

A farmer's wife, with his knowledge and sanction, deposited the produce of the surplus butter, eggs and poultry with a firm in her own name, and he called

it "her money." On his death-bed he gave his executor directions to remove the money and do the best he could with it for his wife:—Held, that the evidence was not sufficient to establish a gift between them, and that the husband had made neither the firm nor himself trustee for his wife. *Ibid.*

The dividends of stock purchased during coverture in the name of the wife out of funds placed at her disposal for family purposes by her husband, then an aged person, were paid into a bank to her account, and by her applied for domestic purposes. The wife dying in the husband's lifetime, in a suit to administer the husband's estate,—Held, that the presumption that the stock was a gift to the wife arising from the purchase being made in her name, was rebutted by the mode of dealing with the dividends. *Hayes v. Kinderley*, 2 Sm. & G. 195.

A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was, on the part of the husband alone, to execute all necessary deeds, so that such property should (so far as he was concerned) be vested in the trustees on the trusts of the settlement:—Held, that property afterwards given to the separate use of the wife was not liable to be settled. *Hammond v. Hammond*, 19 Beav. 29.

(b) Liability in respect of.

A married woman, whose husband was of unsound mind, consulted a solicitor with respect to her separate estate; she also communicated with him in respect of certain suits to which her children by their next friend and also her husband were parties; she also joined with some of her children in requesting him to take active proceedings in those suits:—Held, that her separate estate was not liable for the costs of the suits. *In re Pugh*, 23 Law J. Rep. (N.S.) Chanc. 132; 17 Beav. 336.

The rights of married women may be barred, and their estates affected by active participation in breaches of trust, and if, their powers having been exercised by will, the trust funds become their assets, they must be liable for those breaches of trust—*semble*.—But the fact of a married woman having permitted her husband to receive the trust funds does not preclude a right to relief by her or her appointees, for that would be to defeat the purpose for which the trust was created—the protection of the wife against the husband. *Hughes v. Wells*, 9 Hare, 749.

A married woman having a life estate to her separate use in certain leasehold and personal property, with a general power of appointment by will only, appointed to children:—Held, that in the administration of her estate a tradesman supplying her with goods, while she concealed her marriage and dealt with him as a single woman, had a claim to be paid out of the appointed fund. *Vaughan v. Vanderstegen*, 2 Drew. 408.

An administrator *ad litem* of a married woman does not sufficiently represent her separate estate to enable the Court to decide how far that estate is liable in respect of her acts as a trustee. *Shipton v. Rawlins*, 4 De Gex & Sm. 477.

(D) SEPARATION DEEDS.

By deed of three parts between husband, wife, and trustee, reciting that differences existed, and that the

husband and wife had agreed to live separate, the husband covenanted to pay to the trustee an annuity for the separate maintenance of the wife. The trustee having sued the husband for arrears of the annuity, the latter pleaded that he was induced to make the deed by means of false and fraudulent misrepresentations made by the plaintiff to him, that is to say, by the plaintiff, before the making of the deed, falsely and fraudulently representing to him that E, the wife, was a virtuous person, whereas in truth the said E was not a virtuous person, and the plaintiff "had then carnally known the said E, so then being the wife of the defendant, and subsequently to the intermarriage of the said E and the defendant, and before the making of the deed," which last-mentioned facts the plaintiff concealed from the defendant, and induced him to make the deed, in order that the plaintiff might continue an adulterous intercourse with the said E. At the trial, the plea was proved, and the verdict thereon entered for the defendant:—Held, on motion to enter judgment for the plaintiff *non obstante veredicto*, that although the plea did not shew that the representations set out were necessarily fraudulent, it not being alleged that the plaintiff knew them to be false, or that he knew that E was the defendant's wife at the time he had intercourse with her, yet it might be sustained as a general plea of fraud, which, after verdict, was a good answer to the action. *Evans v. Edmonds*, 22 Law J. Rep. (N.S.) C.P. 211; 13 Com. B. Rep. 777.

Held, also, that it was not necessary to allege that the wife, as *cestui que trust*, was a party to the fraud upon the defendant, as a Court of law can only look to the legal rights of the parties to the deed. *Ibid*.

Seemle—*per Maule, J.*, that if the plaintiff, intending to deceive the defendant for the plaintiff's own advantage and the defendant's disadvantage, induced the latter to make the deed by representing a fact to be true which was not true, but about which the plaintiff knew nothing, that would amount to fraud, and avoid the deed. *Ibid*.

A husband in a deed of separation having entered into a covenant with trustees not to molest his wife, against whose debts, &c. he was indemnified, will be restrained from doing any act contrary to the terms of his covenant. *Sanders v. Rodway*, 22 Law J. Rep. (N.S.) Chanc. 230; 16 Beav. 207.

A father, upon the marriage of his son, settled real estate upon the intended husband and wife. The settlement contained a proviso that in case of a separation between husband and wife, by reason of any disagreement or otherwise, the interest given to the wife should, during the joint lives of herself and her husband belong to him alone:—Held, that this proviso was in the nature of a condition,—was contrary to the policy of the law,—and was, therefore, void. *Cartwright v. Cartwright*, 22 Law J. Rep. (N.S.) Chanc. 841; 3 De Gex, M. & G. 982; 10 Hare, 630.

A, a husband, and B, his wife, agreed to live separately, and a deed of separation was executed containing the usual terms and a covenant by A to pay B an annuity for her life. They lived for some time separately. Afterwards A proposed to B that she should come and live with him, and promised that, in that event, the annuity should be continued. B returned to A, and lived with him until his death:—

Held, that the annuity was not forfeited by the re-cohabitation. *Webster v. Webster*, 22 Law J. Rep. (N.S.) Chanc. 837; 4 De Gex, M. & G. 437; 1 Sm. & G. 489.

Although generally the provisions of a separation deed are annulled by reconciliation and re-cohabitation, yet a husband may so conduct himself subsequently as to create new obligations on the footing of the old obligations contained in the deed of separation. *Ibid*.

(E) ACTIONS AND SUITS.

(a) *Actions, when maintainable alone or jointly.*

A declaration in case by a husband and wife stated that the defendant, who was the maker and seller of certain lamps called Holliday's lamps, sold to the husband one of these lamps, to be used by his wife and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that in consequence of the insufficient materials with which it was constructed it exploded and burnt her. At the trial, the jury found that the accident had been caused by the defective nature of the lamp; but that the defendant was ignorant of this unsoundness, and had sold the article in good faith:—Held, that the fraud on the part of the defendant having been negatived, the action was not maintainable by the wife, who was not a party to the contract. *Longmeid v. Holliday*, 20 Law J. Rep. (N.S.) Exch. 430; 6 Exch. Rep. 761.

A married woman who has bought railway stock with her own earnings, and had it transferred to herself, may maintain an action against the railway company for the dividends, subject to a plea in abatement. *Dalton v. the Midland Counties Rail. Co.*, 22 Law J. Rep. (N.S.) C.P. 177; 13 Com. B. Rep. 474.

By settlement made on the marriage of the plaintiff and his wife, leaseholds were assigned, upon trust, to allow the wife to receive the rents and profits during her life, to her separate use. The wife, after marriage, received the rents from the trustee, and lent a portion of them to the defendant:—Held, that the plaintiff might, after his wife's death, recover this money *jure mariti* from the defendant in an action for money lent. *Bird v. Pegrum*, 22 Law J. Rep. (N.S.) C.P. 166; 13 Com. B. Rep. 639.

The indenture provided that the wife's receipt alone should be "a valid discharge" for the said rents. *Quere*—whether this meant a discharge to the tenants only or to the trustee also. *Ibid*.

(b) *Suits.*

The plaintiff, being the wife of the principal defendant, filed a bill against her husband, alleging that by their marriage settlement a particular estate was charged with a jointure on her behalf; that she afterwards signed a deed exonerating that estate from the jointure, upon the understanding that it was to be charged on another estate, and that during the preparation of that deed the solicitor of the husband acted also on her behalf, and that she had no other legal advice. The decree prayed was that the second estate might be charged with the jointure. The husband, by his answer, stated that the transaction relative to the release of the jointure was conducted by the solicitor solely on his behalf, and the solicitor

stated that the plaintiff had no separate solicitor or counsel, and acted only under the opinion of the husband's legal advisers:—Held, (reversing the decision of the Court below) that the solicitor was to be deemed the solicitor of the wife as well as of the husband; and that the wife had a right to the inspection of all documents which came into the solicitor's possession in relation to and during that employment. *Warde v. Warde*, 21 Law J. Rep. (n.s.) Chanc. 90; 3 Mac. & G. 365: reversing 20 Law J. Rep. (n.s.) Chanc. 36; 1 Sim. N.S. 18.

Semble—Where husband and wife have distinct interests, and the wife is induced, in dealing with those interests, to act under the advice of a solicitor employed and paid by the husband, the solicitor will be deemed to act as the solicitor both of the husband and wife. *Ibid*.

A deed executed by a husband, pending proceedings in the ecclesiastical court, for the purpose of preventing the suit, if successful, from affecting his property, declared void, and all arrears of alimony directed to be paid; but as to future payments, *quære*. *Blenkinsopp v. Blenkinsopp*, 21 Law J. Rep. (n.s.) Chanc. 401; 1 De Gex, M. & G. 495: affirming 19 Law J. Rep. (n.s.) Chanc. 425; 12 Beav. 568.

A testator, by his will, devised his real estate for the benefit of the children of his heiress-at-law, a married woman. A bill was filed, on behalf of the children, to have the trusts of the will executed. The heiress-at-law entered a *caveat* against probate, but did not proceed. She and her husband, who were defendants to the suit, admitted, in their joint answer, the due execution of the will. She and her husband, in her right as heiress, brought an action of ejectment against the trustees of the will, but afterwards discontinued it, and were ordered to pay the costs. At the hearing of the cause in Chancery, an issue *devi-savit vel non* was, on her application, granted, her adult children being directed to be plaintiffs. The record was withdrawn by them just before the time of the trial, and the trustees were then directed to be plaintiffs. The heiress and her husband appealed from this order unsuccessfully, their petition being dismissed. Just before the time for the trial of the issue, the heiress-at-law and her husband petitioned, alleging that the testator was unduly influenced against them in making his will, and that they had not tried the issue at the earnest solicitation of their adult children, and praying that the orders relating to the proceeding to the trial of the issue might be discharged, the petitioners undertaking to admit the validity of the will, and submitting to the execution of the trusts of the same, and praying that all the costs of and relating to such orders might be costs in the cause. The cause and this petition came on for hearing together, and on the 14th of February 1833 a decree establishing the will was made, and on the petition an order was made, "the heiress-at-law, by her counsel, consenting," in conformity with the prayer of the petition. Further proceedings were afterwards taken by her and her husband, both in the ecclesiastical court and at common law, which failed, and she was enjoined by this Court from taking any further proceedings for the recovery of the real estate. On the 13th of January 1851 she obtained leave to present a petition of rehearing of the decree or order of the 14th of February 1833, and on the 29th of

January she obtained an order for setting it down. On the 29th of May the order of the 13th of January for a rehearing was discharged, on the ground of the acquiescence of the heiress in the former proceedings, and the petition was ordered to be taken off the file. From this last order she appealed:—Held, that the heiress-at-law being a married woman could not contract not to have the cause reheard, nor could she by her conduct be in any way bound, nor could her consent inserted in the order of the 14th of February 1833 in any way prejudice her right. *Turner v. Turner*, 21 Law J. Rep. (n.s.) Chanc. 422; 2 De Gex, M. & G. 28; 20 Law J. Rep. (n.s.) Chanc. 112.

Held, also, that the petition of rehearing must be restored to the file. *Ibid*.

Held, further (on the rehearing), that the decree of the 14th of February 1833 must be varied by striking out the consent of the heiress-at-law, and adding words reserving to her, if she should survive her husband, and to her heirs if she should die in his lifetime, the right to dispute the will; but

Held, also, that although the decree was inoperative against the heiress-at-law to bind her inheritance, it was conclusive as against the husband as tenant by the curtesy to the extent of his estate; the decree being, in fact, a bargain that all his and his wife's costs, to which he was alone liable, should be costs in the cause, he agreeing that they would no longer dispute the will. *Ibid*.

The trustee of a fund, to which a young lady was entitled in remainder after the death of her mother, at the request of a needy father advanced sums of money amounting to 460*l*. to enable the father to educate her. Shortly after she came of age, being engaged to be married, she, by deed prepared by the father's solicitor, reciting a contract for sale at the price of 250*l*., for which a receipt was indorsed, assigned the fund absolutely to the trustee, and married on the following day. The trustee was present at the wedding, but the husband was informed neither of the existence of the fund nor of the deed. On a bill by the husband and wife,—Held, that the deed falsely representing the transaction to be an actual sale must be set aside. *Lewellin v. Cobbold*, 1 Sm. & G. 376.

(c) *Pleading and Evidence.*

[Declaration by husband and wife on an account stated, see *Johnson v. Lucas*, title ACCOUNT STATED (B).]

A declaration against husband and wife stated that the wife *dum sola*, together with J A, made their joint and several promissory note payable to the plaintiff, and the wife *dum sola* promised to pay the same to the plaintiff. The declaration was (after issue) amended by adding, that the husband after the marriage, in consideration of the premises, promised to pay the plaintiff the said note. The defendants pleaded the Statute of Limitations. The evidence was that the note was made in 1837, and that interest was paid on it regularly until 1843, when the defendants married. On the 10th of August 1844, a year's interest was paid by the female defendant, but without her husband's privity. The action was commenced on the 2nd of August 1850:—Held, that, under these circumstances, no promise was proved within six years, as none could have been made by the wife *dum sola* within that period, and

as the payment made by the wife within six years was without her husband's privity, no promise by him could be inferred. *Nere v. Hollands*, 21 Law J. Rep. (n.s.) Q.B. 289; 18 Q.B. Rep. 262.

Semble—that the declaration as amended was bad in arrest of judgment. *Ibid*.

A husband cannot make his wife a defendant to a suit instituted by him to recover real estate purchased by her in the name of a third party, and paid for with monies which she had accumulated unknown to her husband; and, notwithstanding an allegation that she claimed the property as separate estate, a demurrer by her to the bill was allowed. *Earl v. Ferris*, 24 Law J. Rep. (n.s.) Chanc. 20; 19 Beav. 67.

Suit by a feme covert in respect of her separate estate, in which her husband was named as a defendant. The plaintiff proved at the hearing that her husband was out of the jurisdiction:—Held, that the suit was properly constituted. *Monday v. Waghorn*, 21 Law J. Rep. (n.s.) Chanc. 353.

A married woman instituted a suit against her husband in respect of property come to his hands, which she claimed as belonging to her, and tendered her evidence in the suit:—Held, that her evidence was not admissible. *Alcock v. Alcock*, 21 Law J. Rep. (n.s.) Chanc. 356; 5 De Gex & Sm. 671.

In a suit relating to the property of a wife, the evidence of her husband is not admissible against her. *M'Neillie v. Acton*, 22 Law J. Rep. (n.s.) Chanc. 820.

BARRISTER.

[See PRACTICE.]

RIGHT TO APPEAR.

The Vice Chancellor and heads of the colleges in the University of Cambridge have authority to make a decree that every tradesman with whom any person in *statu pupillari* should contract a debt exceeding 5*l.* should be required to send notice thereof at the end of every quarter to the college tutor of the person so indebted, on pain of being punished by discommunion or otherwise as to the Vice Chancellor and heads of colleges should seem fit. Where a tradesman resident in Cambridge who has violated this decree is summoned to appear before the Vice Chancellor and heads of houses to answer the complaint, he is not entitled to appear by counsel or attorney as upon a judicial proceeding. *Ex parte Death*, 21 Law J. Rep. (n.s.) Q.B. 337; 18 Q.B. Rep. 647.

Upon a conviction under the Copyright of Designs Act, 6 & 7 Vict. c. 65, the party convicted making default was, upon complaint made, summoned to shew cause why he had not paid the amount of the penalties and costs under such conviction, and why he should not be committed in default of payment, and be further dealt with according to law. Thereupon his counsel and attorney appeared to shew cause, but the sitting magistrate refused to hear the case in the absence of the party himself, and granted a warrant reciting the summons and the neglect of the party to appear, and commanding his apprehension to answer to the complaint made, and to be further dealt with according to law, under which the party was apprehended and imprisoned:—Held (the conviction being afterwards quashed), that the

magistrate was liable to an action of trespass for false imprisonment: first, on the ground that the above section did not apply to default on non-appearance to a summons after conviction; and, secondly, assuming the section to apply to a summons after conviction, that there had been no default in appearance, the appearance by counsel and attorney being sufficient. *Bessell v. Wilson*, 22 Law J. Rep. (n.s.) M.C. 94; 1 E. & B. 489.

The 2nd section of the act to amend the law of evidence, 14 & 15 Vict. c. 99, does not abridge the former right of a party to a suit to act as his own advocate; and a Judge at Nisi Prius has no authority to prevent a party to a suit addressing the jury as his own advocate, and afterwards giving evidence as a witness in support of his own case: but such a course of proceeding is most objectionable. *Cobbett v. Hudson*, 22 Law J. Rep. (n.s.) Q.B. 11; 1 E. & B. 11.

BASTARDY.

[Agreement to support a Bastard, see CONTRACT.]

(A) PROOF OF ILLEGITIMACY.

(B) ORDER OF AFFILIATION.

(a) *Jurisdiction to make the Order.*

(1) *On Soldiers.*

(2) *On Application of Married Woman.*

(3) *Service of Summons.*

(b) *Form and Sufficiency of the Order.*

(c) *Enforcing the Order.*

(C) NOTICE OF APPEAL.

(D) NOTICE OF RECOGNIZANCE.

(A) PROOF OF ILLEGITIMACY.

Where a husband after a long absence did not rejoin his wife till the 29th of November 1849, and she nevertheless produced to him a full-grown child on the 18th of May 1850,—Held, that he could not have been the father, and that she was guilty of adultery. Bill passed with a clause bastardizing the child. *Heathcote's Divorce Bill*, 1 Macq. H.L. Cas. 277.

Strict proof of non-access is required in such cases. *Ibid*.

The log and muster-books of a ship, returned every quarter to the Admiralty, mentioned the name of an officer as with the ship, at a certain place for a given period of time:—Held, that this was not sufficient evidence of his having actually been there for the time specified. *Ibid*.

Where a wife after a long absence did not rejoin her husband till the 22nd of December 1847, and she nevertheless produced to him a full-grown child on the 5th of July 1848; the evidence of adultery (independently of non-access) being complete,—Bill passed, but a clause proposing to bastardize the child *rejected*. *Ibid*.

By the law of Scotland, legitimation *per subsequens matrimonium* operates only from the time of the marriage, not from the time of the birth. *Shedden v. Patrick*, 1 Macq. H.L. Cas. 535.

Semble—That the ancient fiction which supposed an interchange of matrimonial consent at the moment of conception, is not sanctioned by the law of Scotland. *Ibid*.

Semble.—That the doctrine of mid-impediments is also without foundation in the law of Scotland. *Ibid*.

Semble.—That by the law of Scotland, if the mother of a bastard, instead of marrying the father of the bastard, marries another man who dies,—she can afterwards, by marrying the father of the bastard, render the bastard legitimate from the date of her second marriage, but not from the date of the bastard's birth. *Ibid*.

The customary law of the Isle of Man respecting legitimation by subsequent marriage of the parents, was proclaimed at a Tynwald, held on the 13th of July, 1577, as follows:—"If a man get a maid or young woman with child before marriage, and within a year or two after doth marry her, if she was never slandered or defamed with any other before, that child begotten before marriage shall have his father's corbe and his farme, according to the custom of this Isle." This custom was (among other laws) propounded for the resolution of all doubts therein, to the two Deemsters and Twenty-four Keys of the Island, on the 24th of June, 1594, and was by them confirmed and answered as follows:—"If a man get a maid or young woman with child, and then within a year or two after doth marry her, we judge them to be legitimate by our customary laws." Upon a construction of this custom, held, affirming the judgment of the Court of Chancery of the Isle of Man,—First, that such custom was not a rule of descent to lands of inheritance descending from father to son, but embraced the case of a female entitled as purchaser under the trusts of a will; second, that the custom applied to a case where more than one child had been born before marriage; and, third, that a child was legitimate, although more than two years had elapsed between the time the woman was gotten with child and the marriage of the parents. *Quane v. Quane*, 8 Moore, P.C.C. 63.

The child of a married woman held to be illegitimate on proof of non-access of the husband, and of conduct and admissions of the wife and her paramour. *Re Sinclay*, 17 Beav. 523.

On the trial of an issue as to the legitimacy of a child born of a married woman, the evidence of the husband is not admissible for the purpose of proving access, or for the purpose of proving any collateral fact which would tend to shew that he had had opportunities of access. *Wright v. Holdgate*, 3 Car. & K. 158.

Nor in such a case is evidence of expressions of feeling by the wife towards the husband admissible. *Ibid*.

If the jury are satisfied that intercourse took place between the husband and wife at such times as in the course of nature to account for the birth of the child, such child must be taken to be the husband's child, although during the same period other men may have had intercourse with the mother. *Ibid*.

(B) ORDER OF AFFILIATION.

(a) Jurisdiction to make the Order.

(1) On Soldiers.

If an order of Justices be made commanding a soldier in the Queen's service to pay a certain sum weekly for the maintenance of a bastard child, the soldier may be indicted for refusing to obey the

order, and is not protected from punishment by section 52. of the Mutiny Act, 12 & 13 Vict. c. 10; as such disobedience is a criminal matter, and criminal matters are expressly excepted from the operation of that section. *Regina v. Ferrall*, 20 Law J. Rep. (n.s.) M.C. 39; 2 Den. C.C.R. 51.

[But see 13 & 14 Vict. c. 5. s. 52.]

(2) On Application of Married Woman.

Under the 7 & 8 Vict. c. 101. s. 3. Justices have jurisdiction to make an order on the putative father of a bastard child, although the mother be a married woman living apart from her husband. *Ex parte Grimes*, 22 Law J. Rep. (n.s.) M.C. 153; 2 E. & B. 546.

The liability of the putative father under such an order does not cease upon the return of the woman's husband and his cohabitation with her. *Ibid*.

Justices have a discretion as to enforcing an order of affiliation by distress; but where they declined to issue their warrant, on the ground that the putative father was discharged from the order by reason of the husband of the mother having returned and cohabited with her, this Court made absolute a rule, under the 11 & 12 Vict. c. 44. s. 5, ordering the Justices to issue the distress warrant. *Ibid*.

(3) Service of Summons.

A few days after D had left his father's house, his last place of abode, and sailed for America, a summons calling upon him to answer the charge of being the putative father of a bastard, was left for him at his father's house. An order of affiliation, which recited that the summons had been duly served on D, was made against him in his absence from the country. On an application for a certiorari to bring up and quash the order made by D on his return from America, he swore that he did not leave home with any intention of avoiding service of the summons, but he did not deny that he was the father of the child. The Court refused the certiorari. *Regina v. Davis*, 22 Law J. Rep. (n.s.) M.C. 143; 1 Bail C.C. 191.

(b) Form and Sufficiency of the Order.

The words "having also heard all the evidence tendered by the said" defendant, in the forms of orders of bastardy given by 8 & 9 Vict. c. 10, need only be inserted where any evidence has been given on behalf of the defendant. If none has been in fact tendered by him, these words are properly struck out. *Regina v. Pearcey*, 21 Law J. Rep. (n.s.) M.C. 129; 17 Q.B. Rep. 902.

An order of maintenance ordered a person as putative father to pay a weekly sum for the maintenance of a bastard child from the birth of the child. As the application for the order was not made until more than two months after the birth, the order was clearly bad as to the period between the date of the birth and the time of applying for the order. Notice of abandonment of all claim under the order for payment anterior to the date of the order had been served on the putative father:—Held, that the order was valid, and might be enforced against the putative father in respect of the weekly payments which became due after the date of the application to the magistrates. *Regina v. Green*, 20 Law J. Rep. (n.s.) M.C. 168; 2 L. M. & P. P.C. 130.

(c) *Enforcing the Order.*[See *ante*, (b).]

The jurisdiction given to a single Justice of the Peace by 7 & 8 Vict. c. 101. s. 3, at any time after the expiration of one month from the making of an order for the maintenance of a bastard child, to grant a warrant against the putative father, for the purpose of enforcing payment under the order, is not suspended by an appeal to the Quarter Sessions by the putative father against the order, and the confirmation of the order by the Sessions subject to a special case. Where, therefore, an order in bastardy had been confirmed upon appeal, subject to a special case, and two days after the hearing of the appeal a Justice of the Peace granted his warrant, under sect. 3. of 7 & 8 Vict. c. 101, to bring the putative father before two Justices for the purpose of enforcing the order,—Held, that the 11 & 12 Vict. c. 44. s. 2, protected the Justice from liability to an action of trespass for the arrest under the warrant. *Kendall v. Wilkinson*, 24 Law J. Rep. (n.s.) M.C. 89; 4 E. & B. 680.

(C) NOTICE OF APPEAL.

If a party against whom an order of affiliation has been made applies to a Justice, stating that he has given notice of appeal, and requires the Justice to take his recognizance to appear and try the appeal, and to pay costs if awarded, the Justice has no jurisdiction to decide whether the notice of appeal be sufficient, for that is a question for the Sessions on hearing the appeal. *In re Carter*, 24 Law J. Rep. (n.s.) M.C. 72.

(D) NOTICE OF RECOGNIZANCE.

Justices at petty sessions, after verbally adjudging B to be the putative father of twin bastard children, and ordering him to pay 1s. a week for the maintenance of each, drew up a separate order in respect of each child. B gave notice of appeal, and entered into a separate recognizance to prosecute in each case. One notice of recognizance only was served on the mother by the attorney of B, and it stated, "We hereby give you notice that B has entered into a recognizance to try an appeal," &c. "against an order of affiliation, made on," &c. "whereby B was adjudged to be the father of two bastard children of which you, J T, had then lately been delivered." It was objected that the notice was insufficient, as there was no such recognizance as that stated in the notice, and no such order as an order adjudging B to be the father of two children:—Held, that the notice of recognizance was sufficient, as, putting a reasonable construction upon it, it gave the mother sufficient information that B had entered into recognizances to appeal in respect of each child. *Regina v. the Recorder of Leeds*, 21 Law J. Rep. (n.s.) M.C. 171; 1 Bail C.C. 50.

BEER AND BEERHOUSE.

[See ALE AND BEERHOUSE.]

BENEFIT BUILDING SOCIETIES.

[See FRIENDLY AND BENEFIT SOCIETIES.]

BETTING HOUSES.

[See GAMING.]

BIGAMY.

In order to prove that a marriage in Scotland is valid according to the law of Scotland, a witness conversant with Scotch law as to marriage ought to be called. *Regina v. Povey*, 22 Law J. Rep. (n.s.) M.C. 19; 1 Dears. C.C.R. 32.

BILL OF EXCEPTIONS.

[See PRACTICE.]

BILLS OF EXCHANGE AND PROMISSORY NOTES.

[See COMPANY—USURY.]

(A) FORM AND OPERATION.

- (a) *Acknowledgment only.*
- (b) *Certainty as to when and to whom payable.*
- (c) *Imperfect Instrument—no Drawer.*
- (d) *Joint or Several.*
- (e) *Bill or Note.*

(B) STAMP.

- (a) *On re-issue.*
- (b) *Foreign or Inland.*

(C) ALTERATION.

- (a) *When material.*
- (b) *Operating as a Discharge of Liability.*

(D) ACCEPTANCE.

- (a) *What amounts to.*
- (b) *In blank.*
- (c) *Payable at Banker's.*
- (d) *Revocation or Cancellation—*[See (G) DISCHARGE FROM LIABILITY ON.]
- (e) *Evidence of.*

(E) TRANSFER.

- (a) *In general.*
- (b) *Indorsement in blank.*
- (c) *Restricted Indorsement.*
- (d) *Without Indorsement.*
- (e) *Delivery for Special Purpose.*
- (f) *After Maturity.*

(F) ACCOMMODATION BILLS.

(G) DISCHARGE FROM LIABILITY ON.

- (a) *By Payment.*
- (b) *By cancelling Acceptance.*
- (c) *By giving Time.*

(H) RETIRING BILLS.

(I) CONSIDERATION.

(J) PAYMENT.

(K) PROTEST FOR NON-PAYMENT.

(L) NOTICE OF DISHONOUR.

- (a) *Form and Requisites.*
- (b) *By Party having no Knowledge of the Dishonour.*

- (c) *At what Place.*
- (d) *Within what Time.*
- (e) *Waiver.*
- (M) ACTIONS AND SUITS.
 - (a) *When Bill or Note lost or destroyed.*
 - (b) *Rate of Interest recoverable.*
 - (c) *Parties.*
 - (d) *Staying Proceedings.*
 - (e) *Pleadings.*
 - (f) *Evidence to vary Terms of Bill.*
- (N) SALE OF BILLS
- (O) CHEQUES AND LETTERS OF CREDIT.

(A) FORM AND OPERATION.

(a) *Acknowledgment only.*

A document in the following form—"Borrowed, this day, of J H 100*l.* for one or two months; cheque, 100*l.* on the Naval Bank. (Signed) J D," held to be a mere acknowledgment, and not to require a stamp either as an agreement or a promissory note. *Hyne v. Dewdney*, 21 Law J. Rep. (N.S.) Q.B. 278.

The plaintiff advanced money to the defendant on the collateral security of certain debentures in the following form, varying only in the number—"No. 5252. On the 15th of July 1850. The Governor and Company of Copper Miners in England promise to pay to *H. J. Enthoven* or order, at &c., the sum of 500*l.*, and further to pay to the holder of the warrants annexed on presentment thereof, as they shall fall due, interest on the said sum of 500*l.* at the rate of 5*l.* per cent. per annum." To each debenture were affixed several warrants which, differing only in date, ran thus—"The Governor and Company of Copper Miners in England. Warrant for 12*l.* 10*s.* for one half-year's interest on debenture No. 5252, due the 15th of July 1849. W I, Secretary." There was a separate warrant annexed for each half-yearly payment of interest that would fall due on the debenture. When payment of interest was demanded the warrant for the instalment then due was detached and presented separately to the company's bankers:—Held, that the separated warrant was not a promissory note and did not require any stamp. *Enthoven v. Hoyle* (in error), 21 Law J. Rep. (N.S.) C.P. 100; 13 Com. B. Rep. 373.

(b) *Certainty as to when and to whom payable.*

Declaration by the plaintiff as payee, against the defendant as drawer of a bill of exchange, directed to C S, and requesting him *ninety days after sight* or *when realized* to pay to the plaintiff or order the sum of 1,256*l.* 13*s.* 4*d.* sterling, value received:—Held, in arrest of judgment, that the time of payment was altogether uncertain, and therefore that the alleged bill was not a good bill of exchange, according to the custom of merchants. *Alexander v. Thomas*, 20 Law J. Rep. (N.S.) Q.B. 207; 16 Q.B. Rep. 333.

Semble—also, that it would have been equally invalid supposing the proper construction to be that it was payable at all events at the expiration of the stated period of ninety days. *Ibid.*

The following instrument was sued upon as a promissory note by the plaintiff, who, at the time of

the making of it, and from thence until the commencement of the action, was the secretary of the Indian Laudable and Mutual Assurance Society:—"Nine months after date I promise to pay to the secretary for the time being of the Indian Laudable and Mutual Assurance Society, or order, company's rupees 20,000, with interest at 6*l.* per cent. per annum, and I hereby deposit in his hands twenty-two Union Bank shares, as particularized at foot, by way of pledge or security for the due payment of the said sum of company's rupees 20,000, and in default thereof hereby authorize the said secretary for the time being forthwith, either by private or public sale, absolutely to dispose of the said bank shares so deposited with him, and out of the proceeds to reimburse himself the said loan of company's rupees 20,000, he rendering to me any surplus, and I hereby promise to make good whatever may be wanting over and above the proceeds of such sale to make up the full amount of such loan and interest":—Held, that the promise to pay contained in the instrument was a floating contingent promise, the performance of which was to be made to a person to be ascertained *ex post facto*, namely, the secretary when the instrument became due, and therefore that the instrument could not be sued upon as a promissory note. *Storm v. Stirling*, 23 Law J. Rep. (N.S.) Q.B. 298; 3 E. & B. 832.

Quære—whether the additional promise to pay the deficiency in the event of a sale of the bank shares deposited as a security proving insufficient, rendered the instrument invalid as a promissory note. *Ibid.*

(c) *Imperfect Instrument—no Drawer.*

A parcel delivered to a railway company for carriage contained 9*l.* 10*s.* in cash, and an instrument, bearing a bill of exchange stamp, in the following form:—"Three months after date pay to me the sum of 11*l.* 10*s.*, value received. To Mr. Cruttenden, &c.," and written across it was an acceptance by Cruttenden. The parcel was addressed to G, a creditor of Cruttenden, and the intention was that G should put his name to the instrument as drawer. In the course of transmission the parcel was opened, and the instrument and the money it contained were abstracted:—Held, in an action against the company for the loss, that the instrument was a "writing," and not a bill, note, or security for money, within the meaning of the Carriers Act, 11 Geo. 4. & 1 Will. 4. c. 68. s. 1, but that it could not be considered of value, so as under that section to exempt the company from their common law liability as carriers. *Stoessiger v. the South-Eastern Rail. Co.*, 23 Law J. Rep. (N.S.) Q.B. 293; 3 E. & B. 549.

Semble—by the law merchant an instrument is not a bill of exchange unless it has a drawer and drawee. *Peto v. Reynolds*, 23 Law J. Rep. (N.S.) Exch. 98; 9 Exch. Rep. 410.

"Cameroons, September 3, 1852. Exchange for 200*l.* On sight of this, my third exchange, the first and second of the same tenour and date being unpaid, please to pay to S. M. Peto, Esq., or order, 200*l.* sterling, for value received, and place the same, by letter of advice, to the account of Alfred Righton." Across this document, Righton, the drawer, had written the words, "Accepted, S. Reynolds, Esq., Shire Lane, Bedminster, Bristol":—Held, by *Parke, B., Alderson, B. and Martin, B.*, that if the de-

defendant, by acknowledging himself to be liable, ratified the act and authority of Righton, the document might be treated as a promissory note. *Ibid.*

Semble—that the document had not an address upon it. *Ibid.*

(d) *Joint or Several.*

The defendant agreed to join his brother in making a promissory note on the representation that one R would also join, and that he, the defendant, should not be responsible unless R also joined. The defendant signed the note jointly with his brother; R refused to sign, and the brother, without the defendant's knowledge, delivered the note to the plaintiff for value.—Held, that the defendant was not liable on the note. *Awde v. Dixon*, 20 Law J. Rep. (N.S.) Exch. 295; 6 Exch. Rep. 869.

An action was brought upon an instrument, in the following form, dated the 1st of August 1846:—"We, directors of the Royal Bank of Australia, for ourselves and the other shareholders of the said company jointly and severally promise to pay to G W or bearer, on the 1st of August 1851, 200l. for value received on account of the company," signed by three directors. The defendants were two directors, one of whom had signed the instrument in question, and four of the shareholders of the company, which was an unregistered joint-stock company.—Held, that, assuming the directors to have authority to bind the company by such an instrument, the whole of the defendants were jointly liable upon it, notwithstanding that it purported also to bind them severally, which it would not do, and notwithstanding that the note was not given in the name of the partnership firm. *MacLae v. Sutherland*, 23 Law J. Rep. (N.S.) Q.B. 229; 3 E. & B. 1.

Annexed to this note were coupons for the payment of half a year's interest on the amount secured by the note in each successive half year subsequent to the date of the note until the period there specified for payment.—Held, that these coupons could not affect the legality of the note. *Ibid.*

(e) *Bill or Note.*

An instrument was drawn in the following form, "Two months after date I promise to pay to A B or order 99l. 15s. H. Oliver." At the foot it was addressed to "J. E. Oliver," and across it was written, "Accepted payable S & A Bankers, London. E. Oliver".—Held, that in an action by the payee against the drawer it might be treated and declared upon as a bill of exchange. *Lloyd v. Oliver*, 21 Law J. Rep. (N.S.) Q.B. 307; 18 Q.B. Rep. 471.

(B) STAMP.

[See Statutes 16 & 17 Vict. c. 59. s. 19; 17 & 18 Vict. c. 83. s. 1.]

(a) *On Re-issue.*

In an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that he accepted for the accommodation of the drawer, that the drawer negotiated the bill for his own use, and paid it when it became due; that it was afterwards delivered by the holder to the drawer, who then, without the consent of the defendant, indorsed it to the plaintiff, without having it re-stamped. The bill, on being produced at the trial, had the name of

the drawer on the back, and a memorandum of the date when it was due on the face of it; and it appeared that the drawer delivered it to the plaintiff after that date.—Held, that this was no evidence to go to the jury in support of the allegations in the plea, that the bill was negotiated by the drawer, and paid at maturity,—commenting on *Lazarus v. Cowie*. *Jewell v. Parr*, 22 Law J. Rep. (N.S.) C.P. 253; 13 Com. B. Rep. 909.

Quære—whether the plea was good. *Ibid.*

(b) *Foreign or Inland.*

Where a bill of exchange drawn in blank in a foreign country was sent by the drawer to his agent in London to be accepted by a customer of the drawer as a mode of payment for goods, and the agent, without any authority from the drawer, filled it up and induced the defendant, who was not a customer of the drawer, to accept it, and afterwards, in fraud of the drawer, indorsed it to the plaintiffs for value.—Held, that the bill being drawn partly abroad and partly in this country did not require a stamp. *Barker v. Sterne*, 23 Law J. Rep. (N.S.) Exch. 201; 9 Exch. Rep. 684.

(C) ALTERATION.

(a) *When material.*

A note was made payable five months after date with lawful interest, and afterwards and before the note became due, the words "interest to be paid at 6l. per cent. per annum" were written in the corner of it without the consent of the maker.—Held, in an action by the payee against the maker, that there was a material alteration of the note, and that the plaintiff was not entitled to recover in the action. *Warrington v. Early*, 23 Law J. Rep. (N.S.) Q.B. 47; 2 E. & B. 763.

(b) *Operating as a Discharge of Liability.*

Where a bill of exchange was, without the privity of the acceptor, altered by inserting the words "payable at A," and afterwards indorsed to the plaintiff for value, who took it *bona fide* and without knowledge of the alteration, it was held that this was a material alteration which discharged the acceptor. *Burchfield v. Moore*, 23 Law J. Rep. (N.S.) Q.B. 261; 3 E. & B. 683.

The plaintiff's remedy in such a case is confined to a right to recover the consideration for the bill as between himself and his immediate indorser; and a similar remedy may be resorted to between all prior parties to the bill until the party is reached through whose fraud or laches the alteration was made. *Ibid.*

The maker of a promissory note is discharged from his liability by any alteration of the note, wherever the altered instrument, if genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice. *Gardner v. Walsh*, 24 Law J. Rep. (N.S.) Q.B. 285.

A being indebted to the plaintiffs, it was arranged between them that B and the defendant should join as her sureties in a promissory note for the amount payable to the plaintiffs. The defendant, in ignorance of the arrangement that B should sign the note, signed a joint and several note for the amount together with A, and as her surety. The note so signed was then handed to the plaintiffs, who procured it to be signed by B, without the defendant's

consent or knowledge:—Held, that, assuming the note to have been completely issued when it was signed by B, this was an alteration of the note and of the defendant's liability in a material point, and that the defendant was consequently discharged; overruling *Catton v. Simpson*. *Ibid*.

(D) ACCEPTANCE.

(a) What amounts to.

A person who accepts a bill addressed to himself and others is individually liable. *Owen v. Van Uster*, 20 Law J. Rep. (N.S.) C.P. 61; 10 Com. B. Rep. 318.

Where a bill was addressed to a mining company and accepted by the defendant as manager, and it was shewn that he and three others had agreed to form the company, and that the mine had been worked on the footing of that agreement,—Held, that the defendant was individually liable on the bill as a member of the company. The case of *Vice v. Lady Anson*, 7 B. & C. 409; 6 Law J. Rep. K.B. 24, commented upon. *Ibid*.

A bill of exchange drawn upon a completely registered joint-stock company by its corporate name, was accepted as follows:—"Accepted J B and E N, directors of the C Company, appointed to accept this bill." J B and E N were, in fact, directors of the company. The corporate seal, having the name of the company inscribed, was also affixed to the bill, and it was countersigned by the secretary:—Held, that the bill of exchange was sufficiently expressed to be accepted by J B and E N on behalf of the company within 7 & 8 Vict. c. 110, s. 45. *Halford v. Cameron's Coalbrook Steam Coal and Swansea and Loughor Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 160; 16 Q.B. Rep. 442.

A bill of exchange, drawn on a completely registered joint-stock company by its corporate name, was accepted by two of the directors of the company as follows:—"Accepted, J B and E N, directors of the C Company, appointed by resolution to accept this bill." The bill was sealed with the corporate seal, having the corporate name of the company circumscribed, and was countersigned by the secretary:—Held, in an action upon the bill against the company, that the bill sufficiently expressed upon the face of it that it was accepted on behalf of the company within the 45th section of the 7 & 8 Vict. c. 110, and that the company were liable upon the bill. *Edwards v. Cameron's Coalbrook Steam Coal and Swansea and Loughor Rail. Co.*, 6 Exch. Rep. 269.

A bill of exchange, directed to the defendant thus: "To J D, Purser, West Downs Mining Company," was accepted by him in these terms: "J D, accepted per proc. West Downs Mining Company." J D was a member of the company, but was not authorized to accept bills on their behalf:—Held, that he was personally liable. *Nicholls v. Diamond*, 23 Law J. Rep. (N.S.) Exch. 1; 9 Exch. Rep. 154.

(b) In blank.

The defendant, being in execution for a debt, signed a blank promissory note in July 1846, and delivered it to the attorney for the execution creditor, and was thereupon released. In 1851 he became bankrupt, and obtained his certificate on the 12th of

May. On the 20th of October 1852 the note was filled up and made payable at one month after date, and indorsed to the plaintiff. To an action upon the note, the defendant pleaded that he did not make the note, and his certificate under the bankruptcy. The jury found that the note had been filled up within a reasonable time:—Held, that the defendant was liable, and that the certificate afforded no defence. *Temple v. Pullen*, 22 Law J. Rep. (N.S.) Exch. 151; 8 Exch. Rep. 389.

The defendant, in 1840, gave S, for value, his acceptance in blank, on a 5s. stamp. S, in 1852, and, as the jury found, not within a reasonable time, filled in his own name as drawer, for 200l. at five months. The defendant, being sued on the bill by an innocent indorsee for value, pleaded, first, that he did not accept; secondly, the Statute of Limitations:—Held, that the plaintiff was entitled to the verdict on both issues, notwithstanding the finding of the jury. *Montague v. Perkins*, 22 Law J. Rep. (N.S.) C.P. 187.

In a suit for the administration of the estate of a deceased person a claim was made, by the holder of a bill of exchange, to be admitted as a creditor, but it being proved that the holder, who was indorsee of the bill, and was aware of the fact of the acceptance being in blank, it was held he must be taken to have had as full knowledge of the circumstances of the origin of the bill as he might have acquired if he had made proper inquiry; and therefore, affirming the certificate of the chief clerk of one of the Vice Chancellors and the decision of his Honour refusing to disturb the same, the claim was disallowed. *Hatch v. Searles*, 24 Law J. Rep. (N.S.) Chanc. 22; 2 Sm. & G. 147.

(c) Payable at Banker's.

If a bill of exchange, made payable to order, be accepted payable at the acceptor's bankers, and the indorsement of the payee be forged, and the bankers pay the bill to a party presenting it for payment, they are guilty of no breach of duty towards the acceptor in making the payment; but they are not at liberty to charge the amount of the bill in account against him, although the payee be a stranger to them, and they have no immediate means of ascertaining the genuineness of his handwriting, and have dealt with the bill in the ordinary course of business. *Robarts v. Tucker* (in error), 20 Law J. Rep. (N.S.) Q.B. 270; 16 Q.B. Rep. 560.

Semble—that bankers have a reasonable time to inquire into the genuineness of the indorsements of strangers necessary to make out the title to the bill. *Ibid*.

(d) Revocation or Cancellation.

[See post, (G) Discharge from Liability.]

(e) Evidence of.

To an action by an indorsee against the acceptor of a bill of exchange at four months, dated the 9th of November, 1850, the defendant pleaded that he was an infant when he accepted. It was proved that the acceptance, which was not dated, was written by the defendant, that all the parties to the bill resided in London, and that the defendant came of age on the 11th of March, 1851:—Held, that the jury might on this evidence find for the defendant, as the proper inference from it was, that the bill was ac-

cepted shortly after it was drawn. *Roberts v. Bethell*, 22 Law J. Rep. (N.S.) C.P. 69; 12 Com. B. Rep. 778.

Where, in an action against the acceptor of a bill of exchange, plea, non acceptavit, the defendant's attorney signed an admission that the acceptance was in the handwriting of the defendant, without adding the usual clause, "saving all just exceptions to the admissibility of evidence,"—Held, that the jury were warranted in finding for the plaintiff, notwithstanding the non-production of the bill. *Chaplin v. Levy*, 23 Law J. Rep. (N.S.) Exch. 117; 9 Exch. Rep. 531.

(E) TRANSFER.

[See *post*, (N) Sale of Bills.]

(a) In general.

The rule laid down in the cases of *Gill v. Cubitt* (3 B. & C. 466) and *Down v. Halling* (4 B. & C. 330), that the negligence of a party taking a negotiable instrument fixes him with the defective title of the party passing it, observed upon, and those cases declared to be no longer law. *Bank of Bengal v. Macleod*, 5 Moore, Ind. App. i.

(b) Indorsement in blank.

Where a bill of exchange is indorsed in blank, and is transferred by the indorsee by delivery only, without any fresh indorsement, the transferee takes as against the acceptor any title which the intermediate indorsee possesses. *Fairclough v. Pavia*, 23 Law J. Rep. (N.S.) Exch. 215; 9 Exch. Rep. 690.

(c) Restricted Indorsement.

Bill of exchange drawn by M, under the name of M & Co., upon and accepted by J & Co., payable six months after sight to order of M, and by M indorsed to B, and by B indorsed to C, "value in account with the Oriental Bank," and by C indorsed to S. Action by S, as indorsee, against M, as drawer, upon the bill being dishonoured. Demurrer, that the indorsement preceding that to S was restrictive:—Held, by the Supreme Court of Hong Kong, that there was nothing upon the indorsement by B to preclude C, the restricted indorsee, from making an assignment of the bill, so as to give the subsequent indorsee a right of action for the benefit of the restraining indorser, or *cestui que trust*, as the case may be. Such decision, on appeal, affirmed by the Judicial Committee of the Privy Council. *Murrow v. Stuart*, 8 Moore, P.C.C. 267.

(d) Without Indorsement.

W, being the representative of a deceased holder of a bill of exchange, requested R, who had guaranteed the payment, to see it paid. R. employed the plaintiff to sue upon it in his own name, and informed W of the fact, saying that he required the bill to deliver to the plaintiff for that purpose. W thereupon gave the bill to R, who, after making a copy in his presence, gave it back, saying it would be safer in the hands of W until it was wanted. The copy was then delivered to the plaintiff, who commenced the present action. W shortly afterwards delivered the bill to his own attorney to take such steps as he might judge necessary and get the money, and the bill was subsequently given to the plaintiff. The defendant pleaded a denial of the indorsement, and

that the plaintiff was not the holder of the bill at the commencement of the suit:—Held, that as the plaintiff had no interest in nor actual possession of the bill, nor any constructive possession thereof, inasmuch as neither R nor W was his agent, the defendant was entitled to the verdict upon both pleas. *Emmet v. Tottenham*, 22 Law J. Rep. (N.S.) Exch. 281; 8 Exch. Rep. 884.

(e) Delivery for special Purpose.

A, being the payee and holder of a bill of exchange, wrote his name upon it, and gave it to B for the purpose of getting it discounted. B never paid any money in respect of the bill, but kept it until it was overdue, when he delivered it to C without receiving any value for it:—Held, that there was no indorsement by A to B. *Lloyd v. Howard*, 20 Law J. Rep. (N.S.) Exch. 1; 15 Q.B. Rep. 995.

Quere—whether there was any indorsement by B to C. *Ibid*.

Where E wrote his name on the back of a bill of exchange, and delivered it to B to get it discounted, and B deposited it with T, receiving from him a memorandum that certain goods and chattels enumerated, and amongst them the bill in question, would be sold if not redeemed within a specified time,—Held, that there was an indorsement of the bill from E to T. *Barber v. Richards*, 20 Law J. Rep. (N.S.) Exch. 135; 6 Exch. Rep. 63.

(f) After Maturity.

[See *Jewell v. Parr, ante*, (B) Stamp (a).]

The right of an indorsee of an overdue bill of exchange to sue the acceptor is not defeated by the existence of a debt due from the drawer to the acceptor, and notice by the latter to the drawer, before indorsement, of his election to set off the amount against the bill; nor is the indorsee of such overdue bill of exchange affected by the existence of a right of set-off as between the acceptor and the drawer, although the bill was indorsed without value and for the purpose of defeating the set-off. *Oulds v. Harrison*, 24 Law J. Rep. (N.S.) Exch. 66; 10 Exch. Rep. 572.

Therefore, where to an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that after the bill became due, and before indorsement, the drawer was indebted to the defendant in a sum exceeding the amount of the bill, and that the drawee, in order to defraud the defendant and in collusion with the plaintiff, indorsed the bill to the plaintiff after it became due, in order to enable him to sue the defendant on it, and without consideration, and that the plaintiff sued merely as the agent of the drawer and in collusion with him, and that the sum due from the drawer to the defendant had not been paid,—Held, that the plea was no answer to the action. *Ibid*.

It is no defence to an action against the acceptor of a bill of exchange that the bill was given for bets on horse-races made by the drawer as the acceptor's agent, but paid by him without the acceptor's request. *Ibid*.

(F) ACCOMMODATION BILLS.

In an action by an indorsee against the accommodation acceptor of a bill, it is not a good defence to the further maintenance that, after action brought,

the drawer paid the amount of the bill and interest to the indorsee, under a Judge's order in another action brought by the indorsee against the drawer. *Randall v. Moon*, 21 Law J. Rep. (N.S.) C.P. 226; 12 Com. B. Rep. 261.

An indorsee for value of an accommodation bill, without notice that it is one of that description, may, notwithstanding notice subsequently acquired, release the drawer without releasing the acceptor. *Ex parte Graham in re Black*, 5 De Gex, M. & G. 356.

(G) DISCHARGE FROM LIABILITY ON.

[See *ante*, (C) ALTERATION, (b).]

(a) *By Payment.*

The first count was on a promissory note of the defendant for 500*l.*, dated the 7th of December 1845; second count on a similar note, dated the 20th of January 1846, both payable on demand to J. Clark, the testator; third count, money lent; fourth count, account stated. Pleas to the first and second counts, first, payment; second, that after the making of the notes, and before demand of the principal or interest, and before any breach of the promises, J. Clark exonerated and discharged the defendant from payment of the notes; third, that after making the notes it was agreed between J. Clark and the defendant that the latter should purchase with his own money a piece of paper marked with a 10*s.* receipt stamp, and should fill up and write on it thus:—"Hull, Feb. 16, 1846.

—Received of R. Dauber (the defendant) the sum of 1,080*l.*, being the principal and interest on two notes, dated December 1845 and January 1846, in full of all demands;" that the defendant should suffer J. Clark to sign his name, and that such purchase of the paper and such writing out and filling up, and permitting J. Clark to sign it, should be accepted by J. Clark in full satisfaction and discharge of the said causes of action. Fourth plea, to the third and fourth counts, non assumpsit; fifth, to the same, payment; sixth, to the same, the Statute of Limitations; seventh, to the same, a similar plea to the third plea. In 1835 J. Clark agreed to lend the defendant 1,000*l.* on receiving two promissory notes for 500*l.* each. The notes were given, and the interest thereupon regularly paid by the defendant to J. Clark, who on receiving it was in the habit of indorsing a memorandum on the back of the notes. The back of the notes being at length entirely covered, J. Clark proposed that the notes should be cancelled and others substituted, which was accordingly done and the notes in question given by the defendant. In February 1846 J. Clark, expressing a wish to make the defendant a present of the 1,000*l.*, directed him to buy a 10*s.* stamp and draw out a receipt for 1,000*l.*, and 80*l.* for interest, which having been done and the receipt having been signed by Clark, no further interest was paid. J. Clark subsequently died, having previously bequeathed the notes in question to his executors, with certain directions as to the investment of the proceeds:—Held, first, that the transaction did not amount to a payment of the notes. Secondly, that the third and seventh pleas were not supported. Thirdly, that the second plea of discharge was proved; that a liability on a bill of exchange may be discharged by parol, whether between immediate or intermediate parties; and that the same rule applies to promissory notes; and, therefore, that the second

plea was good on motion for judgment *non obstante veredicto*. Lastly, that the giving of the receipt was not a part payment or acknowledgment of the debt, so as to take the case out of the Statute of Limitations; and that the renewal of the two notes in January 1846 could not be considered as a promise so as to render the defendant liable by a new promise to pay the original notes. *Foster v. Dauber*, 20 Law J. Rep. (N.S.) Exch. 385; 6 Exch. Rep. 839.

The indorsee of a bill of exchange is entitled to proceed, in an action against the acceptor, for the recovery of costs, though, pending the action, payment in full satisfaction of the amount of the bill with interest, and all monies due thereon, be made by another party to the bill and accepted by the plaintiff. *Goodwin v. Cremer*, 22 Law J. Rep. (N.S.) Q.B. 30; 18 Q.B. Rep. 757.

Where, therefore, to a declaration against the acceptor of a bill of exchange for 49*l.* 16*s.* indorsed by W T to the plaintiff, the defendant pleaded, first, *non acceptit*; secondly, (*puis darrein continuance*), that after the pleading of the first plea W T had paid to the plaintiff, then being the holder of the bill, and the plaintiff had accepted 60*l.*, being the full amount of the bill and all interest due thereon, in full satisfaction and discharge of the said bill, and of all monies due and payable on account and in respect thereof, —Held, on demurrer, that the plea was no bar to the further continuance of the action. *Ibid.*

(b) *By cancelling Acceptance.*

A S, a merchant residing at Trieste, in November 1841, drew upon Messrs. D & Co., the defendants, merchants residing in Liverpool, a number of bills in two parts, and requested them to accept and send them to Messrs. Glyn & Co. the London bankers of the defendants, to be held by them at the disposition of the holders of the seconds. The seconds were negotiated at Trieste and other places, and were addressed at the foot to Messrs. D & Co. (the defendants), payable in London, the firsts with Messrs. Glyn & Co. Messrs. D & Co. wrote across the bills a memorandum of acceptance and transmitted them to Messrs. Glyn & Co., to be held at the disposition of the holders of the seconds, and by letters dated the 3rd of December and the 8th of December, informed A S of what they had done. At the time the firsts were so remitted to Messrs. D & Co. A S had sent the seconds to Messrs. F & Co. of Paris, for discount, but they declined to discount them, and they were received back by A S on the 8th and 13th of December, and then cancelled by him. On the 4th of December A S wrote to Messrs. Glyn & Co. requesting them to hand to Messrs. D & Co. all the firsts so drawn by him upon them and handed to Messrs. Glyn & Co. as before mentioned. He also wrote to Messrs. D & Co. to request them to instruct Messrs. Glyn & Co. to return all the said firsts which remained on their hands. On the 7th of December A S wrote to Messrs. D & Co. that he had annulled the previous instructions to Messrs. Glyn & Co., and he requested Messrs. D & Co. to replace the firsts in the hands of Messrs. Glyn & Co. to be held as before. Messrs. Glyn & Co., on the 15th of December, remitted the bills to Messrs. D & Co. pursuant to the letter of the 4th; and Messrs. D & Co. on the 16th cancelled the acceptances. On the 18th of December Messrs. D & Co., after the receipt of the

letter of the 7th of December, wrote as follows:—"As we stated on the 16th, the firsts of your drafts, which Glyn & Co. returned to us, were immediately cancelled, and it would hardly do therefore to re-issue them in their present state; but we have to-day written to Glyn & Co. explaining this, and requesting them to refer the holders of the seconds to us when they are presented to them." On the 21st, 22nd, and 23rd of December A S issued what purported to be seconds to intermediate indorsees, from whom the plaintiffs afterwards received them for value in due course of business, the said intermediate indorsees having no knowledge of the correspondence except that A S represented to them that the firsts had been accepted:—Held, in an action by the holders against Messrs. D & Co., that the acceptances were cancelled by the letter of the 4th of December being acted upon according to the intention of the drawer, and that the subsequent indorsements of the new seconds to the plaintiff conferred no right against Messrs. D & Co. *Ralli v. Denistoun*, 20 Law J. Rep. (n.s.) Exch. 278; 6 Exch. Rep. 483.

Quære—whether the letter of the 18th of December amounted to a fresh acceptance; but held, that if it did, the defendants having pleaded the facts as above stated, such fresh acceptance should have been new assigned. *Ibid*.

(c) By giving Time.

To a declaration by the payee against one of two makers of a joint and several promissory note payable on demand, the defendant pleaded that he made the note as surety and for the accommodation of F, his co-maker, and that there never was any value or consideration for the defendant making or paying the said note, all which had always been known to the plaintiff; and averred that after the note had become due and payment had been demanded of F, the plaintiff, being the holder, gave time to F, without the consent of the defendant. After verdict for the defendant on this plea,—Held, that it was no answer to the action. *Manley v. Boycot*, 21 Law J. Rep. (n.s.) Q.B. 265; 2 E. & B. 46.

The *bonâ fide* holder of a bill or note cannot be prejudiced in the rights which he has according to the terms of the instrument, by knowledge that the acceptor or maker is surety for another, where there is no specific agreement, at the time when he takes the instrument, to receive it from the acceptor or maker as a surety only. *Ibid*.

Quære—whether if such a contemporaneous agreement be proved, the acceptor or maker is discharged by time being given to his principal. *Ibid*.

(H) RETIRING BILLS.

According to the ordinary meaning of the word "retire" as applied to a bill of exchange, the retiring of a bill at maturity by an acceptor takes it entirely out of circulation; but if an indorser "retires" it, he merely withdraws it from circulation as far as he himself is concerned, and may hold it with the same remedies as if he had paid the amount in due course to his indorsee. *Elsam v. Denny*, 23 Law J. Rep. (n.s.) C.P. 190; 15 Com. B. Rep. 87.

(I) CONSIDERATION.

[See USURY.]

Assumpsit on a bill of exchange, drawn by E A B,

and accepted by the defendant, payable to the order of the drawer, and by E A B indorsed to W C, who indorsed the same to the plaintiff. Plea, that the bill was drawn for the accommodation of the defendant, and for the purpose of getting it discounted, and was indorsed in blank and delivered to the defendant; that before the bill became due the defendant delivered it to W M, who received and held it for the special purpose of getting it discounted for the defendant, and paying over the proceeds to the defendant or of returning the same; that W M did not get the bill discounted, or pay over any proceeds to him, or return the bill, but delivered the same to W C for the purpose of his, W C's, discounting it; that W C, in violation of the said purpose and against good faith, without the authority or knowledge of the defendant or of W M, without any consideration or value whatever for the said indorsement, afterwards indorsed the bill to the plaintiff; and that there never was any value or consideration for the defendant's acceptance, or the said indorsements. On the part of the defendant evidence was given shewing that the bill was drawn as an accommodation bill, and that M had received it in the manner and for the purpose alleged in the plea; that he had indorsed it to W C for the purpose of his getting it discounted, who promised to do so, and to pay over the money at a stated time and place; that W C failed to perform his promise, and had never paid over any money on account of the bill:—Held, that from such evidence, the truth of the allegations in the plea as to the indorsement of the bill to the plaintiff having been against good faith and without value, might be inferred, and, therefore, that sufficient was shewn to cast on the plaintiff the onus of proving that he had given value for the bill, and in the absence of such proof to entitle the defendant to a verdict in his favour. *Smith v. Braine*, 20 Law J. Rep. (n.s.) Q.B. 201; 16 Q.B. Rep. 244.

A plea to an action on a promissory note alleging "that the note was given without consideration," and stating "that it was obtained from the defendant upon a representation by the plaintiff that a sum of money was owing from the defendant to the plaintiff by virtue of an indenture, whereas no such sum was owing," is a good plea of no consideration, without alleging that the representation was made "fraudulently," or that it was a representation of a matter of fact. *Southall v. Rigg* and *Forman v. Wright*, 20 Law J. Rep. (n.s.) C.P. 145; 11 Com. B. Rep. 481.

Such a plea, with the addition of the word "fraudulently" in the statement of the misrepresentation, is sufficiently proved by a finding that the note was given upon the faith of an innocent misrepresentation of a matter of law by the plaintiff; and the word "fraudulently" may be rejected as surplusage. *Ibid*.

In an action by the payee against the maker of a promissory note, the defendant pleaded that it was made by the defendant at the request of the plaintiff, as a collateral security for a debt due from J B to the plaintiff, and that the defendant was not liable to pay the debt or to give the note as security, and that there was no other consideration:—Held, a good plea of want of consideration, after verdict. *Crofts v. Ecale*, 20 Law J. Rep. (n.s.) C.P. 186; 11 Com. B. Rep. 172.

Where in an action on a bill of exchange by the indorsee against the acceptor, the defendant pleads that the bill was obtained from him by fraud, and that the plaintiff gave no consideration for it, to which the plaintiff replies *de injuriâ*, although the latter averment is essential to make the plea good, proof of the fraud throws upon the plaintiff the burthen of proving that he gave consideration for the bill. *Harvey v. Towers*, 20 Law J. Rep. (N.S.) Exch. 318; 6 Exch. Rep. 656.

Upon the trial of such an issue it is not the duty of the Judge to determine whether fraud is proved, but only whether there is evidence of it to go to the jury; and it is correct for him to direct the jury that if they think the fraud proved, in the absence of proof of consideration having been given by the plaintiff, the defendant is entitled to the verdict. *Ibid.*

Action on a bill of exchange drawn by M upon and accepted by the defendant, indorsed by M to H, and by H to the plaintiff. First plea, that the bill was accepted by the defendant, and drawn and indorsed in blank by M without value; that the defendant gave it to E to get it discounted for the defendant; that E did not get it discounted, but, in fraud of the defendant, and without the consent of M, delivered it to some person unknown; and that neither H nor the plaintiff gave value for the indorsements to them respectively. Second plea, the same as the first, except that, instead of alleging want of consideration by H and the plaintiff, it alleged that H and the plaintiff respectively had notice that the bill had been obtained from the defendant by fraud. On the part of the defendant, evidence was given that E had obtained possession of the bill by fraud, upon which the Judge ruled that the onus was cast upon the plaintiff of proving that he gave value:—Held, that this ruling was correct. *Beny v. Alderman*, 23 Law J. Rep. (N.S.) C.P. 34; 14 Com. B. Rep. 95.

A plea of want of consideration, in an action on a bill of exchange, must, besides shewing the circumstances, distinctly allege that there was no other consideration than that mentioned. *Boden v. Wright*, 12 Com. B. Rep. 445.

A banking firm advanced money to A and took a promissory note for such advance, which was signed by A and his wife, who had no separate property. A died an insolvent. Nine days after his death one of the partners in the bank went to the house of the widow, taking with him a proper stamp, and asked her if she could pay any money on account, and on her answering that she could not, obtained her signature to a new promissory note, written by him upon the stamp. It being doubtful whether the plaintiff knew that she was not liable upon the original note, and nothing having been mentioned at the interview concerning her non-liability:—Held, that the note so obtained was invalid, and that the case was too plain to render it necessary to send it to be tried at law. *Coward v. Hughes*, 1 Kay & J. 443.

(J) PAYMENT.

[See ante, (G) Discharge from Liability on (a).]

To an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded that J H, the drawer, indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always

held it without value or consideration, and that after the bill became due, J H accepted certain scrip certificates from the defendant in full satisfaction and discharge of the bill. The plaintiff replied that the bill was indorsed for value and consideration, and upon this issue the defendant had a verdict:—Held, that the plaintiff was entitled to judgment *non obstante veredicto*. *Milnes v. Dawson*, 20 Law J. Rep. (N.S.) Exch. 81; 5 Exch. Rep. 948.

An agreement between the payee and one of several makers of a joint and several promissory note, that the payee shall take another promissory note in satisfaction of the first, with payment of the note taken by the payee on such understanding, amounts to payment by the other makers of the joint and several note. *Thorne v. Smith*, 20 Law J. Rep. (N.S.) C.P. 71; 10 Com. B. Rep. 659; 2 L. M. & P. F. C. 43.

A joint and several promissory note had been given by the defendant and K to the plaintiffs. K agreed with L and the plaintiffs that the plaintiffs should take L's promissory note in satisfaction of the defendant's liability on his joint and several note. The plaintiffs having taken L's note on that understanding, received payment of it from R, authorized by L, to pay it:—Held, that in an action on the first note, the above facts might be given in evidence under a plea alleging payment by the defendant. *Ibid.*

By the rules of a 50*l.* money club, each member was to pay a weekly sum for each of his shares, and to take his share by sale as the sum of 50*l.* was paid in by the members, upon giving security to be approved of by the committee. Interest was to be paid from immediately after the sale. B being a member of such club for a 40*l.* share (which was subject to similar rules as the 50*l.* shares) became a purchaser of a 40*l.* share, and together with the defendant and another person gave a joint promissory note to the treasurer of the club for 40*l.*, payable on demand with interest. The weekly payments were duly made for some time by A and his sureties, but on their being discontinued an action was brought upon the note for the full amount:—Held, that the weekly payments were not evidence under a plea of payment. *Jones v. Gretton*, 22 Law J. Rep. (N.S.) Exch. 247; 8 Exch. Rep. 773.

A, B, and C were in partnership, as merchants, having three houses of business, at Liverpool, Manchester and Shanghai. Their course of business was, for A to buy, for their customers, goods at Manchester, to be consigned through the Liverpool house to the house at Shanghai for sale; and with the proceeds other goods were to be purchased and remitted to the Liverpool house. To keep their customers out of cash advances, bills of exchange for the price of the goods were drawn by the firm upon, and accepted by, the customers, and were generally discounted and the money applied in payment for the goods. The agreement was, that the return goods from Shanghai should be in the hands of the firm as security, as well for their commission as for the amount of the bills so drawn by them. The firm became bankrupt; but the fiat was subsequently annulled by an arrangement for a composition, and by the terms of the deed the equities and liens of the creditors were reserved as if the bankruptcy had continued. At the date of the fiat certain of such return goods were in the hands

of the firm in specie, and other such goods, arriving subsequently, were possessed by the trustees of the composition deed. P, a customer, and the acceptor of certain bills, had, previously to the fiat, died confessedly insolvent, though not judicially declared so. On a suit by the bill holders.—Held, that the rule in *Ex parte Waring* (19 Ves. 345) was applicable; and that the bill holders were entitled to avail themselves of the equity of the firm upon the goods in their possession, and to have such goods applied in the first place in payment of their bills either in full or *pro tanto*; and *semble*, to prove for the deficiency, if any. *Powles v. Hargreaves*, 23 Law J. Rep. (N.S.) Chanc. 1; 3 De Gex, M. & G. 430.

For the application of the rule in *Ex parte Waring*, it is not necessary that there should be a double bankruptcy: it is sufficient if both parties are insolvent; nor, that the deposited goods should be sufficient to cover the whole amount of the bills. The order in *Ex parte Waring* provided for the proof of the deficiency, if any. *Ibid*.

(K) PROTEST FOR NON-PAYMENT.

Where a bill is paid *supra* protest for the honour of a party to the bill, it is not necessary that the protest shall have been formally drawn up or extended before the payment; but it is sufficient if the bill has in fact been protested, and a declaration that the payment was for honour made before a notary, and these facts recorded in the notarial registers before the payment was made. *Geralopulo v. Wieler*, 20 Law J. Rep. (N.S.) C.P. 105; 10 Com. B. Rep. 690.

The protest may be drawn up or extended at any time; and where protests had been formally drawn up before payment for honour and sent to Moscow, and an action was brought by the party who had paid for honour, and it was alleged in the declaration that "the bill was duly protested for non-payment, and thereupon the plaintiff declared before a notary public that he would pay and did pay the said bill under the said protest," it was held, that duplicate protests made out from the notary's book after the action was brought were primary evidence as much as the protests sent to Moscow, and sufficient to support the allegation in the declaration, it having been proved that a protest in fact took place before the payment, that a declaration that the payment was for honour had been made before a notary, and that these facts had been then recorded in the notary's book. *Ibid*.

Vandewall v. Tyrell, (Moo. & M. 87), examined and explained. *Ibid*.

(L) NOTICE OF DISHONOUR.

(a) Form and Requisites.

A notice of dishonour sent by the indorsee of a bill of exchange to the drawer, stated the amount of the bill correctly, but erroneously described it as drawn by the acceptor and accepted by the drawer.—Held, a sufficient notice of dishonour. *Mellersh v. Rippen*, 21 Law J. Rep. (N.S.) Exch. 222; 7 Exch. Rep. 578.

The following is a good notice of dishonour of a bill of exchange:—"We beg to acquaint you with the non-payment of Mr. Miles's acceptance to James Wright's draft of the 29th of December last at four months, 50l., amounting, with expenses, to 50l. 5s. 1d., which remit us in course of post without fail, or pay

to Messrs. Everards & Co., of Lynn." *Everard v. Watson*, 22 Law J. Rep. (N.S.) Q.B. 222; 1 E. & B. 801.

(b) By Party having no Knowledge of the Dishonour.

If a party to a bill gives a positive notice of its dishonour, which afterwards turns out to be true, it is immaterial whether he had absolute knowledge of the fact at the time when he gave the notice. *Jennings v. Roberts*, 24 Law J. Rep. (N.S.) Q.B. 102; 4 E. & B. 615.

The defendant indorsed a bill, accepted and payable in London, to the plaintiff, who indorsed it to a country bank. On the day when it fell due the plaintiff told the defendant that he had seen the manager of the bank, who said the bill would be back from London in the morning, and he asked the defendant for the money for it. Another witness gave a similar account of the conversation, but added that the plaintiff said the bill had been dishonoured. The manager of the bank did not, in fact, know that the bill had been dishonoured until the next morning, when the bill was returned. The Judge told the jury that if they believed the evidence, this was a good notice of dishonour, if the defendant so understood it. The jury found for the plaintiff.—Held, that the evidence was sufficient to make out a notice of dishonour, and that there was no misdirection, what was said about the defendant understanding the words as a notice of dishonour being an observation in favour of the defendant, and by way of caution to the jury against giving to the words the meaning which they would ordinarily bear. *Ibid*.

(c) At what Place.

Notice of the dishonour of a bill of exchange for non-payment by the acceptor, was sent by the holder to the drawer through the post, addressed "London," the bill itself being dated London simply. The drawer resided at Chelsea, and the notice never reached him, and it was stated in evidence that had inquiry been made of the acceptor, whose address was given in the bill, the drawer's address might have been ascertained.—Held, in an action against the drawer, that due diligence on the part of the holder sufficiently appeared, and therefore that he was entitled to succeed upon the issue of whether or not due notice of dishonour had been given. *Burmester v. Barron*, 21 Law J. Rep. (N.S.) Q.B. 135; 17 Q.B. Rep. 828.

(d) Within what Time.

Assumpsit on a bill of exchange drawn by G on K, indorsed by G to the defendant, by the defendant to A, and by A to the plaintiff. The bill became due on Saturday, the 15th of November, and was dishonoured. The plaintiff, the holder, on Monday the 17th, gave notice of dishonour to A. A gave no notice to the defendant, but on the 18th the plaintiff gave the defendant notice.—Held, that the notice to the defendant was too late. *Rowe v. Tipper*, 22 Law J. Rep. (N.S.) C.P. 135; 13 Com. B. Rep. 249.

(e) Waiver.

In an action by a second indorsee against drawer, the defendant pleaded that he had no notice of dishonour. Proof that the first indorsee, who had had

notice, had consented to a Judge's order for staying proceedings against him on payment of debt and costs, and that the defendant had provided the money to pay the amount under that order, is not such evidence of an admission of liability by the defendant as will dispense with proof of notice of dishonour. *Holmes v. Staines*, 3 Car. & K. 19.

(M) ACTIONS AND SUITS.

[By Summary Procedure, see 18 & 19 Vict. c. 67.]

(a) *When Bill or Note lost or destroyed.*

[See 17 & 18 Vict. c. 125, s. 87.]

In an action by the executor of the payee, against the maker of a non-negotiable note, the defendant pleaded *non fecit*. It appeared at the trial that the note was lost, and secondary evidence of its contents was received:—Held, that even if the loss of a non-negotiable note be a good defence in an action on it, that defence does not arise on a plea of *non fecit*. *Semble*, per Jervis, C.J. that even if specially pleaded, it would be no defence. There was a plea which stated that the note had been destroyed in consequence of an agreement between the testator and the defendant:—Held, that this could not be treated merely as a plea stating the loss of the note, by rejecting the rest of its allegations. On application by the defendant for leave to amend by pleading the loss of the note, the Court refused to grant him leave, although (*semble*) the Court may give leave to amend after trial. *Charnley v. Grundy*, 23 Law J. Rep. (n.s.) C.P. 121; 14 Com. B. Rep. 608.

A suit for the payment of a promissory note alleged to have been lost, but which was in the hands of the defendant, was dismissed, not on account of the frame of the suit, but upon the evidence, which preponderated in favour of the note having been given up by the deceased payee with a view to release the debt. *Cook v. Darwin*, 23 Law J. Rep. (n.s.) Chanc. 997; 18 Beav. 60.

The Court will not entertain a bill for the payment of money due upon a bill of exchange, which is proved to have been destroyed, the plaintiff having a sufficient remedy at law. *Wright v. Lord Maidstone*, 24 Law J. Rep. (n.s.) Chanc. 623; 1 Kay & J. 701.

(b) *Rate of Interest recoverable.*

In an action against the drawer of a bill of exchange not bearing interest, which has been dishonoured by non-acceptance, if the jury find the plaintiff entitled to interest by way of damages, the measure of damages is the rate of interest at the place where the bill was drawn. *Gibbs v. Fremont*, 22 Law J. Rep. (n.s.) Exch. 302; 9 Exch. Rep. 25.

(c) *Parties.*

[See *BARON AND FEME*.]

C & Co., merchants in London, being requested by their correspondents H W & Co., merchants in America, in their own name, and through the medium of a broker, arranged for the purchase from the defendants M & Co., also London merchants, of a bill of exchange, C & Co. having at the time funds of H, W & Co. in their hands for the purpose. The bill was drawn by the defendants M & Co. on a banker at Paris, in the following form:—"A cinq jours de date, payez par cette première de change,

la seconde, &c., dix-neuf mille quatre cents soixante dix-huit francs cinq centimes. Valuer de Messieurs Coates & Co., que passerez," &c. The bill was handed over to C & Co. on one foreign post day, for a price then agreed upon to be paid, according to the custom of merchants in London, on the next foreign post day, and was forwarded to the plaintiffs P P, merchants at Paris, to whom H, W & Co. were indebted in more than the amount of the bill, to be collected to the credit of H, W & Co. The plaintiffs acknowledged the receipt of the bill, and stated that they had placed it to the credit of H, W & Co. The bill was not presented until it became due, when it was refused payment by direction of the defendants; C & Co. having failed to pay the price agreed upon. H, W & Co. immediately reimbursed the plaintiffs the amount of the bill and cost of protest, and the defendants were thereupon proceeded against as drawers:—Held, that the plaintiffs were *bonâ fide* holders of the bill for value, and were entitled to maintain the action, though H, W & Co. were really the parties for whose benefit the action was prosecuted, C & Co. not acting as agents of H, W & Co. in the purchase of the bill, so as to pledge their credit to the defendants for the price. *Poirier v. Morris*, 22 Law J. Rep. (n.s.) Q.B. 313; 2 E. & B. 89.

(d) *Staying Proceedings.*

[See *Randall v. Moon*, *ante*, (F), and see Reg. Gen. Hil. Term, 1853, r. 24, 22 Law J. Rep. (n.s.) ix.; 1 E. & B. App. vi.]

The plaintiff sued the defendant on a bill of exchange, and at the same time proceeded by summons in bankruptcy under the 12 & 13 Vict. c. 106, s. 78. The action having been stayed on payment of debt and costs,—Held, that the plaintiff had no right to keep the bill until the costs in bankruptcy were paid. *Cornes v. Taylor*, 9 Exch. Rep. 441.

(e) *Pleadings.*

[See *ante*, (I) Consideration—Forms of declarations, see 15 & 16 Vict. c. 76, sch. B. No. 15—18.—As to pleas, see Reg. Gen. Trin. Term, 1853, r. 7, 22 Law J. Rep. (n.s.) ii.; 1 E. & B. xxx.—Equitable defence, see title PLEADING.]

To an action upon certain bills of exchange drawn by M & Sons upon and accepted by the defendant, and payable to the plaintiff at certain periods after date, the defendant pleaded that after the bills became due, M & Sons made an agreement with the acceptor to discharge him on receiving 2s. 9d. in the pound upon, *inter alia*, the said acceptance, in consideration of the payment of a certain specified sum in settlement of their differences of account, and that the plaintiff took the bills after the agreement. The plea contained averments that M & Sons were the holders of the bills at the time the agreement was made, and that they afterwards *delivered* them to the plaintiff. The replication traversed the former of these allegations:—Held, that although the replication admitted a *delivery* of the bills by M & Sons to the plaintiff after the making of the agreement, that it did not admit such a delivery as to give the plaintiff a new title to the bills, and consequently that the replication was good, as putting in issue a substantial averment in the plea. *Corlett v. Booker*, 5 Exch. Rep. 197.

(f) Evidence—to vary Terms of Bill.

A made his promissory note payable on demand, with interest, in favour of B and C, the executors of D. A was, with several other relatives, to be entitled to certain benefits, under D's will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the executors were authorized to lend the funds in their hands on personal security, and a part of these funds having been lent to A (as well as to the other legatees), he gave the executors the note in question. By the agreement it was settled that the notes given to the executors should not be sued on till the youngest legatee had arrived at the age mentioned in the will. The executors did not sign this agreement; but when it had been signed by the other parties, took it into their possession. The executors brought the action while the legatee in question was alive, and before he had attained the specified age. A pleaded the agreement as an answer to the action, averring that plaintiffs accepted and received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age. At the trial the agreement was proved:—Held, that the plea was bad in substance, for that the agreement was collateral, and was not between the same parties as the note. *Salmon v. Webb*, 3 H.L. Cas. 510.

The terms of a bill of exchange cannot be altered by a parol contract. *Besant v. Cross*, 20 Law J. Rep. (n.s.) C.P. 173; 10 Com. B. Rep. 895; 2 L. M. & P. C.C. 351.

A plea to the further maintenance of an action, brought by the indorsee against the acceptor of a bill of exchange, stating that the defendant was indebted to T the drawer, that it was agreed between them that the defendant should pay by four instalments, and that the defendant should accept a bill; that the defendant accepted the bill in the declaration mentioned as security for the payment of the debt; that T indorsed to the plaintiff to hold the bill as his agent; that the defendant paid three of the instalments before action, and the fourth after action, on the day when it became due, and that it became the duty of T to return the bill to the plaintiff:—Held, a bad and non-issuable plea. *Ibid.*

(N) SALE OF BILLS.

Where bills of exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And, where the money realized by the sale was wrongfully applied by the agent, it was held by the Judicial Committee (affirming the judgment of the Court at Calcutta), that the remitter was entitled to recover the value of the bills in assumpsit, upon an indebitatus count, from the purchaser of them, who had notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent. *Seal v. Dent*, 8 Moore, P.C.C. 319.

The vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports on the face of it to be. *Gompertz v. Bartlett*, 23 Law J. Rep. (n.s.) Q.B. 65; 2 E. & B. 849.

Where, therefore, an unstamped bill of exchange, purporting to be a foreign bill drawn at Sierra Leone, but which had been really drawn in London, was

sold, and refused payment by the acceptor,—Held, that the vendee was entitled to recover back the price of the bill, on the ground of a failure of consideration. *Ibid.*

The vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness, and if it turns out that the name of one of the parties is forged and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. *Gurney v. Womersley*, 24 Law J. Rep. (n.s.) Q.B. 46; 4 E. & B. 139.

The defendants, bill brokers, having received from A a bill of exchange drawn and indorsed by A, for the purposes of being discounted, took it to the plaintiffs, who were money lenders, with whom the defendants had previously had similar dealings, and acting as principals, the defendants procured the bill to be discounted by the plaintiffs, without, however, indorsing or guaranteeing it, though asked by the plaintiffs to do so. The rate of discount charged by the defendants to A exceeded that charged by the plaintiffs to the defendants. The acceptance to the bill turned out to have been forged by A, and the bill proved valueless:—Held, that the plaintiffs were entitled to recover the sum paid to the defendants upon the discount of the bill as upon a failure of consideration. *Ibid.*

(O) CHEQUES AND LETTERS OF CREDIT.

The crossing of a cheque payable to bearer with the name of a banker does not restrict its negotiability to such banker alone. Such crossing is, however, so far a protection to the owner of the cheque that the banker upon whom the cheque is drawn ought not to pay it except through a banker, for if he does so and the person actually presenting it turns out not to be the lawful holder, the circumstance of his so paying would be strong evidence of negligence on the part of the banker, in the event of his seeking to claim credit against his customer for the amount. *Bellamy v. Majoribanks*, 21 Law J. Rep. (n.s.) Exch. 70; 7 Exch. Rep. 389.

The banker's duty is the same where the crossing is by the customer or by any intermediate holder, or where the original crossing is erased, and the name of another banker written instead of it. *Ibid.*

In an action against bankers for money lent, to which the defendants pleaded payment, it appeared that the plaintiffs had drawn a cheque on the defendants, crossed thus, "Bank of England, for account of the Accountant General." The payee to whom this cheque was delivered struck out the crossing by running a pen through it, leaving it, however, perfectly legible, and crossed it a second time with the name of his own bankers and paid it into their bank to the credit of his own account. The cheque being presented by them for payment was paid by the defendants, who charged it to the debit of the plaintiffs' account. The payee appropriated the sum so received to his own purposes, and it never was paid to the Accountant General; and the plaintiffs, who were trustees, were obliged to pay the amount themselves:—Held, that the circumstance of this cheque being thus doubly crossed afforded no additional evidence of negligence against the defendants. *Ibid.*

In an action against bankers for refusing to pay a trader's cheques, they having at the time of refusal sufficient assets of the trader, the latter may recover

substantial damages without proof of actual damage. *Rolin v. Steward*, 23 Law J. Rep. (N.S.) C.P. 148; 14 Com. B. Rep. 595.

A letter of credit saying, "Please to honour the drafts of A to the extent of 460*l.* 9*s.*, and charge the same to the account of B," is an authority to make the payment, but the possession of it by the person to whom it is addressed does not prove that the payment has been made. To shew that the payment has been made there must be a draft by A. *Orr v. the Union Bank of Scotland*, 1 Macq. H.L.C. 513.

Payment of a forged draft is no payment as between the person paying and the person whose name is forged. *Ibid.*

The person presenting the letter of credit is not necessarily the person entitled to make the draft. Therefore the bankers to whom the letter of credit is addressed ought to see that the signature to the draft is genuine. If they do not, the loss will be their own. *Ibid.*

When, for a sum paid down, a banker grants a letter of credit, he must shew that it has been complied with, or pay back the money. In such a case, the banker cannot insist on having the letter of credit brought back to him. *Ibid.*

The rules applicable to negotiable securities do not hold with respect to letters of credit. *Ibid.*

Semble—that the laws of England and of Scotland on these points correspond. *Ibid.*

BILLS OF SALE.

[As to registering, see 17 & 18 Vict. c. 36.]

Judgment having been obtained against the plaintiff in 1844, he executed a bill of sale of his plate to M to defeat the execution. M afterwards took an assignment of the judgment, and in 1848 issued an execution against the plaintiff and seized his goods, whereupon the latter, for the purpose of defeating the execution of M, deposited the plate with the defendant.—Held, in an action of trover for the plate, that the defendant was entitled to set up the right of M to it. *Cheesman v. Excell*, 20 Law J. Rep. (N.S.) Exch. 209; 6 Exch. Rep. 341.

Semble—that where property is pledged to which the pledgor has no title, and which he has no right to pledge, the pledgee is bound to return it to the true owner; his undertaking, in the absence of a special contract to the contrary, being that he will return it to the pledgor, provided it turns out not to be the property of another. *Ibid.*

A bill of sale purported to assign to G R "all the household goods and furniture of every kind and description whatsoever in the house No. 2, Meadow Place, more particularly mentioned and set forth in an inventory or schedule of even date, and given up to the said G R on the execution thereof." At the time of the execution of the bill of sale one chair was delivered to G R in the name of the whole of the said goods and furniture. The inventory did not specify all the goods and furniture in the house.—Held, that the bill of sale only operated as an assignment of the goods and furniture specified in the inventory. *Wood v. Rowcliffe*, 20 Law J. Rep. (N.S.) Exch. 285; 6 Exch. Rep. 407.

R, in consideration of past and future advances, by bill of sale, dated the 28th of November 1850,

assigned all his household goods, growing crops, &c., to W, with a proviso of defeasance if he should repay W the sums advanced and to be advanced, in all not exceeding 700*l.* and interest thereon, on the 1st of January 1851; but it was provided that, if default was made in payment on that day, W should have possession of all the goods, &c., at his discretion should sell them, and should retain the proceeds in trust to pay himself the sums so due, and to pay the surplus, if any, to R. Default was made on the 1st of January 1851, and on the 4th of February W took possession of the goods, &c. On the 25th of February R filed his petition under the 7 & 8 Vict. c. 96, and the plaintiffs were appointed assignees. On the 4th of March W sold the property included in the bill of sale:—Held, in an action brought by the assignees of R, that by this sale W did not avail himself of the bill of sale within the meaning of the 7 & 8 Vict. c. 96. s. 21, and that the assignees were not entitled to recover the goods. *Simpson v. Wood*, 21 Law J. Rep. (N.S.) Exch. 152; 7 Exch. Rep. 349.

The sheriff being in possession of the goods of one T under a *f. fa.*, on the evening of Saturday the 20th of December executed a bill of sale of the goods seized to L, the execution creditor, containing a clause of indemnity by L to the sheriff. T had previously committed an act of bankruptcy, upon which he was afterwards made a bankrupt. Notice of this act of bankruptcy was sent to L's residence, but in consequence of his absence from home, was not received by him until Sunday. L did not execute the bill of sale until Monday the 22nd, when the goods were delivered to him:—Held, that the property passed upon the execution of the bill of sale by the sheriff, and that the execution was, therefore, "executed and levied by seizure and sale" within the 12 & 13 Vict. c. 106. s. 133. *Christie v. Winnington*, 22 Law J. Rep. (N.S.) Exch. 212; 8 Exch. Rep. 287.

By bill of sale under seal, dated the 26th of January 1848, S assigned to the plaintiff all his household goods in and about his dwelling-house, and all his live and dead farming stock, crops of grain and the whole of his personal estate in and about the same, and upon and about the said farm and lands, to hold the same unto the plaintiff, his executors, administrators and assigns, as a security for the payment of certain advances made and to be made, not exceeding in the whole 2,000*l.* Proviso, that it should be lawful for the plaintiff, his executors and administrators, by virtue of the said indenture at any time or times to seize and take possession of the said household goods, live and dead farming stock, crops of grain and other effects, which should or might from time to time be substituted in lieu of the said stock, crops and implements of husbandry thereby assigned, or any part thereof, or which should for the time being be found in or about the messuage or dwelling-house, farm, lands, and premises in the lifetime or after the decease of the said S, and to sell the same, and out of the proceeds to pay all costs, &c., and monies due to the plaintiff. Further sums were advanced, and on the 21st of February 1849 a sum of 1,297*l.* 18*s.* 7*d.* being then due under the deed, the plaintiff, under the powers thereby granted, seized and took possession (amongst other things) of some crops of grain then growing upon the said farm

and lands, and which had been sown by the said S subsequently to the execution of the said deed. A man was then put in possession of these crops, and remained in possession of the same on behalf of the plaintiff. The day after this seizure a *fi. fa.* upon a judgment recovered against S was delivered to the sheriff, and under it he seized the said growing crops. On the 8th of March S presented his petition to the Insolvent Court under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. The official assignee in the first instance claimed the crops and other things seized as above mentioned by the plaintiff, and a bill was filed by him in the Court of Chancery to restrain the plaintiff from selling the same. This bill was afterwards dismissed, upon terms agreed on between the plaintiff and the assignee, and the latter then abandoned all claim to such crops and other things. The sheriff continued in possession; and the crops were subsequently sold, and produced less than the claim of the plaintiff:—Held, that as against the defendant, the execution creditor, the plaintiff was entitled to the proceeds of the growing crops. *Congreve v. Evetts*, 23 Law J. Rep. (N.S.) Exch. 273; 10 Exch. Rep. 298.

BOND.

[See EXTENT—REPLEVIN—STAMP.]

- (A) CONSTRUCTION AND OPERATION.
 - (a) *Joint and several Bond.*
 - (b) *Merger of Simple Contract Debt.*
 - (c) *Forfeiture.*
- (B) LIABILITY OF OBLIGOR.
 - (a) *On Collector's Bond.*
 - (b) *On Indemnity Bond.*
 - (c) *When affected or discharged by Change of Circumstances or Parties.*
 - (d) *When discharged by Payment.*
 - (e) *Discharge of, by Operation of the Statute of Limitations.*
- (C) RELEASE.
- (D) ACTION ON.
 - (a) *Payment into Court.*
 - (b) *Pleas.*
 - (c) *Signing Judgment for want of Plea.*

(A) CONSTRUCTION AND OPERATION.

(a) *Joint and several Bond.*

Bond by three obligors, whereby they bound themselves "jointly" and their heirs, &c. respectively, to pay, which was conditioned to be void if they or either of them, their or either of their heirs paid:—Held, that it was a joint and several obligation, and one having died, that his assets were liable. *Tippins v. Coates*, 18 Beav. 401.

(b) *Merger of Simple Contract Debt.*

A bond given for a simple contract debt merges it, whatever may have been the intention of the parties. *Price v. Moulton*, 20 Law J. Rep. (N.S.) C.P. 102; 10 Com. B. Rep. 561.

To an indebitatus count in debt for 6,000*l.*, the defendant pleaded as to 3,000*l.* parcel, &c., that he agreed with the plaintiffs to deliver an indenture conditioned for the payment of the said sum of

3,000*l.* on a certain day; that the defendant, with the assent and consent and at the request of the plaintiffs, did deliver an indenture and thereby covenanted to pay the said sum of 3,000*l.* Replication.—That the indenture was made by way of security for the payment of the said sum, and that it was expressed to be made as such security. On demurrer,—Held, that the plea was a good plea of merger, although it contained no allegation that the deed was accepted in satisfaction; and that the replication was bad and gave no answer to the plea. *Ibid.*

In the case of a bond given by one of several joint debtors the legal effect of which is to merge the simple contract debt, can this effect be controuled by the parties agreeing by a separate instrument that such bond shall be deemed a collateral security only, and that all remedies shall remain for the simple contract debt, as if the bond had not been taken—*quere*. *Owen v. Homan*, 3 Mac. & G. 373.

(c) *Forfeiture.*

Debt against the defendant, as surety for J C, on a bond conditioned that J C would duly and faithfully account for, apply and pay to the plaintiff all sums of money which had or should come to his hands as treasurer of the S M turnpike roads, according to the direction, true intent and meaning of the 26 Geo. 4. c. lxxi., and three other acts extending that act, and of the 3 Geo. 4. c. 126. Plea that the 3 Geo. 4. c. 126. was repealed by the 4 Geo. 4. c. 95, and that up to the time of such repeal J C had duly and faithfully accounted, &c. Replication, assigning as a breach that although after the said repeal J C was required by the then trustees of the S M roads to render to A C P and S G, then being persons duly appointed by them for that purpose, a true and perfect account in writing of all monies which he had received and disbursed as treasurer, and although a reasonable time had elapsed, yet the said J C had not rendered such account; and for a further breach, that J C had received large sums of money as treasurer, and had failed duly to account for and pay the same, according to the true intent and meaning of the said acts and the statute 3 Geo. 4. c. 126, and of the said bond; although before and after the said repeal large sums remained in his hands, and although during all the time there were trustees entitled and ready to receive the same, and although no other person was authorized to receive the same. Rejoinders, as to the first breach, that a part of the sum was received by J C before the repeal of the 3 Geo. 4. c. 126, for which he had duly accounted, and that the residue of the said sum was received after the repeal of the 3 Geo. 4. c. 126. And as to the other breach, that no part of the sums in that breach mentioned was received by J C before the repeal of the 3 Geo. 4. c. 126:—Held, upon demurrer, first, that the repeal of the 3 Geo. 4. c. 126, did not of itself render the bond invalid, supposing the enactments of the local act to be sufficient for enforcing it. Secondly, that the first breach assigned was bad, as the local act provided only for the treasurer being called upon to account to the trustees themselves, and the section in the 3 Geo. 4. c. 126, requiring the treasurer to account to such person or persons as the trustees should appoint, had been

repealed by the 4 Geo. 4. c. 95. Thirdly, that although the other breach required no aid from the repealed section of the 3 Geo. 4. c. 126, and therefore that the statement as to that act was surplusage; yet as there was no allegation of a requisition to account or pay, as provided by the local act, the breach failed to shew a forfeiture of the bond under that act, and was therefore bad. Fourthly, that the plea admitting a non-performance of the condition, subsequent to the repeal of the 3 Geo. 4. c. 126, did not answer the whole of the declaration, and was therefore bad. *Davis v. Cary*, 20 Law J. Rep. (n.s.) Q.B. 48; 15 Q.B. Rep. 418.

The condition of a bond executed by the defendant as surety for A recited (*inter alia*) that it had been agreed between the directors of a company and A, that A should proceed to such a place in the East Indies, at such time and by such conveyance as the directors should direct, and there serve the company as engineer, at a certain monthly salary, to commence from the day of his embarkation at Southampton. The defeazance provided (*inter alia*) that if A should forthwith proceed to such place in the East Indies at such time and by such conveyance as the directors should direct, the bond should be void. A was paid part of his salary in advance in London by a clerk of the company, who, at the same time, gave him a ticket for the steamer from Marseilles, and money for the journey to that place, but he remained at Boulogne for some time and then returned to London:—Held, in an action against the defendant on the bond, that the embarkation of A at Southampton was not a condition to the operation of the bond; and that there was evidence of A having been directed by the directors to proceed to the East Indies by Marseilles, and that by his neglect the bond was forfeited. *Evans v. Erie*, 23 Law J. Rep. (n.s.) Exch. 265; 10 Exch. Rep. 1.

(B) LIABILITY OF THE OBLIGOR.

(a) On Collector's Bond.

The sureties to a bond, given by a person appointed a collector of Income Tax, under 5 & 6 Vict. c. 35, and conditioned for the payment of all sums assessed and collected, or to be assessed and collected by him for a particular year, as such collector, are not liable in respect of sums collected by him without legal authority. *Kepp v. Wiggett*, 20 Law J. Rep. (n.s.) C.P. 49; 10 Com. B. Rep. 35.

Such a person has no legal authority to collect sums assessed under 5 & 6 Vict. c. 35, until he is furnished with the duplicate assessment and warrant to collect, mentioned in section 172. of that act. *Ibid.*

In a bond given as a security for the due performance by J L of his office of collector, it was recited that he had been duly nominated and appointed a collector for the year ending the 5th of April 1847; and that duplicates of the assessments and a warrant for collecting the same had been delivered to him. An action was brought, and judgment given against the sureties to the bond, for default by J L in non-payment of sums received by him as such collector. Upon a writ of inquiry to assess the damages by reason of the breaches assigned, the jury found a verdict for the plaintiffs, subject to a case, which stated that J L having been nominated and appointed in the usual manner, collected several sums which

had been assessed under Schedules A and D of the act for the year ending the 5th of April 1847; that as to the sums collected by him under Schedule A duplicates of assessment and a warrant for collection had been delivered to him, before he collected these sums; but, as to the sums collected under Schedule D, that no duplicate assessment or warrant had been delivered to him, and that, at the time when he received those sums, the time appointed for appeals against the assessments under Schedule D had not expired:—Held, that the sureties were liable for the sums collected by J L under Schedule A, but that they were not liable for those collected under Schedule D; such collection having been an unauthorized act, for want of the duplicate assessment and warrant. *Ibid.*

Held, also, that the above recitals in the bond did not estop the defendants from setting up the above defence, inasmuch as it was true that J L had been nominated and appointed a collector, in one sense, and duplicates of assessments and warrants to collect had been delivered to him with regard to the sums assessed under Schedule A, though not as to those assessed under Schedule D. *Ibid.*

(b) On Indemnity Bond.

By a deed, after reciting the appointment of W T as bailiff to the plaintiffs, sheriff of Middlesex, the defendants, W T and his sureties, covenanted to save harmless the plaintiffs from any action brought against them touching or concerning any matter "wherein the said bailiff shall act, or assume to act as bailiff," or "for or by reason of any extortion or escape happening by the act or default of the said bailiff." The declaration, after stating an escape, averred that it happened "by the default of the defendant W T, and not otherwise, he, the defendant W T, then being the bailiff of the plaintiffs as such sheriff." The defendants cravedoyer, and after setting out the deed, pleaded that the default "was not the default of him, the said W T, as such bailiff of the plaintiffs":—Held, that the plea was bad for ambiguity; but *semble*, that the declaration would have been bad on special demurrer, for not shewing how the escape was the default of W T. *Cubitt v. Thompson*, 20 Law J. Rep. (n.s.) Exch. 49; 5 Exch. Rep. 811.

(c) When affected or discharged by Change of Circumstances or Parties.

A special overseer appointed under the 7 Will. 4. & 1 Vict. c. 81. s. 3, to make, levy, or collect borough-rates in a parish lying partly within and partly without a borough, is not an annual officer, nor is he such an officer as could be appointed under the 5 & 6 Will. 4. c. 76. s. 58. *The Mayor, &c. of Birmingham v. Wright*, 20 Law J. Rep. (n.s.) Q.B. 214; 16 Q.B. Rep. 623.

Therefore, where the defendants had entered into a bond as surety for W R, and the condition of the bond recited that W R had been appointed to act as overseer for making, &c. borough-rates within part of the parish of A, situate within a borough, during the pleasure of the council, and the bond was conditioned for the due performance of his duties by W R during such time as he should act as such overseer; and in an action upon the bond the defendants set out the bond and condition upon

oyer, and pleaded that W R was duly appointed by the council to act as such overseer, subject to the pleasure of the said council, for the period of one year and no more, under and by virtue of the 7 Will. 4. & 1 Vict. c. 81, and alleged performance of the duties of the said office by W R during the period of one year for which he acted as such overseer:—Held (on demurrer to the replication), that the plea was no answer to the action. Ibid.

The Municipal Corporation Act, 5 & 6 Will. 4. c. 76. s. 58, directs the council of every borough every year to appoint a treasurer, and to take such security for the due execution of his office as they shall think proper. The treasurer, by section 60, is to account to the council, at such times during the continuance of his office, or within three months after the expiration of his office, and in such manner as the council shall direct. By the 5 & 6 Vict. c. 89. s. 6, the treasurer, instead of being appointed annually, is to hold his office during the pleasure of the council, but no alteration is thereby made in the nature or duties of the office. M had, before the 6 & 7 Vict. c. 89, been elected treasurer of a borough for a year, and was ordered by the council to render an account of cash in his possession at every quarterly and adjourned meeting, and at any special meeting, if required. The defendant entered into a bond as surety for the due performance of his duty by M “during the whole time of his continuing in the said office in consequence of the said election, or under any annual or other future elections of the said council:”—Held, first, that the council might legally take such security to remain in force under any number of successive elections; and, secondly, that the liability of the surety was by the terms of the bond extended to a continuance in office by M under an election during the pleasure of the council; and that there was no alteration in the time or mode of accounting, by reason of his holding the office for an indefinite period, which would discharge the surety. *Berwick-upon-Tweed (Mayor, &c.) v. Oswald; the Same v. Renton; the Same v. Dobie*, 22 Law J. Rep. (n.s.) Q.B. 129; 1 E. & B. 295.

The Municipal Corporation Act, 5 & 6 Will. 4. c. 76. s. 58, provides that the council of every borough shall, in every year, appoint a treasurer of the borough, and shall take such security for the due execution of his office as they shall think proper, and in case of a vacancy, by death, resignation, removal, or otherwise, may appoint another person in his place. By section 60. the treasurer shall, at such times during the continuance of his office, or within three months after the expiration of it, and in such manner as the council shall direct, duly account for money received. By the statute 6 & 7 Vict. c. 89. s. 6. the above-mentioned provision, that the council shall, in every year, elect a treasurer, is repealed, and it is enacted, that the council of every borough shall, on the 9th of November next after the passing of the act, appoint a treasurer, who shall thenceforth hold his office during the pleasure of the council for the time being; and in case of a vacancy, the council shall, within twenty-one days after, appoint a fresh one. Subsequent to the month of November 1841, M was appointed treasurer for the remainder of the year, to November 1842, if the council should so long

please. On the 9th of November 1842, he was elected treasurer again, and continued in office for the year, until the 9th of November 1843, when he was again elected to be treasurer (the statute 6 & 7 Vict. c. 89. having then come into operation) during the pleasure of the council for the time being. He remained treasurer down to June 1848. On his first election he entered into a bond, with sureties, who bound themselves for his duly accounting for and due payment of monies received “during the whole time of his continuing in the said office, in consequence of the said election, or under any annual or other future election.” In 1848, when he ceased to be treasurer, there were certain sums which he had received since the 9th of November 1843, and which he had not duly paid over:—Held, in an action against a surety, by a majority of the Court, that the change made by the statute of Victoria, in the tenure of the office from that of an annual appointment to an appointment during pleasure, did not exempt the sureties from liability, as the duties were not altered, and they had agreed to be bound for his conduct as treasurer, not only during his first election, but under any annual or other future election. *Oswald v. the Mayor, &c. of Berwick-upon-Tweed*, 23 Law J. Rep. (n.s.) Q.B. 321; 3 E. & B. 653.

R, in 1841, by a resolution of vestry, was appointed permanent assistant overseer, at the annual salary of 16*l*. In 1846 the vestry resolved that R continue his office, giving security. Accordingly a bond was immediately entered into by R, and two sureties, conditioned that R should from time to time and at all times thereafter, during the continuance of his said appointment, duly perform his duties; and a warrant of appointment of R as assistant overseer was executed a few days afterwards by two magistrates. R performed the duties of assistant overseer from 1841 to 1851; but the duties having been reduced, in consequence among other things of the appointment of a relieving officer, the vestry, by R's consent, in 1851 came to a resolution that R should continue the assistant overseer's office at a salary of 14*l*. per annum from year to year, unless he received proper notice from the inhabitants. R after this served the office for some months, but subsequently resigned, and was found in debt to the parish:—Held, that the resolution of 1851 did not revoke R's former appointment, but that subsequently to it he held the old office at a reduced salary; consequently, that the liability of the sureties continued. *Frank v. Edwards*, 22 Law J. Rep. (n.s.) Exch. 42; 8 Exch. Rep. 214.

The defendant, by bond, became surety for the honesty and good conduct of a clerk to the Eastern Union Railway Company. That company afterwards, by act of parliament, became amalgamated with the Ipswich and Bury Railway Company, under the name of the Eastern Union Railway Company, the present plaintiffs. By the 10th section of the Amalgamating Act, “all conveyances, contracts, agreements, mortgages, bonds, covenants, and securities made or entered into before the granting of such certificate to, with, in favour of, or by or for the dissolved companies, or either of them, or any person duly authorized on their behalf, shall, immediately after the granting of such certificate, be and remain as good, valid and effectual in favour of, and

against, and with reference to the new company, and may be proceeded on and enforced in the same manner to all intents and purposes as if the last-mentioned company had been a party to and executed the same, or had been named or referred to therein instead of the persons, company or party actually named therein respectively":—Held, that the defendant, the surety, was liable to the plaintiffs, the amalgamated company, in respect of a breach of the bond committed by the clerk after the amalgamation. *Eastern Union Rail. Co. v. Cochrane*, 23 Law J. Rep. (N.S.) Exch. 61; 9 Exch. Rep. 197.

By a resolution of a vestry duly held on the 27th of March 1845, R L was nominated and elected assistant overseer, the salary being understood to be 27*l.* a year with extras, but the resolution did not specify the salary. On the 25th of April 1845 two sureties were proposed to the vestry and accepted, and, on the 9th of May they executed the usual bond for the faithful performance by R L of his duties as assistant overseer. On the 19th of March 1846 the vestry resolved "that the permanent overseer's salary," meaning the salary of R L, should be raised from 27*l.* to 35*l.* a year, including all other extras. On the 25th of June 1846 two Justices signed the warrant of appointment, which recited that R L had been appointed on the 19th of March 1846:—Held, *per Pollock, C.B., Parke, B. and Alderson, B.*, that R L was not duly appointed assistant overseer, no appointment having been made pursuant to the resolution of the 27th of March 1845, and therefore the sureties were not liable for his breach of the conditions of the bond—*Martin, B. dissentiente*. *Holland v. Lea*, 23 Law J. Rep. (N.S.) Exch. 122; 9 Exch. Rep. 430.

A bond was entered into in January 1851 by the defendant and others severally to the N.-W. Railway Company. The condition recited that the company had agreed to appoint L as their coal agent, for the purpose of selling coal for them, at a salary of 100*l.* per annum, on his finding sureties for his duly accounting and his honest conduct during the time of his continuance in such coal agency; and then stated that if L should from time to time and at all times duly account and pay over the monies received, the obligation should be void: Provided, that each of the sureties should be liable only for 50*l.* and should be at liberty to put an end to his liability on the bond on giving the railway company six months' notice in writing. On the execution of the bond, L entered upon his duties as coal agent, and continued therein at the fixed salary until May 1851, when it was agreed between L and the company that instead of the fixed salary of 100*l.* a year L should have a commission of 6*d.* per ton on all the coal for which he should get orders. L after this performed the same duties as before until the autumn of 1852, receiving or being allowed the commission, which was calculated to be, and in fact was, larger in amount than the fixed salary. The defendant never gave any notice to determine his liability. L afterwards became indebted to the company for sums which he did not pay over. In an action against the defendant, as surety, it was held, that the agreement between him and the company was that he would be liable as surety so long as L continued coal agent at the specified fixed salary, and therefore that the change in the mode of remuneration relieved him from responsibility. *North-Western Rail. Co. v. Whinray*, 23 Law J. Rep. (N.S.) Exch. 261; 10 Exch. Rep. 77.

The acceptance of the office of overseer does not operate as a resignation of the office of assistant overseer, under 59 Geo. 3. c. 12. And even assuming that those two offices are incompatible, where such assistant overseer continues to perform the duties of assistant overseer after his appointment as overseer, and is guilty of defalcations, the sureties to the bond taken under the provisions of that statute are liable. *Worth v. Newton*, 23 Law J. Rep. (N.S.) Exch. 338; 10 Exch. Rep. 247.

Semble—that the offices of overseer and assistant overseer are not necessarily incompatible. *Ibid.*

Declaration on a bond. Plea setting out the bond and condition, which, after reciting that E J had been appointed clerk to the Torquay Gas Company, and superintendent and inspector of the works and property of the said company, and that upon such appointment it was agreed that the said E J and his co-obligors as sureties for him, should enter into such bond for the due execution of his said office, stated as the condition of the bond, that the said E J should "from time to time, and at all times so long as he shall continue to hold the said office or employment," duly and faithfully account for all sums of money received by him by virtue or in execution of his said office or employment, &c. Averment, that the appointment of E J to the office and employment mentioned in the condition was for one year and no longer, and that he did well and truly perform all that the conditions of the said bond required. Replication that E J, with the assent of the other defendant and the company, continued in the said office and employment after the expiration of the year in the plea mentioned for a long period of time, and during such period omitted and neglected to account:—Held, upon demurrer, that the averment in the plea of the time for which the appointment to the office was made, had the same effect as if it had been recited in the condition of the bond, and that, in accordance with previous authorities, the liability of the sureties did not continue beyond the period of one year, and that the plea, therefore, was a good answer to the action. *Kitson v. Julian*, 24 Law J. Rep. (N.S.) Q.B. 202; 4 E. & B. 854.

(d) When discharged by Payment.

To debt upon bond, the defendant may plead as to part, payment in satisfaction *post diem*, under 4 & 5 Ann. c. 16. s. 12. *Husband v. Davis*, 20 Law J. Rep. (N.S.) C.P. 118; 10 Com. B. Rep. 645.

Payment to one of two trustees binds both. *Ibid.*

Debt on bond in the penal sum of 2,800*l.* First plea: the defendant cravedoyer of the bond, by which it appeared that J O and the defendant and M A N were jointly and severally bound to the plaintiff in 2,800*l.* The condition, as set out onoyer, was for payment of 1,400*l.* by the defendant to the plaintiff on the 12th of August 1851. There was also a memorandum on the bond that the 1,400*l.* secured by the bond was the same sum as was mentioned in a warrant of attorney given by J O to the plaintiff, upon which judgment was intended to be entered up. Averment, that J O did, after the said 12th of August, and before action, pay the plaintiff

1,400*l.* and interest. Second plea, that the plaintiff impleaded J O for the monies in the declaration mentioned and in respect of the bond, and obtained judgment for 2,800*l.*; that the sheriff upon a *fi. fa.* sued out thereon, and indorsed to levy 1,417*l.* 17*s.* 8*d.*, took goods of J O of that amount, and thereout paid the plaintiff. Third plea, that J O executed a warrant of attorney for 2,800*l.* with a defeasance; that the warrant was given for securing payment of 1,400*l.* to the plaintiff, and as a further security to him for the 1,400*l.* along with the bond; that the plaintiff impleaded J O for the detention of the sum of 2,800*l.* in the bond and warrant of attorney mentioned, recovered 2,800*l.* and sued out a *fi. fa.*; that J O was a trader and liable to the bankrupt laws; that the plaintiff negligently omitted to file the warrant of attorney; that 1,417*l.* 17*s.* 8*d.* was levied out of the goods of J O and paid to the plaintiff in satisfaction of his debt; that the plaintiff thereby suspended the right of action against J O and precluded himself and the defendant from suing J O, whereby the debt as regarded the defendant was extinguished. The plaintiff demurred to the second plea, and also replied to the same, that the warrant of attorney became fraudulent and void as against the assignees, whereby the plaintiff was obliged to pay back to them the debt and damages paid to him. Similar replications were pleaded to the first and third pleas:—Held, on demurrer to the pleas and replications, first, that the levy under the execution did not amount to payment *post diem* within the statute of Anne; secondly, that the levy of the sum of 1,400*l.* was no answer to an action at law on the bond for the penal sum of 2,800*l.* *Parker v. Watson*, 22 Law J. Rep. (N.S.) Exch. 167; 8 Exch. Rep. 404.

Held, also, that the plaintiff was entitled to judgment on the several demurrers. *Ibid.*

(e) *Discharge of, by Operation of the Statute of Limitations.*

Debt on bond, dated the 5th of December 1812: the condition of which recited that J B had agreed to advance T W the produce of the sale of 877*l.* 4*s.* 1*d.*, 5*l.* per cent. stock, without any advantage over that he would have been entitled to if the stock continued in his own name in the books of the Bank of England. That J B sold the stock and paid the produce, 729*l.* 4*s.*, to J B, and that it had been agreed between them that the same or a like sum of 877*l.* 4*s.* 1*d.*, 5*l.* per cent. stock, should be replaced and transferred to J B. The condition then stated, that if T W, before the 5th of June then next ensuing, purchased the said amount of stock, and transferred the same to J B, and paid to J B in lieu of the dividends thereof such sum as J B would have been entitled to receive for the dividends of the same in case the same had continued in his name, at such time and times, in such shares and proportions, and in such manner as the same dividends would have been payable to him if the same had not been sold, then the bond was to be void; otherwise to remain in force. Breach, first, that J W did not before the said 5th of June, nor at any time since, purchase the said amount of stock and transfer the same to J B or the plaintiff as administrator. Secondly, that the dividends of the said stock, if the same had continued standing in the name of

J B, would have been payable half-yearly after the date of the said bond, and the first and only one of such dividends before the said 5th of June would have been payable on the 5th of January 1813, that J B on the 11th of September 1824 died, and that if the said stock had continued standing in J B's name, or the plaintiff as administrator, a sum, to wit, &c. would have been payable half-yearly as dividends, and the money payable in lieu of such dividends, and becoming due after J B's death, amounted to a large sum, to wit, &c. And although the said stock had not been transferred into the name of J B or the plaintiff, yet the said T W and the defendants had wholly failed to pay the sums which became due in lieu of the said several dividends. Plea, that the causes of action did not accrue at any time within twenty years next before the commencement of the suit. Replication, so far as related to the first breach, that whilst the stock remained untransferred and a certain sum, to wit, &c. was due, in lieu of the dividends which J A would have been entitled to receive, to wit, on the 10th of September 1824, T W made an acknowledgment that the said stock remained untransferred, contrary to the said condition, and was due thereon by T W making to J satisfaction on account of part of the said sum of money, to wit, of 10*l.*, and that the action was brought within twenty years next after such acknowledgment; and so far as related to the other causes of action in the declaration mentioned, that the said causes of action did accrue within twenty years next before the commencement of the suit. Rejoinder as to the first part of the replication, a traverse of the bringing of the action within twenty years, *modo et formâ*. An agreement between J B and T W was proved, by which J B was to be boarded and lodged by T W for half-a-guinea a week, and that this weekly sum should go and be accepted in part satisfaction of the dividends of the stock due from T W, and that they were to have a settlement every six months. This agreement appeared to have been acted upon until J B's death, on the 11th of September 1824, down to which time he boarded and lodged with T W, but no settlement had taken place between them, although repeatedly asked for by J B:—Held, first, that supposing the issue raised by the rejoinder cast upon the plaintiff the burthen of proving an acknowledgment within twenty years next before the commencement of the action, the above was sufficient evidence to entitle the plaintiff to the verdict on that issue, as also on the second issue raised by the replication. Secondly, that the bond in addition was not within the 5th section of the 3 & 4 Will. 4. c. 42. That the replication, therefore, as to the first breach, set up no answer in law to the plea, and the plaintiff, consequently, was not entitled to any damages on that breach; but as to the second breach, thirdly, that the part of the condition which stipulated for the payment from time to time of such sums as would have been payable by way of dividends, if the stock had continued standing in J B's name, a cause of action still existed, and, therefore, the plaintiff was entitled to judgment; the damages to be confined to those claimed in the second breach. *Blair v. Ormond*, 20 Law J. Rep. (N.S.) Q.B. 444; 17 Q.B. Rep. 423.

Declaration in the common form on an annuity bond, dated the 9th of June 1828. Pleas, the Statute

of Limitations, and the bankruptcy of the defendant after the making of the bond and the accruing of the causes of action in the declaration mentioned, and before the commencement of the action. Replication joining issue on the latter plea, and as to the former, that the said causes of action did accrue to the plaintiff within twenty years next before the commencement of the action (setting out the bond and condition, and assigning as a breach of the condition, the non-payment of 50*l.* for two years and a half arrears of the annuity). The bond was a joint and several bond of the defendant and M, and was conditioned (after reciting that M had agreed with the plaintiff for the sale of an annuity of 20*l.* to be paid to the plaintiff, his executors, &c., during the joint and several lives of the plaintiff and his wife, for the sum of 150*l.*, and that the defendant at the request of M, had assented to join in and execute the bond for securing the due and regular payment of the annuity and the receipt by M of the said sum of 150*l.*) for the due payment by M or the defendant, their or either of their heirs, &c. of the said annuity, by two equal half-yearly payments on the 9th of December and the 9th of June in every year, during the joint and several lives of the plaintiff and his wife, and a proportionate part of the half-yearly payment of such annuity in the event of the death of the survivor between the half-yearly days of payment. On the trial, it was proved that the defendant had become a bankrupt in 1836; that the defendant had, down to 1848, paid the half-yearly instalments of the annuity, but on no occasion, until after the days of payment stated in the condition; so that there had been breaches of the bond before the defendant's bankruptcy, and, it appeared also, more than twenty years before the commencement of the action; and that arrears were then due in respect of breaches committed since 1848:—Held, that a new cause of action arose with each successive breach of the condition, and that by proof at the trial of breaches committed within twenty years, the plaintiff was entitled to the verdict upon the issue raised by the plea of the Statute of Limitations. *Amott v. Holden*, 22 Law J. Rep. (N.S.) Q.B. 14; 18 Q.B. Rep. 593.

(C) RELEASE.

A being in debt to B, C and D, three sisters, who were his near relations, partly on his own account and partly as executor of his father, executed to them a bond for 500*l.* At the time of the giving of the bond A objected to give it, and agreed to do so only on a verbal representation that it was not intended to be enforced until B, C and D should come to want, an event which did not happen. The bond remained in the hands of the three till the death of B, and after her death in the hands of the survivors, and after the death of C in the hands of D, whose property (by mutual arrangements) it was at the time of her death. On the bond was found the following indorsement—"This bond is never to appear against A. Witness C D." This was dated eleven years after the date of the bond. It was not made clear that C's name was written by herself; it was said that D had written it. It was, however, proved that if D had written it she did so with the authority of C:—Held, that, without saying whether the indorsement amounted to a release, which was a legal question, there was an equity

under the circumstances against enforcing the bond; that if put in suit the action would be restrained, and that there was nothing due on the bond to the estate of D. *Major v. Major*, 1 Drew. 165.

(D) ACTION ON.

(a) Payment into Court.

[See *Husband v. Davis*, ante, (B) (d).]

In an action on a bond money cannot be paid into court. *The Bishop of London v. M'Niel*, 23 Law J. Rep. (N.S.) Exch. 11.

In an action on an administration bond, breaches were assigned in the declaration, and the defendant by way of plea set out the condition and paid money into court as to certain breaches, and as to the residue averred performance or excuse for non-performance:—Held, that the plaintiff was entitled to strike out the whole plea, and proceed to assess damages. *Ibid.*

(b) Pleas.

The Westminster Improvement Commissioners were authorized by several acts of parliament to borrow such sums of money as they should think necessary for the purposes of the act, and to give bonds for the same, and which bonds were assignable. In an action by the plaintiff, as transferee of one of such bonds, the condition of which recited that the defendants had, in pursuance of the said acts, borrowed of one T P 5,000*l.* for enabling them to carry the said acts into execution, the defendants pleaded that they did not borrow the said sum of the said T P, or any part thereof, for the purposes of the said acts, and that they were not authorized to make the said bond, and that the same was made contrary to the provisions of the said acts, of which the said T P and the plaintiff had notice at the time the bond was made and transferred to the plaintiff:—Held, upon general demurrer, that the plea was bad. *Horton v. the Westminster Improvement Commissioners*, 21 Law J. Rep. (N.S.) Exch. 297; 7 Exch. Rep. 780.

The defendants also pleaded, that at and before the bond was made, certain persons, namely, C M and W M, were entitled to receive from the defendants certain bonds; that the said T P and others conspired fraudulently to procure for T P one of the said bonds to which the said C M and W M were entitled, and that by means of such conspiracy and fraud they procured the said C M and W M to authorize the defendants to give to the said T P one of the said bonds they were so entitled to; and that the bond sued upon was thereupon given to T P by the defendants, and that they the defendants had never borrowed any sum of money from the said T P, of all which premises the plaintiff at the time of the transfer to him of the said bond had notice:—Held, bad on general demurrer, because the defendants could not set up as a defence the fraud that had been committed upon C M and W M, by whose directions they had, in pursuance of their contract with them, given the bond to T P. *Ibid.*

(c) Signing Judgment for Want of Plea.

The Lynn and Ely Railway Company having given a bond were afterwards by act of parliament amalgamated with certain other lines, under the

name of the East Anglian Railway Company, to which all the liabilities of the Lynn and Ely Railway Company were transferred. To an action against the East Anglian Railway Company upon the bond, the defendants, after setting out the deed on oyer, pleaded as follows: "which being read and heard, the defendants say that the said writing obligatory is not their deed." The plaintiff having signed judgment as for want of a plea the Court refused a rule to set aside the judgment, there being no affidavit of merits. *Selby v. the East Anglian Rail. Co.*, 21 Law J. Rep. (n.s.) Exch. 27; 2 L. M. & P. C. 595.

BOUNDARIES.

[See COMMISSION TO ASCERTAIN BOUNDARIES.]

BRIDGE.

LIABILITY OF COUNTY TO REPAIR.

[See *Mackinnon v. Penson*, title ACTION, (A) (k).]

The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842 all public bridges in the Isle of Wight not repairable by tenure were repaired either by the tithings in which they were situate, or by rates in the nature of county rates, levied on all the parishes in the island, under the following arrangement. The Isle of Wight, having been assessed to the general county rate, and appeals against such assessment having been made, in 1774 an arrangement was made, by an order of Quarter Sessions and by consent, fixing certain proportions to be paid by the parishes in the Isle of Wight towards the general county rate, but leaving the expense of bridges and houses of correction to be raised by a local rate; "the said island being adjudged and declared not to be liable to pay to the county bridge rate or to the house of correction; the Isle of Wight agreeing to erect and maintain houses of correction and bridges within the island at its own expense." Accordingly, from 1774 the practice was for the Quarter Sessions of the county, on the application of the Justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island for the repair of the bridges and bridewell in the island, and this local rate, and not the general county rate, was always expended in such repairs. In 1813 a local act of parliament passed, by which Commissioners were appointed for managing the roads and highways in the island, and which enacted that all bridges, &c. which had, previous to the passing of the act, been repaired by any tithings, &c., should for the future be repaired in the same manner and by such ways and means as other bridges, usually called county bridges, within the island, had been accustomed to be repaired:—Held, that all bridges which, at the time when the local act passed, were repairable by the tithings, were thenceforward repairable by the county generally; and that the conventional mode of assessing the island alone to a rate for the repairs of its bridges and bridewell under the arrangement of 1774 could not affect the legal liability of the county, or be any answer to an indictment against it for non-repair of such bridges. *Regina v. the Inhabitants of the County of Southampton*, 21 Law J. Rep. (n.s.) M.C. 201.

A bridge in the Isle of Wight was, after the passing of the above local act, wholly rebuilt by order of the Justices for the island division out of the island rate before mentioned. The construction of the new bridge was materially different from, and it stood higher up the stream than, the former bridge. None of the forms required by the 43 Geo. 3. c. 49. were observed in building the new bridge:—Held, that the county remained liable to repair the new bridge. *Ibid.*

A foot-bridge formed by three planks, about nine or ten feet long, and a hand-rail, which carries a public footpath over a small stream, is not such a bridge as the county is bound to repair. *Ibid.*

BUILDING ACT.

[See METROPOLITAN BUILDING ACT.]

BUILDING SOCIETY.

[See FRIENDLY AND BENEFIT SOCIETIES.]

BURIAL.

[See 15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 17 & 18 Vict. c. 87; 18 & 19 Vict. c. 128; 18 & 19 Vict. c. 105.]

(A) RIGHT OF BURIAL.

(B) BURIAL FEES.

(C) RATE FOR ENLARGING BURIAL GROUND.

(A) RIGHT OF BURIAL.

A parent is bound to provide christian burial for the body of a deceased child if he has the means; but if he has not the means, though the body remains unburied and becomes a nuisance to the neighbourhood, he is not indictable for the nuisance, notwithstanding he could have obtained money for the burial expenses by way of loan from the poor law authorities of the parish, for he is not bound to incur a debt. *Regina v. Vann*, 21 Law J. Rep. (n.s.) M.C. 29; 2 Den. C.C.R. 325.

Semble—that the parish officer would be liable for a nuisance in such case. *Ibid.*

(B) BURIAL FEES.

In 1823 a piece of ground, in the parish of St. M in L, was bought by subscription of the inhabitants and conveyed to the Church Building Commissioners, who erected a chapel on a portion of it, and inclosed the remainder for a burial ground. The chapel and burial ground were consecrated in 1827. In 1828 an Order in Council was made, whereby, after reciting the 16th section of the 58 Geo. 3. c. 45, which empowers the Commissioners to divide populous parishes into two or more distinct and separate parishes; also reciting the 21st section of that statute, which empowers the Commissioners to divide populous parishes into ecclesiastical districts; also reciting that the Commissioners had made a representation to the Crown respecting the increase of population and insufficient church accommodation in the parish; also reciting that it appeared to the Commissioners

expedient that an ecclesiastical district should be assigned to the new chapel under the provisions of the 59 Geo. 3. c. 134. s. 16; and that the consent of the bishop had been obtained: His Majesty ordered that the proposed division should be made and effected according to the provisions of the said acts. The boundaries of the district were duly enrolled under the 58 Geo. 3. c. 45. s. 22. No Order in Council was made respecting the performance of the offices of the church in the said chapel, or the appropriation of the fees payable in respect thereof, nor did the Commissioners make any order as to whether the fees for burials, &c. were to be reserved to the incumbent of the parish, or assigned to the curate of the chapel, or whether burials, &c. should be performed in such chapel. In the year 1848, the corporation of L established a cemetery within the borough, under the provisions of the 11 Vict. c. ii., by which the burial service over deceased persons removed for interment in the cemetery was to be performed by, and the fees paid to, the incumbent who might have been required to perform the service, and would have been entitled to the fees, if the interment had taken place in his parish or ecclesiastical district:—Held, that the Order in Council was made under the 58 Geo. 3. c. 45. s. 21, and not under the 59 Geo. 3. c. 143. s. 16; and that upon enrolment of the boundaries, the chapelry became a separate district parish for all ecclesiastical purposes; and that after the death of the then incumbent of the original parish, the curate of the district parish was entitled to the fees for burial, both in his parish and in respect of deceased persons taken from the parish to the cemetery for interment. *Edgell v. Burnaby*, 23 Law J. Rep. (N.S.) Exch. 65; 8 Exch. Rep. 788.

(C) RATE FOR ENLARGING BURIAL GROUND.

Where the churchwardens of a parish made a single rate for providing necessary additional burial ground for the parish, which could only be done (if at all) under the powers given by the Church Building Acts, and also for draining and spouting a chapel in the parish, as at common law, it was held that the rate could not be enforced. *Regina v. Abney*, and *the Churchwardens of Whitwick v. Stinson*, 23 Law J. Rep. (N.S.) M.C. 154; 3 E. & B. 779.

Quære—whether there is any power to make a rate for enlarging or for purchasing a burial ground. *Ibid.*

CAB.

[See HACKNEY CARRIAGE.]

CANAL AND CANAL COMPANY.

[Traffic on canals, see 17 & 18 Vict. c. 31. Rules and forms of proceeding against canal companies, see Reg. Gen. (Common Pleas), 18 Vict. 1855; 24 Law J. Rep. (N.S.) xiii.; 15 Com. B. Rep. 473.]

(A) RIGHTS AND LIABILITIES OF THE COMPANY.

(B) COMPENSATION FOR DAMAGE.

(A) RIGHTS AND LIABILITIES OF THE COMPANY.

Ejectment to recover a portion of the land and banks of the Swansea Canal. In 1779, P, being

seised of the above-mentioned land, demised the same to M & Co. for sixty-five years. In 1793 the Swansea Canal Company was formed for making a canal, which was intended to pass, amongst other places, in part through the land in question, and they obtained an act for that purpose. In 1797 M & Co. and the Duke of B. widened a canal made by M & Co., and extended the same through part of the above land, which canal joined and formed a continuation of the Swansea Canal. The powers for making a portion of the canal which passes through a portion of the lands sought to be recovered were obtained by the Duke of B. and M & Co. By that act it was enacted, sect. 47, that upon payment or tender of certain sums of money, adjudged by certain commissioners or assessed by juries, for the purchase of any such lands, &c., it should be lawful for the canal company to enter upon such lands, or before such payment or tender by leave of the owners and occupiers, and thereupon such lands shall be vested in such company. The lands sought to be recovered in this action formed part of the lands authorized to be taken by the canal act. No payment or satisfaction was made or agreed to be made to the owners of the lands, but everything was done by the Duke of B. with the full consent and approbation and in accordance with the wishes of such owners and proprietors. The defendant, in 1835, became the assignee of the said Duke of B. One J C, in 1800, became the purchaser of the said lands, and the interest therein afterwards became vested in the lessors of the plaintiff at the expiration of the lease in 1845:—Held, that the lessors of the plaintiff were entitled to recover possession of the lands. *Doe d. Patrick v. Beaufort*, 20 Law J. Rep. (N.S.) Exch. 251; 6 Exch. Rep. 498.

The Trent and Mersey Navigation Company, by the 6 Geo. 3. c. 96, were empowered to make the canal and to purchase lands for the purpose of the navigation, and, by section 12, upon payment of the purchase-money, the fee simple of the lands was to be vested in the company "for the use of the said navigation, but to or for no other use or purpose whatsoever." By a subsequent act (37 Geo. 3. c. 36,) they were empowered to make a reservoir for the purpose of supplying the canal with water, and to purchase land for that purpose, and all the clauses, powers, &c. of the former act were extended to the making the reservoir. The canal acts contained various clauses reserving rights of fishery, &c. to the owners of the lands through which the canal and reservoir were made, and enabling them to use pleasure-boats thereon without paying toll, but prohibiting the passage of any boats carrying passengers or goods for hire upon the canal, except upon payment of toll. The canal and reservoir, and all the rights, &c. of the canal company were subsequently vested in the defendants (the North Staffordshire Railway Company) by act of parliament, "in the same manner and to the same extent" as the canal company could have held, used, &c. the same, and all the powers, &c. of the canal acts were extended to the railway company. The canal company purchased from the plaintiff's ancestor, under the powers of their acts, the land upon which they made the reservoir, and took a conveyance of it in fee to a trustee for the company. Two questions being raised, first, whether the defendants could lawfully

let out boats for hire upon the reservoir; and, secondly, whether they could lawfully use the reservoir for any other purpose than for supplying the canal with water,—Held, *per Lord Campbell, C.J.*, that under these statutes there was not an universal prohibition against the defendants using the reservoir for any other purpose, except that of feeding the canal; but that all uses of it, whether by pleasure-boats or otherwise, other than for the purposes of the navigation, whereby the grantor of the land, or his heirs or assigns, were prejudiced, was unlawful; but that the plaintiff, not being a shareholder, could not rely upon the improper application of the corporate funds to this purpose. *Per Coleridge, J.* and *Wightman, J.*, that the defendants could not lawfully let out pleasure-boats for hire upon the reservoir, or use it for any other purposes of profit, except those contemplated by the statutes under which they were incorporated, as the land was vested in them for the use of the navigation, and for no other use or purpose whatsoever; and also, because such use of the reservoir would derogate from the rights of adjacent landholders; and, lastly, because it involved a disposition of the corporate funds to a purpose foreign to the object of their incorporation, and might be prejudicial to the shareholders. *Per Erle, J.*, that the canal company and the defendants acquired by the conveyance of the land to them all the incidents to an estate in fee simple not expressly prohibited by their acts, with the specified duty superadded of using it for the purpose of the navigation, and of not using it for any purpose inconsistent with that object; and that, therefore, they might lawfully use the reservoir with pleasure-boats, or in any other manner which did not impede the performance of the statutory duty. *Bostock v. North Staffordshire Rail. Co.*, 24 Law J. Rep. (N.S.) Q.B. 225; 4 E. & B. 798.

(B) COMPENSATION FOR DAMAGE.

The 1 Geo. 1. c. 24, by section 1, empowered certain persons to make the river Kennet navigable, and to dig and cut through the banks of the said river, and to erect in the said river, and upon the lands adjoining, weirs, pens, dams, &c., and to do all matters and things necessary for making, maintaining, or improving the said navigation, the said undertakers first giving satisfaction to the owners of such lands, weirs, &c. as should be digged, cut, or removed, or otherwise made use of, as the Commissioners named for the purpose should direct, in case the undertakers should not beforehand have agreed with the proprietors of such lands and hereditaments concerning the same. By section 2. Commissioners were appointed to mediate between the undertakers and the owners of lands and hereditaments intended to be made use of, and to settle satisfaction for such portion of the lands as should be cut, digged, or made use of; and a provision was made for filling up vacancies in the body of the Commissioners. By section 18. if any person should sustain damage in his mills by the owners of the navigation taking away or diverting the water, or any similar injury, the Commissioners should, by a jury impanelled as therein directed, assess such damage and award compensation to the party injured. The proprietors of the navigation obstructed the water flowing to the defendant's mill by the erection of a dam, under the

powers of the above act. All the Commissioners appointed under the act had died, and there were no Commissioners in existence by whom compensation could be assessed:—Held, under these circumstances, by *Wightman, J.*, *Erle, J.* and *Crompton, J.*, that the powers of the proprietors to raise weirs for the necessary purposes of the navigation did not cease by reason of the right of the mill-owner to recover compensation for consequential damages through the Commissioners being lost. Held, by *Lord Campbell, C.J.*, that the power to raise the weir and cut off the water flowing to the defendant's mill, could only be exercised during the continuance of the body of Commissioners, and that upon their extinction, the extraordinary powers of the proprietors ceased. *The Kennet and Avon Canal Navigation v. Witherington*, 21 Law J. Rep. (N.S.) Q.B. 419; 18 Q.B. Rep. 531.

Quære—whether any mode of recovering compensation by action or otherwise existed. *Ibid.*

A company of proprietors, by agreement among themselves, made a navigable cut through certain lands on lease for sixty-five years. In 1794 an act of parliament was passed for making the Swansea Canal; the cut which was previously made was adopted as a part of the undertaking to be made by the act, but no steps were taken under the act, or otherwise, to purchase the reversionary interest of the lands comprised in the lease, and this part of the canal was held under the lease until its expiration on the 29th of September 1844. The estate of the original lessor, who was one of the projectors of the original cut, and consented to its being made, was afterwards sold, and was purchased by the ancestor of the defendants, who, upon the expiration of the lease, brought an action to recover the land, and obtained a verdict; upon which the plaintiff, who was the proprietor of the canal, and who alone had the power of levying tolls under the Canal Act, filed this bill to restrain all further proceedings at law for the recovery of the lands, and to obtain a conveyance to confirm his rights under the Swansea Canal Act, and to assure the possession of the canal to him upon payment of a compensation under the Canal Act, or that the defendants might be restrained from interfering with the plaintiff's right as an easement, and from preventing him from maintaining or using the canal through the lands:—Held, that the original lessor had notice of the appropriation of the cut to the purposes of the canal; and that he and those claiming under him could not obtain possession of the land covered by the canal, or interfere with its use; that the purchase from the lessor was made with an implied knowledge that the canal was to exist for ever, and consequently that the defendants could not prevent the use of the cut through the land; and that upon payment of a compensation, to be fixed by the Judge at chambers, as the powers in the Canal Act were defective, the defendants must convey their interest in the lands. *The Duke of Beaufort v. Patrick*, 22 Law J. Rep. (N.S.) Chanc. 489; 17 Beav. 60.

The principle upon which such compensation will be fixed. *Ibid.*

CAPIAS.

[See ARREST—EXECUTION—SHERIFF.]

CARRIER.

[See HACKNEY CARRIAGE—SHIP AND SHIPPING.]

- (A) COMMON CARRIERS.
 - (a) *Who are.*
 - (b) *Beyond the Realm.*
- (B) DUTY AND LIABILITY OF CARRIERS.
 - (a) *As regards Passengers.*
 - (1) *In general.*
 - (2) *Personal Injury.*
 - (b) *As regards Passengers' Luggage.*
 - (c) *In respect of the Conveyance of Goods, &c.*
 - (1) *In general.*
 - (2) *Under Notice or Special Contract.*
 - (3) *Declaration of Nature and Value.*
- (C) CHARGES FOR CARRIAGE OF GOODS.
- (D) ACTIONS.
- (E) DAMAGES RECOVERABLE.

(A) COMMON CARRIERS.

(a) *Who are.*

If a person holds himself out to carry goods for every one as a business, and he thus carries from the wharves to the ships in harbour, he is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If he holds himself out to do it for every one who asks him, he is a common carrier; but if he carries for particular persons only, that is matter of special contract. *Ingate v. Christie*, 3 Car. & K. 61.

(b) *Beyond the Realm.*

A common carrier from a place within to a place without the realm, is subject to the same liabilities at common law as a common carrier who carries only within the realm. *Crouch v. the London and North-Western Rail. Co.*, 23 Law J. Rep. (N.S.) C.P. 73; 14 Com. B. Rep. 255.

(B) DUTY AND LIABILITY OF CARRIERS.

(a) *As regards Passengers.*(1) *In general.*

The plaintiff, intending to go to L and back by the defendants' railway, paid for and received from them the following ticket at B, and went to L with it:—"B to L and back. Excursion ticket. To return by the trains advertised for that purpose on any day not beyond fourteen days after date hereof." A morning and evening return excursion trains were advertised on the Saturdays, but they were not advertised to go to B. On a Saturday morning within the fourteen days the plaintiff presented himself at the L station in time for the morning return train. It became full so that the plaintiff could not find room in it, and it would have been dangerous to have added other carriages to it. The company refused to let him go by an ordinary train, but kept him waiting until the evening return train, in which he found a place. That train took him only to D,

where it arrived on Sunday morning. No trains ran from D to B on Sundays. The line from D to B belonged not to the defendants, but to another company. The plaintiff hired a carriage to take him from D to B, and brought an action to recover the expense from the defendants:—Held, that by the terms of the excursion ticket and advertisements the defendants contracted to carry the plaintiff back to B on any day within the fourteen days that he might choose, and by any of the advertised trains that he might select; that not sending him by the morning train was a breach of contract, and that taking him only to D instead of to B without previous notice was a second breach, and that consequently the action was maintainable. *The Great Northern Rail. Co. v. Hawcroft*, 21 Law J. Rep. (N.S.) Q.B. 178.

A railway company were in the habit of allowing the reporters of a newspaper, when on duty, to travel free on their line. The reporter was supplied with a ticket from the company, made out in the name of an editor or other officer of the paper, and it purported on its face not to be transferable. The plaintiff, a reporter, acting *bona fide* and travelling on business of the newspaper, went to a station with such a ticket, and shewed it to the porter whose duty it was to examine tickets, who said it was all right, and placed him in a railway carriage. It did not appear that the porter knew him; but it was shewn that on several occasions the plaintiff and other reporters had travelled with similar tickets, made out in the names of persons other than those who used them, and that the persons whose names were on the tickets were known to some of the officers and superintendents of the station:—Held, on an issue whether the plaintiff was lawfully in the carriage, that the Judge was not bound, as a matter of law, on the construction of the ticket, to say that the plaintiff was not there lawfully; but that the evidence of the irregular use of the tickets being with the sanction of the superintendents was evidence for the jury, that the plaintiff was in the carriage with the licence of the company, and therefore lawfully. *The Great Northern Rail. Co. v. Harrison*, 23 Law J. Rep. (N.S.) Exch. 308; 10 Exch. Rep. 376.

(2) *Personal Injury.*

A declaration in case alleged that the mails from L to T were carried on the defendants' railway, pursuant to the provisions of the 1 & 2 Vict. c. 98. That the plaintiff was an officer of the Post Office, whom the defendants had been reasonably required by the Postmaster General to take up and carry, and had taken up and were carrying as such officer, in and upon a carriage of the defendants, in which the said mails were being conveyed. That the plaintiff, as such officer, then was lawfully in and upon the said carriage, and that thereupon it became and was the duty of the defendants to use due and proper care and skill in and about the carrying and conveying the plaintiff. Breach, that the defendants omitted and neglected to use due and proper care and skill, and so negligently and unskillfully conducted themselves in and about carrying and conveying the plaintiff, and in conducting, managing, and directing the said carriage and the engine and other carriages, and the railway itself, that the said carriage sustained a

violent concussion, and the plaintiff was thereby greatly injured and prevented from attending to his business, &c. (alleging special damage):—Held, upon demurrer, that a duty as alleged arose out of the obligation imposed upon the defendants by the 1 & 2 Vict. c. 98, and that the action was maintainable. *Collett v. the London and North-Western Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 411; 16 Q.B. Rep. 984.

A declaration against a railway company stated, that the plaintiff, at the request of the defendants, became a passenger in one of their trains to be carried from, &c. for reward to them, &c.; that through the carelessness, negligence, and improper conduct of the defendants, the train in which the plaintiff was such passenger struck against another train, whereby the plaintiff was injured. At the trial, it appeared, that the train in question had been hired of the company by a benefit society for an excursion, the tickets for which were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one; and that the accident occurred by the train, in which the plaintiff was, running against a train standing at the station, it being then dark:—Held, first, that the mere fact of the accident having occurred, was *prima facie* evidence of negligence on the part of the defendants. Secondly, that there was evidence for the jury that the plaintiff was a passenger to be carried by the defendants. *Skinner v. the London, Brighton and South Coast Rail. Co.*, 5 Exch. Rep. 787.

Quære—whether in an action against a railway company, as common carriers for hire, for negligence in managing their station, whereby a passenger was injured, it is a good defence that the passenger contributed to the injury by his own negligence. *Martin v. the Great Northern Rail. Co.*, 24 Law J. Rep. (N.S.) C.P. 209; 16 Com. B. Rep. 179.

(b) *As regards Passengers' Luggage.*

A servant travelling with his master on a railway, may have an action in his own name against the railway company for the loss of his luggage, although the master took and paid for his ticket. The liability of the railway company in such a case is independent of the contract. *Marshall v. the York, Newcastle and Berwick Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 34; 11 Com. B. Rep. 655.

A declaration stated that the defendant received the plaintiff and his luggage to be carried "for reward to the defendants in that behalf," and it was proved that the plaintiff's master paid his fare and took the ticket:—Held, that it was immaterial by whom the reward was to be paid, and that the allegation in the declaration was proved. *Ibid.*

Semble—that if the allegation as to reward meant that it was to be paid by the plaintiff, and if that allegation had been material, the payment for and on behalf of the plaintiff by his master would have been a payment by him. *Ibid.*

The plaintiff, previously to travelling by the defendants' railway, paid for and took a second-class ticket and delivered her luggage into the hands of one of the defendants' porters, and told him where she was going, and saw him label it. When she got to her journey's end, her box was missing, and it appeared that it had been stolen. She sued the company in a county court for the value. The company, in their defence, relied on a bye-law made

under the provisions of their private act as exempting them from liability. The bye-law was in the following terms:—"Every first-class passenger will be allowed 112 lb., and every second-class passenger 56 lb. of luggage, free of charge; but the company will not be responsible for the care of the same unless booked and paid for accordingly." It did not appear that the plaintiff knew of the bye-law, or that the bye-law had been put up at the stations as directed by the act. The county court Judge found for the plaintiff for the full amount of the value of the luggage:—Held, on appeal, that there was evidence to support his decision. *The Great Western Rail. Co. v. Goodman*, 21 Law J. Rep. (N.S.) C.P. 197; 12 Com. B. Rep. 313.

If a passenger on a railway by a third-class parliamentary train carry merchandise packed up with his personal luggage, the railway company are not responsible for the value of the merchandise if the luggage be lost from the train. But if the merchandise be so packed as to be obviously merchandise to the eye, and the railway company make no charge or special bargain for the carriage, they will be responsible for the loss. *Great Northern Rail. Co. v. Shepherd*, 21 Law J. Rep. (N.S.) Exch. 114; 8 Exch. Rep. 20. And see s. p., on second argument of the same case, 21 Law J. Rep. (N.S.) Exch. 286.

The rule that each passenger by a third-class parliamentary train may carry with him 56 lb. weight of luggage, permits a husband and wife travelling together to take 112 lb. weight of luggage between them. *Ibid.*

A railway company, as common carriers of passengers and their luggage, are bound, on the arrival of a train at the terminus of the journey, to deliver a passenger's luggage into a carriage to be conveyed from their station, if required so to do, and if such is their usual practice—affirming *Richards v. the London and South Coast Rail. Co.* Therefore, where a passenger on the arrival of the train got out of the railway carriage on to the platform with a part of his luggage, a small hand-bag, in his hand, which he gave to one of the company's porters to take to a cab, and the porter lost it, the company were held liable as for a non-delivery of the bag; it not being found by the jury that the passenger, by taking the bag into his own possession on the platform, had accepted that as a performance of the company's contract to deliver, according to their usual practice, into a cab. *Butcher v. the London and South-Western Rail. Co.*, 24 Law J. Rep. (N.S.) C.P. 137; 16 Com. B. Rep. 13.

A section of the act which incorporated a railway company, enacted that, without extra charge, it should be lawful for every passenger travelling on the railway to take with him articles of clothing not exceeding forty pounds in weight and four cubic feet in dimensions, and that the company should be in no case responsible for any things whatsoever carried upon the railway with any passenger other than such passenger's articles of clothing not exceeding the weight and dimensions aforesaid. Provided that nothing therein contained should extend to make liable the company further than where, according to law, stage-coach proprietors and common carriers would be liable. Another section enabled the company to make bye-laws for the good government of

the affairs of the company, and for the management of the undertaking. The company made a bye-law that every first-class passenger should be allowed to carry 112 lb. of luggage free of charge, but that the company would not be responsible for the care of the same, unless booked and the carriage thereof paid for:—Held, that the company had no power to make the bye-law, since it was in contravention of the first section. *Williams v. the Great Western Rail. Co.*, 10 Exch. Rep. 15.

(c) *In respect of the Conveyance of Goods, &c.*

[As to railway traffic and the jurisdiction of the Court of Common Pleas, see 17 & 18 Vict. c. 31, and for forms of proceeding under that act, see Reg. Gen. (Common Pleas) Hil. term, 18 Vict., 1855, 24 Law J. Rep. (N.S.) xiii; 15 Com. B. Rep. 473.]

(1) *In general.*

The plaintiff delivered to the defendants, a railway company, certain goods to be carried, and took from them a receipt note which stated that the goods were to be conveyed by the company as below, and on the conditions stated on the other side. The note stated that Bristol was the station from which, and Paddington the station to which, the goods were to be conveyed, but below the name of the consignee (the plaintiff) was added in pencil his address at Brompton, which was beyond the immediate vicinity of the goods station at Paddington. The conditions stated, that goods addressed to consignees resident beyond the immediate vicinity of the company's goods station would be forwarded by public carrier, or otherwise, as opportunity might offer; but that the delivery of the goods by the company would be considered as complete, and the responsibility of the company cease, when such carriers received the goods, and that any money received by the company as payments for the conveyance of goods by other carriers beyond their own railway, would be received as for the convenience of the consignors, to be paid to such other carriers, and not as a charge made by the company upon the goods as carriers beyond their own railway. Notice was also given in the conditions, that the company would not be responsible for any loss or damage to goods occurring beyond the limits of their railway. The goods in question arrived safely at Paddington, and were there delivered to a person appointed by the defendants to collect and deliver goods beyond the limits of the railway, and by the negligence of his servants they were damaged before they were delivered to the plaintiff at Brompton. The declaration alleged a delivery of the goods to be carried from Bristol to Brompton:—Held, a fatal variance, for that the contract with the defendants ceased upon the arrival of the goods at Paddington, and that the defendants were not liable for the subsequent damage. *Fowles v. the Great Western Rail. Co.*, 22 Law J. Rep. (N.S.) Exch. 76; 7 Exch. Rep. 699.

A package, containing goods and marked "Scotthorn & Co. to the East India Docks, passenger-ship *Melbourne*, Australia," was sent by the plaintiffs to the Great Bridge Station of the defendants, the South Staffordshire Railway Company, to be taken to London for hire. By the practice of the South Staffordshire Company, goods delivered at

that station for London are conveyed by their line as far as Birmingham, and thence by the London and North-Western Railway. Before the goods in question arrived in London, one of the plaintiffs delivered to a clerk at the Euston Station of the London and North-Western Railway a written order, directing that they should be forwarded to Ratcliffe Highway. The order was, however, not complied with; the goods were taken to the *Melbourne* and carried to Australia, and lost to the plaintiffs:—Held, that the plaintiffs were entitled to countermand the directions originally given by them; that the clerk at the Euston Station was an agent of the defendants, having authority to receive the countermand; and that the defendants were, therefore, liable for a loss occasioned by their non-compliance with the countermand. *Scotthorn v. the South Staffordshire Rail. Co.*, 22 Law J. Rep. (N.S.) Exch. 121; 8 Exch. Rep. 341.

To an action against the defendants as common carriers for refusing to carry a package of the plaintiff, the defendants pleaded that when the package was tendered they requested the plaintiff to inform them of its contents, and that the plaintiff refused to do so; wherefore, and because the defendants did not know what the package contained, they refused to receive and carry it:—Held, a bad plea; for that a carrier has no general right, in every case and under all circumstances, to require to be informed of the contents of packages tendered to him to be carried. *Crouch v. the London and North-Western Rail. Co.*, 23 Law J. Rep. (N.S.) C.P. 73; 14 Com. B. Rep. 255.

The defendants, as common carriers, in their ordinary course of dealing with the public, were in the habit of carrying packed parcels:—Held, that they were bound to carry packed parcels for the plaintiff. *Ibid.*

(2) *Under Notice or Special Contract.*

A declaration against a railway company stated that the plaintiffs, at the defendants' request, delivered, and the defendants received, certain horses to be carried and conveyed for the plaintiffs by the defendants, in their carriages upon and along their railway, for reward to them in that behalf, from H to S; that after such delivery and acceptance the said horses were placed in certain carriages of the defendants to be so carried and conveyed; that after the said horses had left H, and whilst they were being conveyed along the railway, and whilst the said carriages and the locomotive power thereof were under the management of the defendants, one of the wheels of the said carriages caught fire, of which the defendants had due notice, and were afterwards at a convenient time and place, to wit, at the next station, requested by the plaintiffs not to persist in conveying the said horses in the said carriage further, which the defendants refused to do, and in spite of such request did continue to convey the said horses in the said carriage; that afterwards the wheel again took fire by and for want of due precaution against friction, and in consequence thereof the said carriage was thrown out of its proper position on the railway, and the said horses injured. Plea, amongst others, traversing the delivery and acceptance of the said horses to be carried *modo et formâ*. At the trial, the defendants put in

evidence a ticket signed by one of the plaintiffs on the occasion of the horses being received and placed upon the railway, in which was a memorandum stating that the ticket was issued subject to the owner undertaking all risk of injury by conveyance and other contingencies, and his seeing to the efficiency of the carriage before the horses were put therein, the charge being for the use of the carriages and locomotive power only; and that the company would not be responsible for any alleged defects in their carriages or trucks, unless complained of at the time of booking, or before the same left the station, nor for any damage whatever to horses, &c. travelling upon their railway in their vehicles:—Held, that the special terms of the memorandum disproved the bailment alleged in the declaration, which was material to the breach, and therefore that the defendants were entitled to the verdict on the above plea. *Austin v. the Manchester, Sheffield, and Lincolnshire Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 440; 16 Q.B. Rep. 600.

The plaintiff, who had some cattle conveyed by a railway company, received for them a ticket, which he signed, containing the terms on which the railway company carried the cattle. At the foot of the ticket there was a clause: "N.B.—This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be liable for any injury or damage howsoever caused, and occurring to live stock of any description travelling upon the L. and Y. Railway, or in their vehicles." The plaintiff saw the cattle put into the truck. During the journey some of the cattle got alarmed, and broke out of the truck and were injured. The truck was so defectively constructed as to be unfit and unsafe for the conveyance of cattle:—Held, that there was no implied stipulation that the truck should be fit for the conveyance of cattle; and that the company were protected by the terms of the ticket from liability to the plaintiff for the damage to the cattle. *Chippendale v. the Lancashire and Yorkshire Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 22.

The respondent took a horse to a station on the railway of the appellants, who were common carriers of horses, to be carried to a distance along the line. After paying the charge for the carriage, he signed a ticket produced by the company's clerk, which stated: "This ticket is issued subject to the owner's undertaking to bear all risk of injury by conveyance and other contingencies," &c. "The company will not be responsible," &c. "for any damages, however caused, to horses," &c. "travelling upon their railway or in their vehicles." The horse was injured during the journey:—Held, that this ticket was not a mere notice which would be void under section 4. of the Carriers Act, 11 Geo. 4. & 1 Will. 4. c. 68, but contained the terms of a special agreement between the respondent and the company, which was valid under section 6. of that statute; and that, consequently, the company were protected by its terms from any liability in respect of the injury to the animal. *The Great Northern Rail. Co. v. Morville*, 21 Law J. Rep. (N.S.) Q.B. 319.

A railway company letting trucks for hire for the conveyance of horses, delivered to the owner of the horses a ticket, in which it was stated that the owners were to undertake all risks of injury by conveyance and other contingencies, and further stipu-

lated that the company would not be liable for any damages, however caused, to horses or cattle:—Held, that the owner of the horses could not recover for damage done to them through the breaking of an axle, which was attributable to the culpable negligence of the company's servants. *Austin v. the Manchester, Sheffield, and Lincolnshire Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 179; 10 Com. B. Rep. 454.

The plaintiff being the owner of a horse, delivered it to the defendants, a railway company, to be carried on their railway, subject to conditions which stated that the owners undertook all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling on the railway. The horse having been injured by the horsebox being propelled against some trucks through the gross negligence of the company,—Held, *hesitante* Platt, B., that the company under the terms of the contract were not responsible for the injury. *Carr v. the Lancashire and Yorkshire Rail. Co.*, 21 Law J. Rep. (N.S.) Exch. 261; 7 Exch. Rep. 707.

Quære—whether the company would have been responsible if the horse had been stolen. *Ibid.*

The York and North Midland Railway Company issued printed notices, stating that fish would be conveyed at reduced rates from S upon the condition, amongst others, that the company was not to be responsible for the delivery of fish in any certain or reasonable time nor in time for any market, nor for any loss or damage arising from any delay or stoppage, nor were they to be required to carry by any particular trains. The notice also stated that the station clerk or servants of the company had no authority to alter or vary the conditions in the notice. The plaintiff, a fish-dealer at S, sued the company, as common carriers, for loss occasioned by delay in delivery of fish forwarded by the defendants' railway, after he had been served with a copy of the notice. At the time of delivery of the fish at the company's station at S, the plaintiff objected to the station-master that the notice was of no use and not binding upon him. The learned Judge at the trial left to the jury the questions of whether or not the notice had been served upon the plaintiff, and whether a special contract existed between the plaintiff and the company for the carriage of the fish upon the terms in the notice; and he directed them that, if, being served with the notice, the plaintiff afterwards forwarded the fish, they ought to infer an agreement on the plaintiff's part to such terms, unless there appeared an unambiguous refusal by the plaintiff to be bound by the notice, and an acquiescence by the company in that refusal; and that it was to be observed, that the station-master had no authority to alter or vary the notice. The jury found a verdict for the defendants:—Held, that the direction was right, and that the jury were warranted in inferring a special contract to carry the fish upon the conditions stated in the notice; the plaintiff's objections to the station-master being of no avail whatever. Held, also, that the 4th section of the Carriers Act, 11 Geo. 4. & 1 Will. 4. c. 68, did not invalidate a contract so made. *Walker v. the York and North Midland Rail. Co.*, 23 Law J. Rep. (N.S.) Q.B. 73; 2 E. & B. 750; 3 Car. & K. 279.

A took some cattle to a railway station to be carried along the railway. He hired a truck for the cattle, paid for their carriage, and thereupon received from the railway clerk a ticket, which contained terms exonerating the railway company from liability in case of injury to the animals or delay in the delivery. In an action by A against the company for an injury to the animals and delay in delivering them,—Held, that on these facts the Judge who tried the cause was guilty of a misdirection in leaving it to the jury to say whether the railway company were common carriers of cattle for hire, and whether they received the plaintiff's cattle for carriage as common carriers for hire, or whether they received them under a special contract but that contained in the ticket; as there was no evidence of the company being common carriers of cattle for hire, nor of any other contract but that contained in the ticket, and that he ought to have told the jury that there was either a special contract or no contract at all. *York, Newcastle and Berwick Railway v. Crisp*, 23 Law J. Rep. (N.S.) C.P. 125; 14 Com. B. Rep. 527.

To an action against the defendants as common carriers for not delivering "within a reasonable time" pigs of the plaintiff, received by them to be carried from S to B, the defendants pleaded not guilty; and that they received the pigs subject to a contract with the plaintiff, that they would not be responsible for the delivery of the pigs "within any certain or definite time, nor in time for any particular market." At the trial the special contract was proved; and evidence was given that the pigs were carried from S and delivered at B as expeditiously as the defendants' arrangements for the carriage of cattle would admit of, and the Judge, no objection being made by the plaintiff's counsel, nonsuited the plaintiff. The plaintiff moved to set aside the nonsuit and for a new trial, on the ground that the evidence as to the delivery within a reasonable time ought to have been left to the jury; but, inasmuch as he had not insisted at the trial upon having the evidence left to the jury, and as the Judge ought, as matter of law, to have directed the verdict to be entered for the defendants upon the plea setting up the special contract, the Court refused to disturb the nonsuit. *Hughes v. the Great Western Rail. Co.*, 23 Law J. Rep. (N.S.) C.P. 153; 14 Com. B. Rep. 637.

The course of business as to carrying pigs by a railway from H to L, which the plaintiff S well knew, was that on the delivery of the pigs, the porter who received them gave the drover of the owner a consignment note, which was signed both by the drover and the porter; that the drover then presented the consignment note to a clerk, who gave him a duplicate of a cattle note, to be presented on the delivery of the pigs at L. In the consignment note there was a notice that the company would not be liable for any articles unless they were signed for by their clerks or agents. S, after having delivered a large number of pigs in the usual manner, sent six more to the station by X, who was going to take some of his own. At the station, X got the usual notes for his own pigs, and told M, a porter, that the six pigs belonged to S, and M said that he would take care of them; but no consignment note was made out or signed. The pigs were never delivered:—Held, in an action brought by S against the rail-

way company for not delivering the pigs, that he could not recover, as there was no evidence that M had any authority to contract for carrying the pigs, except in the usual manner, or that he held himself out as having such authority. *Slim v. the Great Northern Rail. Co.*, 23 Law J. Rep. (N.S.) C.P. 166; 14 Com. B. Rep. 647.

(3) Declaration of Nature and Value.

[See *Stoessiger v. South-Eastern Rail. Co.*, title **BILLS AND NOTES**.]

All persons sending packages by a carrier, containing valuable goods of the description and amount specified in the statute 1 Will. 4. c. 68, are bound, in order to fix the carrier with responsibility for such articles in case of loss or injury, to make a declaration of their nature and value at the time that they are delivered to be carried, whether the delivery be at the office, warehouse, or receiving house of the carrier, or to his servant on the road, or at any other place. *Baxendale v. Hart*, 21 Law J. Rep. (N.S.) Exch. 123; 6 Exch. Rep. 769; reversing *Hart v. Baxendale*, 20 Law J. Rep. (N.S.) Exch. 338; 6 Exch. Rep. 769.

The Carriers Act, 11 Geo. 4. & 1 Will. 4. c. 68. s. 1, does not protect carriers in all cases where the owner of the article sustains damage from the neglect of the carrier, but the loss there referred to is confined to those cases where the article is abstracted or lost from the personal care of the carrier. A plea, therefore, alleging want of notice under the Carriers Act, is no answer to a declaration against a railway company for breach of contract, in not safely delivering the plaintiff's luggage on the termination of a journey, averring that by the carelessness of the defendants it became wholly lost to the plaintiff, and the plaintiff was deprived of the use of it from the 3rd of June to the 23rd of September, and the damages claimed being in respect of the delay in the delivery. *Hearn v. the London and South-Western Rail. Co.*, 24 Law J. Rep. (N.S.) Exch. 180; 10 Exch. Rep. 793.

(C) CHARGES FOR CARRIAGE OF GOODS.

By 5 & 6 Will. 4. c. cvii. the defendants were incorporated for the purpose of making and working the Great Western Railway.

By s. 163. all persons were empowered to use the railway, with proper carriages, upon payment of such rates and tolls as the act authorized to be taken.

By s. 164. tolls, none of which exceeded 3d. per ton per mile, were allowed to be taken by the company for tonnage of articles to be conveyed on the railway.

By s. 166. the company were empowered to provide power for drawing articles on the railway, and to receive such sums for the use of such power as they should think proper, in addition to the other rates, tolls, or sums by the act authorized.

By s. 167. the company were authorized to use locomotive or other power, and in carriages drawn thereby to convey goods, and to make such reasonable charges for such conveyance as they might determine upon, in addition to the rates or tolls by the act authorized.

By s. 171. the company were empowered to make such orders for fixing a sum to be charged in respect of small parcels not exceeding five cwt. as to them

should seem proper; "provided that the said provision shall not extend to articles sent in large aggregate quantities, though made up of separate parcels, such as bags of sugar, coffee, meal and the like, but only to single parcels unconnected with parcels of the like nature which may be sent at the same time."

By s. 175. it was provided, that the rates and tolls to be taken by virtue of that act should be charged equally and after the same rate per ton per mile in respect of the same description of articles, and that no reduction or advance in the same should either directly or indirectly be made, partially, or in favour of or against any particular person; but that every such reduction or advance should extend to all persons using the railway or carrying the same description of articles thereon.

By 1 & 2 Vict. c. xcii. s. 44. the company were empowered to receive a reasonable charge for the loading and unloading or weighing any articles which they might be required to load, unload, or weigh.

By 7 & 8 Vict. c. iii. s. 50. the company were empowered, whenever they should act as carriers or provide locomotive power or carriages for the conveyance of goods, to charge for such power and carriages such sum (not exceeding the sums, if any, limited by former acts) as they should think expedient. Provided that such charges should be made equally to all persons in respect of all articles of a like description and conveyed in a like carriage over the same portion of the railway and under the like circumstances, and no reduction or advance in any of such charges should be made partially, either directly or indirectly, in favour of or against any particular person.

The plaintiff, a carrier, sought to recover, in an action for money had and received, the amount of sums alleged to have been overcharged by the defendants for carriage of goods by their railway.

1. In addition to the rates fixed by the company for the carriage of goods by their scale-bills, they charged the plaintiff a sum for "loading, unloading, covering, and risk of stowage." The plaintiff never required the company to load or unload:—Held, that the rate fixed for "conveyance," where the company acted as carriers under s. 167. of 5 & 6 Will. 4. c. cvii, included the above charges; and that s. 44. of 1 & 2 Vict. c. xcii. did not apply to the case where the company acted as carriers in conveying the goods of other persons, but only to cases in which they did not act as carriers, but performed the duty of loading and unloading for other persons carrying goods, being requested by them to perform it.

2. Up to a certain time the company had made an allowance of 10*l.* per cent. to the plaintiff and other carriers for requiring them to sign certain ticking-off notes and declarations whenever they delivered goods to be carried by the company. In order to make these, some trouble was required in weighing and classifying the goods. The allowance was discontinued after the decision in *Parker v. the Great Western Rail. Co.* The same notes were not required from persons not being carriers:—Held, that the requiring such additional matter from carriers without allowance, did not entitle them to an action for money had and received, as for an overcharge to them, as compared with the rest of the

public, in violation of the 5 & 6 Will. 4. c. cvii. s. 175; but that it was the subject of an action for damages for any injury sustained in consequence.

3. The plaintiff and other carriers were in the habit of making charges for booking parcels. The company entered into an agreement with E S to convey goods to and from their station for 1,000*l.*, and to relinquish booking fees, which he did:—Held, that, assuming the practice of booking without fees to be continued by E S, this was no violation of the proviso in s. 175, the plaintiff not being bound to charge anything for booking, but doing it merely for his own benefit.

4. The company charged the plaintiff and other carriers 50 per cent. more for "packed parcels" than they charged the public in general:—Held, that this was a violation of the proviso in the 5 & 6 Will. 4. c. cvii. s. 175. and in the 7 & 8 Vict. c. iii. s. 50, and that the plaintiff was entitled to recover back the sums so paid.

5. The company, by a scale-bill, in force up to June, announced that on miscellaneous goods, not being aggregate of one "kind or class," they would charge 2*d.* extra:—Held, that, by having used the words "kind" and "class" as synonymous, they were bound by their own definition, and could not charge goods of the same class in their scale-bill as goods unconnected with goods of a like nature, within the meaning of the proviso in s. 171. of the 5 & 6 Will. 4. c. cvii.

By a subsequent scale-bill the goods were divided into "classes" without any miscellaneous class, and it was announced that a parcel-rate would be charged on all parcels under one cwt. When several parcels in one lot of goods of the same class, but of different kinds, each separately being under one cwt., but in the aggregate above one cwt., were directed to one consignee (as was generally the case where the company carried them for the public), the company charged tonnage rate on such lot of parcels; but when a similar lot of parcels was delivered by carriers, directed to different consignees, the company charged each separate parcel at the parcel-rate:—Held, an unequal mode of charging within s. 50. of the 7 & 8 Vict. c. iii, and that the fact of being directed to the same or different consignees does not prevent goods from being goods carried "under the same circumstances" within that section.

The mere division of goods into "classes" in the scale-bill would not enable the plaintiff to treat all the goods in a particular class as goods "of a like nature," within s. 171. of the 5 & 6 Will. 4. c. cvii, or as goods of a "like description" within s. 50. of the 7 & 8 Vict. c. iii. (*post*, 8th head.)

6. Held, that where several parcels of goods of the same kind were sent together and amounted to a greater weight than five cwt. (or the weight fixed upon by the company as the dividing point between the tonnage and parcels rates) they could not be charged an additional sum as "miscellaneous goods," or at the parcel-rate within s. 171. of the 5 & 6 Will. 4. c. cvii.

7. Held, that in addition to the toll of 3*l.* per cent. which the company were empowered to take by s. 164. of the 5 & 6 Will. 4. c. cvii. for tonnage, they were also entitled by s. 167. to charge a reasonable sum for "conveyance" of goods as carriers, including loading, unloading, risk, &c., and were not

restricted to "such a sum as they should think expedient for locomotive power and carriages," within s. 50. of the 7 & 8 Vict. c. iii. (assuming that to be the true construction of the last-mentioned section).

8. Held, that according to the proper construction of the 5 & 6 Will. 4. c. cvii, s. 171, where several small parcels of a like nature, being altogether less than one cwt. (the scale-bill fixing that as the limit), were delivered in one lot directed to different consignees, the company were entitled to charge them as one "small parcel" within that section at the parcel-rate; and where such several small parcels were not of a like nature, though in the same "class" in the scale-bill, the company were entitled to charge each of them as a separate parcel at the parcel-rate. *Parker v. the Great Western Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 57; 11 Com. B. Rep. 545.

The Great Western Railway Company, before the 7 & 8 Vict. c. iii. came into operation, was obliged by the 2 & 3 Vict. c. xxvii. s. 24. to charge for carriage to all persons equally, but they charged P, a carrier, differently from and more than the public:—Held, in accordance with *Parker v. the Great Western Railway Company*, that the overcharge was recoverable as money received to the carrier's use. *Edwards v. the Great Western Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 72; 11 Com. B. Rep. 588.

The 7 & 8 Vict. c. iii. by sections 48, 49. and 50, repealed the 2 & 3 Vict. c. xxvii. s. 24. and re-enacted it, with the difference that in section 50. the words "under like circumstances" were introduced. The company continued to charge P more than the public:—Held, that he might recover the overcharge, the fact of his being a carrier only not rendering the circumstances unlike. *Ibid.*

Under the company's original act, 5 & 6 Will. 4. c. cvii. s. 171, the company was authorized to fix the sums to be charged for small parcels, provided they were not sent in large aggregate quantities made up of separate and distinct parcels. The company published scale-bills, in which they specified divers classes, containing different kinds of goods, and one class comprised miscellaneous goods, "not being aggregate of one class or kind," which were charged at a higher tonnage rate, with an extra charge for each parcel. The company charged P under the miscellaneous class for aggregate goods, which though of different kinds were within the same class in the scale-bills:—Held, that this was an overcharge, and that the word "class" must be taken to mean something more than "kind," and to apply to the classes mentioned in the scale-bills. *Ibid.*

Held, also, with regard to all the foregoing overcharges, that it made no difference that the separate parcels, which were all to be delivered to the carrier or his agents at the end of the journey, were destined for different ultimate consignees. *Ibid.*

P's servants assisted the company's servants in loading, unloading and weighing, but not at the company's request, and the public gave no such assistance. The company, before the decision of *Parker v. the Great Western Railway Company*, had allowed carriers 10l. per cent. for such assistance, and P in this case claimed a similar deduction:—Held, that P was not entitled to any deduction on this ground. *Ibid.*

The company, before the decision in *Parker v. the Great Western Railway*, had entered into an agreement with K to allow him 10 per cent. discount;

but after that decision they refused to make the allowance. K brought an action and recovered a verdict for the 10 per cent., which the company paid accordingly:—P claimed the 10 per cent. on the ground that he and K had been charged unequally, K having been allowed that amount:—Held, that this was not an allowance which made the charge unequal. *Ibid.*

P paid the overcharges under protest, and after notice of action to the company he sent in a claim in writing of interest. It was objected that as the notice of action did not contain a claim for interest it could not be recovered; but as there was no plea of want of notice of action, and as the action and all matters in difference had been referred to an arbitrator:—Held, that the arbitrator might award interest under the 3 & 4 Will. 4. c. 42. s. 4. *Ibid.*

A declaration in case alleged that the defendants were common carriers of goods for hire, and that the plaintiff delivered to them as such common carriers a package to be carried by them to the Euston station, and there to be safely and securely kept by them for the plaintiff, and that it became the duty of the defendants safely and securely to carry and keep the package. Breach, that the defendants did not safely and securely carry the same, but that through their negligence it was lost. Plea, that the defendants gave notice to the plaintiff that they would not carry any package containing several packages addressed to and intended for several parties unless the addresses and contents of the inclosed packages were declared, and that they would not be responsible for such package, unless such declaration were made; that each of the packages in question contained several parcels addressed to and intended for different parties, and that the addresses and contents of the inclosed parcels were not declared:—Held, on demurrer, that the plea amounted to an argumentative traverse of the bailment stated in the declaration. *Crouch v. the London and North-Western Rail. Co.*, 21 Law J. Rep. (N.S.) Exch. 207; 7 Exch. Rep. 705.

The Bristol and Exeter Railway and the Great Western Railway were continuous lines, but are worked by independent companies; and by their acts of parliament were bound to charge all persons equally under the same circumstances for the carriage of goods, &c. By the scale-bills issued by each of the companies, certain sums were specified as the charge for the carriage of goods where the goods were to be collected and delivered by the companies; and a smaller sum was specified as chargeable, where the goods were to be collected and delivered by the parties themselves. The plaintiff, a carrier, sent certain goods which he had undertaken to collect and deliver on his own account by the Bristol and Exeter Railway Company, to be carried upon both lines of railway, but he objected to the charges as being excessive, and paid the whole amount claimed under protest:—Held, first, that he was entitled to recover back the amount so paid in excess of what was a fair and reasonable charge in an action of money had and received, although he had not made any tender of any specific sum as a fair and reasonable charge; and, secondly, that the whole sum so paid in excess was recoverable from the Bristol and Exeter Railway Company, although they had received a portion of it as agents only of the Great Western Railway Company. *Parker v. the Bristol and Exeter Rail. Co.*, 6 Exch. Rep. 702.

(D) ACTIONS.

[See *Marshall v. York, &c. Rail. Co.*, ante, (B) (b).]

An action of debt is not maintainable upon an agreement that the defendant would carry certain goods for the plaintiff, in consideration that the defendant would carry a like quantity for the defendant. *Bracegirdle v. Hincks*, 23 Law J. Rep. (N.S.) Exch. 128; 9 Exch. Rep. 361.

The plaintiffs declared against the defendants as common carriers subject to the terms of a special notice, for the loss of a truss of silk by the gross negligence of the defendants and the felonious acts of their servants. The defendants pleaded, except as to the gross negligence and felony, that the goods were such as are excepted in the Carriers Act, and that the defendants did not declare their value. The plaintiff new assigned that he had brought his action for that the defendants' servants had feloniously stolen the goods. The new assignment was held bad, on demurrer; and the plaintiffs were allowed to amend on payment of costs, and to reply that the goods were lost by the felony of the defendants' servants through the gross negligence of the defendants. Held, also, that the allegation of gross negligence and felony in the declaration was surplusage, and that a replication of felony only without an allegation of gross negligence would have been bad. *Butt v. the Great Western Rail. Co.*, 20 Law J. Rep. (N.S.) C.P. 241; 11 Com. B. Rep. 140.

(E) DAMAGES RECOVERABLE.

The damages recoverable for a breach of contract are such as may fairly and reasonably be considered as arising naturally; i.e. according to the usual course of things, from the breach of the contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. *Hadley v. Baxendale*, 23 Law J. Rep. (N.S.) Exch. 179; 9 Exch. Rep. 341.

Where a contract is made under special circumstances which are communicated by one of the contracting parties to the other, the damages resulting from a breach of the contract, which the parties would reasonably be supposed to have contemplated, are the amount of injury which would ordinarily follow from such a breach of contract under the special circumstances. But if the special circumstances are unknown to the party breaking the contract, he, at the most, can only be held to have contemplated the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract. *Ibid.*

Therefore, where a miller had employed a carrier to convey a broken shaft belonging to his mill, to be delivered to an engineer, and the carrier was guilty of an unreasonable delay in delivering it, and the engineer was thereby prevented from making a new shaft from the model of the old one, and the mill remained idle for a considerable time,—Held, in an action against the carrier for the delay, that the jury, in estimating the damages, were not justified in taking into their consideration the loss of profits by reason of the stoppage of the mill. *Ibid.*

The omission of the Judge to direct the jury as to any established rules of measuring the damages ap-

plicable to the particular case is a ground of new trial. *Ibid.*

CASE.

[See ACTION—ANIMALS—DISTRESS—FALSE REPRESENTATION—HACKNEY CARRIAGE—MASTER AND SERVANT—MINE—NEGLECT—NUISANCE—PATENT—SHERIFF—SLANDER.]

CEMETERY.

[See BURIAL.]

CERTIORARI.

[Costs on removal by, see title COSTS IN CRIMINAL CASES.—To remove beer licence, see *Regina v. Salford*, title ALE AND BEERHOUSE, (A) (b).]

(A) WHEN IT LIES.

- (a) *For Removal of Causes from Inferior Courts.*
- (b) *For Removal of Indictments.*
- (c) *For Removal of Convictions and Depositions.*
- (d) *Though taken away by Statute.*

(B) SERVICE OF NOTICE.

(C) RETURN OF WRIT.

(D) PROCEDENDO.

(A) WHEN IT LIES.

- (a) *For Removal of Causes from Inferior Courts.*

[See post, (C).]

Where a *certiorari* had been issued by leave of a Judge under the 9 & 10 Vict. c. 95, s. 90, upon an affidavit which stated generally that difficult questions would arise, but did not state what those questions were, or the grounds upon which they would arise, the Court refused to set the writ aside, —as it did not appear that those particulars were not pointed out to the Judge at chambers. *Golding v. Candwell*, 2 L. M. & P. P.C. 175.

The writ of *certiorari* to remove a cause from the county court in which the amount claimed is between 20*l.* and 50*l.* is not taken away by the statute 13 & 14 Vict. c. 61, s. 16. *In re Brookman v. Wenham*, 20 Law J. Rep. (N.S.) Q.B. 278; 2 L. M. & P. P.C. 233.

Service of the *certiorari* on a person acting as clerk at the office of the chief clerk of the county court is good service on the Judge; though not sufficient to ground an attachment against the Judge where the writ does not come to the Judge's knowledge until after the return day has passed. The Judge should be ruled to return the writ. *Ibid.*

A writ of *certiorari* was granted by a Judge to two defendants to remove a plaint of replevin from a county court on an affidavit stating that the rent exceeded 20*l.* (9 & 10 Vict. c. 95, s. 121.) No previous application had been made to the county court Judge. At the trial, the defendants presented the *certiorari*, and one of them offered to make the de-

claration under the 121st section, stating that the other was unable to make it. They also tendered a bond conditioned to prove in the superior court that the rent was more than 20*l*. The sureties were not approved by the clerk of the court. A rule *nisi* for an attachment had been granted against the Judge for not receiving and returning the *certiorari*. The Court refused, on the above grounds, to quash the *certiorari*. *Mungean v. Wheatley*, 20 Law J. Rep. (N.S.) Exch. 106; 6 Exch. Rep. 88; 2 L. M. & P. P.C. 155.

The Judge of the county court is bound before allowing the *certiorari* to see that the requirements of the 121st section have been complied with: *e.g.* that the declaration is made, that the bond is given, and that the names of the sureties are given, and approved by the clerk of the court. *Ibid*.

Semble—that a *certiorari* may still issue under 9 & 10 Vict. c. 95. s. 90, to remove a cause from the county court, notwithstanding 13 & 14 Vict. c. 61. s. 16; but,—Held, that all the material facts relative to the state of the cause should be brought before the Judge upon the application for the writ; and therefore, where a *certiorari* had been obtained without the Judge having been informed that the cause had already been heard for several days in the county court, the writ was set aside as having been issued improvidently. *Parker v. the Bristol and Exeter Rail. Co.*, 20 Law J. Rep. (N.S.) Exch. 112; 6 Exch. Rep. 184.

In order to prevent the removal of a plaint from the county court by *certiorari*, on the ground of want of jurisdiction in the superior court to entertain the action after removal, the plaint ought to be so framed as to disclose a cause of action over which the superior court has no jurisdiction. *Rees v. Williams*, 21 Law J. Rep. (N.S.) Exch. 24; 7 Exch. Rep. 51.

Where a plaint was removed from the county court by *certiorari*, on the affidavit of the defendant's attorney, that difficult questions of law would arise, the Court refused to quash the *certiorari*, though the affidavit of the plaintiff's attorney averred that no such difficult questions of law would arise. *Ibid*.

Devise by a testator to his son of certain freehold and leasehold estates and chattels as follows: "On condition of my son paying the following sums, viz. (*inter alia*), I will, order, and direct him to pay unto his mother the sum of 4*s.* a week weekly and every week during her natural life":—Held, that this was not a claim of a legacy within the 65th section of the County Courts Act, 9 & 10 Vict. c. 95, but of a debt; and an action having been brought in the county court, the Court granted a *certiorari*. *In re Longbottom v. Longbottom*, 22 Law J. Rep. (N.S.) Exch. 74; 8 Exch. Rep. 203.

Where a plaint in the county court does not exceed 5*l*, it cannot be removed by *certiorari*, although the plaintiff is an officer of the court. *In re Box v. Green*, 23 Law J. Rep. (N.S.) Exch. 219; 9 Exch. Rep. 503.

Where the bailiff of a county court entered two plaints, one for 5*l*. for an assault, and the other for 5*l*. as a fine under the 9 & 10 Vict. c. 95. s. 114. for assaulting him in the execution of his duty, the assault complained of being the same in both plaints,—Held, that these were two distinct plaints, the

latter being only an informal mode of claiming the fine; and that, therefore, the plaints were not removable by *certiorari*. *Ibid*.

(b) For Removal of Indictments.

The Court will grant a *certiorari* to remove an indictment for conspiracy, on the application of one of the several defendants, without the consent of the others, if that defendant will enter into a recognizance to pay costs if either himself or any of the other defendants are convicted. *Regina v. Foulkes*, 20 Law J. Rep. (N.S.) M.C. 196; 1 L. M. & P. P.C. 720.

The Central Criminal Court Act (4 & 5 Will. 4. c. 36. s. 16.) provides that the Court of Queen's Bench, or the Commissioners under that act, being Judges of the superior courts, or the Judges of the Court of Bankruptcy, or the Recorder of London, may issue writs of *certiorari* or other process to remove into the Central Criminal Court indictments found at the Sessions for London, Middlesex, &c. for any offences cognizable by virtue of that act:—Held, that this does not repeal the 7 & 8 Geo. 4. c. 29. s. 53, which enacts that no indictment for obtaining money, &c. by false pretences shall be removed by *certiorari* into the Court of Queen's Bench; but that it authorizes the several Judges there specified to issue writs, in the nature of writs of *certiorari*, to remove indictments for any offences there cognizable into the Central Criminal Court from the Sessions there mentioned. *Regina v. Sill*, 21 Law J. Rep. (N.S.) M.C. 214; 1 Dears. C.C.R. 10.

Several defendants were indicted for a misdemeanour. One was in custody on the charge, the others were out on bail. The Court, on the application of one of the defendants who was out on bail, granted a *certiorari* to remove the indictment into this court, on the terms that if the defendant in prison did not consent, the applicant was to find bail for him. *Regina v. Drake*, 22 Law J. Rep. (N.S.) Q.B. 304.

(c) For Removal of Convictions and Depositions.

As no *certiorari* issues out of the Court of Exchequer, a conviction is properly brought before it, if verified by affidavit. *In re Allison*, 10 Exch. Rep. 561.

In moving for a *certiorari* to bring up depositions taken before a coroner or magistrates, with a view to admitting a party committed upon them for trial on a charge of murder or manslaughter, it is the proper course to produce copies of such depositions verified by affidavit, and on them to ground the application. *Regina v. Bartholemey*, 1 Dears. C.C.R. 60.

(d) Though taken away by Statute.

By the Game Act the *certiorari* is taken away. *Quere*—whether the objection that there is no proper adjudication of the penalty be one for which the *certiorari* may nevertheless issue; but the conviction having been brought up by *certiorari* under 12 & 13 Vict. c. 45. s. 18. in order to be enforced, the Court entertained the objection. *Regina v. Hyde*, 21 Law J. Rep. (N.S.) M.C. 94.

The 11 & 12 Vict. c. 43. s. 27. provides that where Quarter Sessions, upon an appeal against an order, direct either party to pay costs, "such order shall direct such costs to be paid to the clerk of the

peace, to be by him paid over to the party entitled."—Held, that a mistake in ordering costs to be paid directly to the party to the appeal instead of to the clerk of the peace, was not a defect of jurisdiction, but merely erroneous procedure; and, therefore, where such an order had been made under an act taking away the *certiorari*, the Court refused to set it aside when brought before them by *certiorari*. *Regina v. Binney*, 22 Law J. Rep. (n.s.) M.C. 127; 1 E. & B. 810.

Where the clerk of the trustees of a turnpike-road which was out of repair had been summoned by a single Justice, and two Justices, at a special sessions for the highways, without allowing the clerk to shew that the turnpike funds were insufficient, made an order convicting him in a penalty and directing him to repair the road in a specified time,—Held, that though the *certiorari* was taken away by the act, this order was so entirely without jurisdiction that a *certiorari* might issue to bring up the order to quash it. *Regina v. the Justices of St. Albans*, 22 Law J. Rep. (n.s.) M.C. 142.

An indictment for non-repair of a highway preferred, and found, at the assizes by an order of Justices made under the 5 & 6 Will. 4. c. 50. s. 95, may be removed by *certiorari* into the Court of Queen's Bench. *Regina v. the Inhabitants of Sandon*, 23 Law J. Rep. (n.s.) M.C. 129; 3 E. & B. 547.

The Public Health Act, 1848 (11 & 12 Vict. c. 63.), by section 55, authorizes local boards of health to make bye-laws with respect to the removal by occupiers of "dust, ashes, rubbish, filth, manure, dung, and soil," in or by the side of a street within their district, and such bye-laws are required to be allowed by a Secretary of State. By section 129, penalties imposed by bye-laws made under the act may be recovered before Justices. A local board of health made a bye-law (which was duly allowed by a Secretary of State), requiring all occupiers within the district to remove "all snow and other obstructions" from the foot-paths opposite their premises before nine o'clock in the forenoon. Upon information laid before a Justice under this bye-law, that an occupier had omitted to remove, before the hour specified, an accumulation of snow which had fallen and drifted upon the footpath, he convicted her in a penalty for neglecting to remove "snow," and declined to decide upon the legality of the bye-law, which was contested, considering himself bound by the fact of its allowance by the Secretary of State:—Held, that the bye-law was not warranted by the statute, and therefore, that the Justice had proceeded without jurisdiction, and that a *certiorari* might issue, although it was expressly taken away by the statute. *Regina v. Rose*, 24 Law J. Rep. (n.s.) M.C. 130.

(B) SERVICE OF NOTICE.

Upon the trial of a parish appeal F S, one of the Justices, who was a rated inhabitant of the appellant parish, was on the bench during the hearing, and in the course of the proceedings referred the chairman of the Quarter Sessions to some of the documents put in evidence. Upon an observation being made that he was a party interested, F S stated that he should take no part in the decision, but he remained in court until the final decision, which was in favour

of the appellants. It was sworn that he did not vote or give any opinion upon the question at issue, nor did he influence the decision of the other Justices present, and that if he had not believed that the parties were satisfied with his assurance that he would take no part, he would have retired from the court during the trial:—Held, that notice of an intention to move for a *certiorari* under 13 Geo. 2. c. 18. s. 5, was properly served on F S, as a Justice "by and before whom the order of Sessions was made." *Regina v. the Justices of Suffolk*, 21 Law J. Rep. (n.s.) M.C. 169; 18 Q.B. Rep. 416.

The notice stated that application would be made for a *certiorari* "on behalf of the inhabitants" of the respondent parish, and was signed "J M, attorney for the inhabitants of the respondent parish":—Held, to be sufficient. *Ibid*.

The affidavit of service of notice of an intention to apply for a *certiorari* to remove an order of Sessions, under the statute 13 Geo. 2. c. 18. s. 5, stated that the notice was served on A B and C D, two of the Justices of the Peace in and for the county of S, and stated that the deponent was present at the Quarter Sessions on a particular day, "and did then and there see the said A B and C D acting as Justices of the Peace for the said county of S at the said General Quarter Sessions of the Peace." The order of Sessions, which purported to be made on the day to which the affidavit referred, contained in the caption the names of A B and C D as two of the Justices before whom the sessions were holden. The Court quashed the *certiorari* on the ground that the affidavit did not shew that A B and C D were two of the Justices by and before whom the order was made, and that no presumption could be drawn that they were present when the order was made from the circumstance of their names appearing in the caption. *Regina v. St. James's, Colchester*, 20 Law J. Rep. (n.s.) M.C. 203; 2 L. M. & P. P.C. 314.

(C) RETURN OF THE WRIT.

A plaint in replevin having been commenced in the county court against the landlord and the bailiff making the distress, and a *certiorari* having issued to remove the same, the defendant's attorney delivered the *certiorari* to the Judge, and offered on the part of one of the defendants to make the declaration required by the 121st section of the 9 & 10 Vict. c. 95, to the effect that the rent exceeded 20*l.*, stating that the other defendant, the bailiff, was unable to make the declaration. The defendant, the landlord, was not present, being too ill to attend; but he had executed a power of attorney to one W authorizing him to sign and seal the bond required by the 121st section, and generally to perform all such acts about the conduct, &c. of the writ as he should think proper, &c. The sureties were present in court, but sufficient time had not been given by the defendants to the clerk of the court to inquire into their sufficiency, and therefore the clerk of the court did not approve of them pursuant to the 121st section. The bond tendered by the defendants under that section was conditioned for their proving before the superior court that there was ground for believing that the rent exceeded 20*l.* The Judge disallowed the *certiorari* and tried the cause, on the ground of the want of time for the clerk of the court to

inquire into the sufficiency of the sureties, but he did not fix the amount for which they were to be responsible:—Held, first, that the proceeding of the Judge was erroneous, and that an attachment ought to issue against him. Secondly, that the declaration under the 121st section might be made by the attorney, and need not be made by the defendants in person, or by a writing signed by them, and that it was sufficient if made by one defendant. Thirdly, that the act of the Judge in receiving the declaration was ministerial, and that after receiving it he was bound to fix the amount in which the sureties were to be bound; and that the question of the sufficiency of the sureties did not arise until he had taken that course. *Quære*—as to the proper course, if after the receiving of the declaration and fixing the amount of the sureties' liability, the defendants had been unable to comply with the other requisites of the statute within a reasonable time. Fourthly, that the party named in the power of attorney was authorized not only to sign and seal the bond, but to make the declaration. Fifthly, that the bond in question ought to be conditioned for the defendants' proving before the superior court that there was ground for believing that the rent exceeded 20%, and not 50%; the jurisdiction of the county court as to replevin not being extended by the 13 & 14 Vict. c. 61. *Muncean v. Wheatley*, 20 Law J. Rep. (n.s.) Exch. 108; 6 Exch. Rep. 88.

A *certiorari* issued under this act ought to be made returnable in sufficient time to allow the preliminary inquiries to be made. *Ibid*.

The conditions imposed by the 8 & 9 Vict. c. 95, s. 121, on the removal of actions of replevin by *certiorari*, are to be complied with when the writ is delivered to the inferior Judge in court. *Ibid*.

Where a Judge of a county court, not wilfully, but by mistake, disobeys a *certiorari*, the remedy is by attachment. *Ibid*.

Quære—whether he ought to be ruled to return the writ. *Ibid*.

(D) PROCEDENDO.

A Judge at chambers has jurisdiction to make an order for the issuing of a writ of *procedendo* to send back proceedings removed by *certiorari* from an inferior court, and it is a matter for the discretion of the Judge whether or not a summons to shew cause should not in the first instance be granted. *Regina v. Scawfe*, 21 Law J. Rep. (n.s.) M.C. 221; 18 Q.B. Rep. 773.

CHARITY.

[See stats. 16 & 17 Vict. c. 137. and 18 & 19 Vict. c. 124.—Also titles COLLEGE—UNIVERSITY.]

(A) COMMISSIONERS.

(B) CHARITABLE TRUSTS ACT.

(C) SUPERSTITIOUS USES.

(D) CONSTRUCTION OF INSTRUMENT CREATING IT.

(E) DEVISE AND BEQUEST TO.—VALIDITY OF.

(F) ADMINISTRATION.

(a) Scheme.

(b) Trustees.

(1) Controver over.

(2) Appointment of New Trustees.

(c) Estates.

Digest, 1850—1855.

(G) JURISDICTION OVER.

(a) Of the Court of Chancery.

(1) In general.

(2) Under 8 & 9 Vict. c. 70.

(3) On Petition.

(b) Of the Visitor.

(H) PLEADING AND PRACTICE.

(I) COSTS.

(A) COMMISSIONERS.

The payment of a charity legacy into court under the Trustee Relief Act is not a suit or matter within the Charitable Trusts Act, 1853, to which the exception in the latter act applies; and a petition as to the money so paid in was, therefore, directed to stand over, that the certificate of the Commissioners might be obtained. *In re Markwell*, 23 Law J. Rep. (n.s.) Chanc. 502; 17 Beav. 618.

By a private act for the management of a charity, passed before the Charitable Trusts Act, the trustees were empowered, with the approbation of the Court of Chancery, to sell or exchange lands, and to make any applications that might be necessary for that purpose before one of the Judges of the court in chambers:—Held, that notwithstanding the private act, it was imperative upon the trustees under the Charitable Trusts Act, to obtain the certificate of the Commissioners, in the first instance, before taking any proceedings in the Court of Chancery. *In re the Bingley School and Charity Estate Act*, 23 Law J. Rep. (n.s.) Chanc. 672; 2 Drew. 283.

A testator gave property partly for the benefit of a college in Oxford and partly for a school not connected with the college:—Held, that it was unnecessary to go before the Charity Commissioners for their sanction to an application to the Court in respect of that portion of the charity which applied to the college, though the sanction of the Commissioners would be required as regards the other portion of the charity. *In re Meyrick's Charity*, 24 Law J. Rep. (n.s.) Chanc. 669.

(B) CHARITABLE TRUSTS ACT.

A matter pending, means, within the Charitable Trusts Act, a continuation of something already directed by the Court; not a matter totally new. *Ford's Charity*, 3 Drew. 324.

A legacy given generally to an unendowed charitable institution, supported in part by voluntary contributions, is not within the Charitable Trusts Act, 1853. *In re Wilson's Will*, 19 Beav. 594.

The 28th section of the Charitable Trusts Act (16 & 17 Vict. c. 137.) confers on the Master of the Rolls and the Vice Chancellors at chambers the same jurisdiction as they would have exercised before the passing of that Act in a suit regularly instituted or upon petition. New trustees of a charity having been appointed under the act (16 & 17 Vict. c. 137.) by the Vice Chancellor, and the surviving trustee being lunatic, it is competent for the Vice Chancellor in chambers to make the vesting order under the Trustee Acts, 1850 and 1852. *In re Davenport's Charity*, 4 De Gex, M. & G. 839.

(C) SUPERSTITIOUS USES.

A foreigner and Roman Catholic transferred into the names of trustees a sum of stock upon a parol

trust, to pay annuities to different churches for masses and requiems for the souls of the testator and the poor dead, and for other pious uses:—Held, that there was no violation of the Wills Act in this parol trust; but that the trust was void, as being for superstitious purposes; that the purposes could not be considered as charitable; and that the next-of-kin were entitled to the funds. *Heath v. Chapman*, 23 Law J. Rep. (N.S.) 947; 2 Drew. 417.

(D) CONSTRUCTION OF INSTRUMENT CREATING IT.

A testator possessed of lands in New South Wales, of leasehold property in Scotland, and of pure personality, devised and bequeathed all to trustees, upon trust, for absolute conversion, and after various bequests gave the residue to trustees to apply the same at their absolute and uncontrolled discretion for the benefit and advancement and propagation of education and learning in every part of the world, so far as circumstances would permit:—Held, that the words "education and learning" were to be read "education in learning," and that there was a good charitable bequest. *Whicker v. Hume*, 21 Law J. Rep. (N.S.) Chanc. 406; 1 De Gex, M. & G. 506; 14 Beav. 509.

Held, also, that the statute 9 Geo. 4. c. 83, which provides, that all laws and statutes of the realm shall be enforced in the administration of justice so far as the same can be applied, means "reasonably applied," and that the statute 9 Geo. 2. c. 36. is inapplicable to lands in New South Wales. *Ibid.*

A chapel was founded in England, and was used, and the services therein were performed according to the mode of worship in the Established Church of Scotland. The Court below held, that no person could enjoy the office of minister who was disqualified to be a minister of the Established Church of Scotland; and it being proved that the minister had become so disqualified, he was ordered to be removed, and the trustees who co-operated with him were also removed, and he and they were ordered to pay the costs of the suit. He and they appealed from the decree, but the same was wholly affirmed; Lord Chief Justice Cranworth dissenting from part of the decree by which the Court below declared that "no minister or other person is qualified for, or is competent to exercise the office of minister or pastor without being a licentiate and recognized minister of the Established Church of Scotland, and in full connexion therewith." *Attorney General v. Murdoch*, 21 Law J. Rep. (N.S.) Chanc. 694; 1 De Gex, M. & G. 86.

An application was subsequently made to suspend the execution of the decree of the Court below, pending an intended appeal to the House of Lords; but the Court refused the motion, with costs. *Ibid.*

A testator, by his will, dated the 12th of October 1629, bequeathed a sum of money to be employed for the good and benefit of the poor of Kensington for ever, in such manner as A and B and the churchwardens of the said parish of Kensington should think fit to establish. This sum was, in 1635, laid out in the purchase of land. It appeared in evidence that in 1629 there was a place called the town of Kensington, but that such place had not any known or defined metes or bounds, and that there was no municipal corporate town or market town in the parish of Kensington. It appeared, also, that the rents had

been always applied for the benefit of the poor of Kensington parish generally, and that, in all the deeds relating to the property, no distinction had been made between town and parish:—Held, that the above-mentioned trust was for the benefit of the parish of Kensington generally, and not for any particular part of it. *Ex parte the Incumbent and Churchwardens of Brompton*, 22 Law J. Rep. (N.S.) Chanc. 281; 5 De Gex & Sm. 626.

A founded a school in the town of S, and by the indenture of foundation, declared that "there was about 50*l.* per annum designed to be given for an endowment." He then specified 40*l.* a year to the two schoolmasters and several small sums which made up about 50*l.* a year. By his will, which recited this indenture, he gave to the mayor, &c. of S all his estate at U and N, upon condition, &c. Then followed directions as to the payments provided for by the indenture founding the school, and also as to various other payments; and the residue was to go half to the mayor of S for the time being, and the other half to mend the roads. In an account subjoined to his will, after mentioning all these payments, he introduced this item: "Balance which the corporation of S will gain per annum, 64*l.* 7*s.* 9½*d.*" The estate thus given increased largely in value:—Held, reversing the decree of the Court below, that the increased residue was to go to the mayor towards defraying the expenses of the mayoralty and mending the roads, and that the school was not entitled to a share in the increase. *The Mayor, Aldermen and Burgesses of Southmolton v. the Attorney General*, 23 Law J. Rep. (N.S.) Chanc. 567; 5 H.L. Cas. 1: reversing *Attorney General v. the Corporation of Southmolton*, 14 Beav. 357.

The Hospital of St. Cross was founded, in 1167, for the benefit of 13 poor impotent men, and 100 others of the more indigent were to be received at the hour of dinner, and other relief was to be given to whomsoever should be in want, according to the means of the house. The Almshouse of Noble Poverty was founded, in 1445, for two priests, thirty-five brethren and three sisters. It was within the precincts of the Hospital of St. Cross, and was under the government of the master and brethren. The charter of foundation of the Hospital of St. Cross was lost; but the register of the Bishop of Winchester in 1200 referred to it, and a copy was found to be registered there some time between 1323 and 1333. The charter of foundation of the Almshouse of Noble Poverty, if ever executed, was lost; but the intention of the founder was referred to in the documents by which grants were made for its endowment. In 1696, a document was executed by the master and brethren of the Hospital of St. Cross, by which they made a new disposition of the revenues of both the charities, which had been acted upon until the present time. Upon an information,—Held, that the charitable purpose of the foundation was clearly made out and ought to be upheld, and that the revenues of each ought to be applied to support the charities, though in the one they had been diverted from 1696, and in the other they had been absorbed by the original charity for 150 years and upwards; that no presumption could be made against the clear ostensible purpose of the foundation, though it was supported by a usage of 150 years; and that the purpose for which a foundation is made must deter-

mine whether it is spiritual or lay. The founder's direction that the master shall be a clerk in holy orders will not make it a spiritual foundation. *Attorney General v. the Master and Brethren of the Hospital of St. Cross*, 22 Law J. Rep. (N.S.) Chanc. 793; 17 Beav. 435.

The Duke of Suffolk, in 1437, as lord of the manor of Ewelme, founded, with the licence of king Henry the Sixth, an almshouse for two priests, one of whom was to be the master, and the other was to teach grammar to the children of the manor. The duke afterwards made ordinances for the government of the charity, which directed that the lord or lady of the manor for the time being should be the visitors, and appoint the masters and poor men in case of death or removal. The master was to be a priest thirty years of age, and of the University of Oxford, who might have other preferment, so that it did not interfere with his residence. It also directed that the house should, if thought needful, be visited annually by the visitors. By the attainder of the duke or his successor the manor became vested in the Crown, and was so in the reign of Henry the Eighth. In 1618 James the First, for the promotion of good literature and the increase of the stipend of the Regius Professor of Medicine in the University of Oxford, granted to the Chancellor, masters and scholars, and their successors, the donation and free disposition of the mastership of the almshouse, and declared his pleasure and intention that the professor, though a layman, should enjoy the office, and at the same time gave his assent that in the next session of parliament it should be so enacted. No act of parliament appeared to have been obtained; but in 1818 the Commissioners of Woods and Forests, under the 57 Geo. 3. c. 97, sold the manor of Ewelme, which subsequently became vested in the Earl of Macclesfield, who, as lord of the manor and visitor of the almshouse, on the first vacancy, appointed N to be the master; and N and Dr. O. the Regius Professor of Medicine in the University of Oxford, each claimed the office of master of the almshouse. Upon an information,—Held, that the charity vested in the Crown, upon the attainder of the Duke of Suffolk, and did not escheat and was not affected by the acts for dissolving monasteries or chantries; that the right of nominating the master was analogous to an advowson, which the founder of the almshouse could not make inseparable from the manor, and that any lord of the manor could alien the right of patronage without parting with the manor, and *vice versa*; that the grant of 1818 was sufficient to pass the right of nomination had it been vested in the Crown, which it was not, as the grant of 1618 was sufficient to vary the nature of the office, and to sever it from the manor, and give it for the benefit of the Regius Professor of Medicine in the University of Oxford, though a layman. *Attorney General v. the Chaplains, &c., of the Ewelme Almshouse*, 22 Law J. Rep. (N.S.) Chanc. 846; 17 Beav. 366.

A gift by way of trust to build a bridge makes both principal and accumulations applicable to the purpose contemplated. *Forbes v. Forbes*, 23 Law J. Rep. (N.S.) Chanc. 422; 18 Beav. 552.

In 1652 a testator devised property producing 47l. a-year to a corporation, "in trust and confidence" to pay 20l., 10l., and 10l. to certain charities, and so long as certain taxes continued, what the corporation

could "not spare out of the overplus of rent," namely, 7l. should be deducted out of the two sums of 10l. and 10l. The rent of the estate increased:—Held, by the Master of the Rolls, and affirmed on appeal, that the corporation were entitled to only seven forty-sevenths of the increase, subject to the payment of rates, taxes, and ordinary repairs. *Attorney General v. the Corporation of Beverley*, 24 Law J. Rep. (N.S.) Chanc. 374; 6 De Gex, M. & G. 256; 15 Beav. 540.

A testator bequeathed a sum of money to the treasurer for the time being of a lunatic asylum, thereafter to be instituted "for the humane and charitable purposes of that institution." An asylum afterwards built under the compulsory provisions of an act of parliament supported by compulsory rates, and used entirely for the maintenance of pauper lunatics,—Held, not entitled to the bequest. *Lechmere v. Currier*, 24 Law J. Rep. (N.S.) Chanc. 647.

Where a charitable gift is ambiguous, it may be interpreted by the aid of contemporaneous usage; but no length of usage will warrant a deviation from the terms of a trust which the Court regards as plain; and the Court did not hold itself bound as to such deviation by proceedings in former suits, in which the question did not directly arise. *Attorney General v. the Corporation of Rochester*, 5 De Gex, M. & G. 797.

By a local act, certain commissioners were authorized to levy rates for paving, lighting, watching, widening and improving streets in a town:—Held, that as the object was beneficial, not only to the inhabitants subjected to the rate, but also to all other persons having occasion to visit or pass through the town, the purpose was public and charitable within the meaning of the Statute of Charitable Uses. *Attorney General v. Eastlake*, 11 Hare, 205.

The question whether funds are dedicated to a charitable use within the statute 43 Eliz. c. 4, depends not on the source from which the funds are derived, but on the purpose to which they are to be applied. *Ibid*.

Charitable gift to the use of the reparation of the church of W, and to the use of the reparation of the bridge of W, and to the use of other things needful within the parish of W, at the discretion of the trustees, to be applied and distributed for ever:—Held, that the discretion applied to the third branch only, and that the three objects took equally. *Re Hall's Charity*, 14 Beav. 115.

Under Sir Samuel Romilly's Act the Court had jurisdiction to declare the proportions in which the charitable objects are entitled, but not to repair a previous misapplication of funds amongst them. *Ibid*.

Effect of the authorities upon the construction of Sir Samuel Romilly's Act. *Ibid*.

(E) DEVISE AND BEQUEST TO.—VALIDITY OF.

Bequest by a will of a sum of money to be applied to the restoration of the Jews to Jerusalem and their own land,—Held to be void. *Habershon v. Vardon*, 20 Law J. Rep. (N.S.) Chanc. 549; 4 De Gex & Sm. 467.

Sums invested by the testatrix in stock, and other sums placed by her in the savings bank, were the produce of monies which had been partly collected and partly appropriated by the testatrix for

the purpose of building and endowing a church in a certain parish. The stock had been invested in the names of the testatrix and of another person. At the time of the decease of the testatrix no deed appointing or declaring the trusts of the money had been executed, and no site of the intended church had been obtained:—Held, that the money and stock were at the death of the testatrix part of her personal estate, and that the liability either of the money or the stock to any charitable use was excluded by the statute 9 Geo. 2. c. 36. *Girdlestone v. Creed*, 10 Hare, 480.

Exception to statute 9 Geo. 2. c. 36. in the case of a bequest of monies to the extent of 500*l.* for building or endowing a church. *Ibid.*

After the passing of the Mortmain Act (1736) lands were devised to trustees for a charity. The rents were so applied by the trustees and their heirs down to the present time. On an information against the heir to correct abuses, he set up the invalidity of the devise, but the Court held that the onus of proving that no other mode had been adopted to make the charity valid was on him, and that every presumption would be made in support of its validity. *Attorney General v. Moor*, 20 Beav. 119.

(F) ADMINISTRATION.

(a) Scheme.

By the provisions of a scheme for the management of King Edward the Sixth's Grammar School at Ludlow, duly confirmed by the Lord Chancellor, it was declared "that the trustees should have authority from time to time, upon such grounds as they should at their discretion in the due exercise and execution of the powers and trusts reposed in them deem just from time to time, to remove the master, usher, &c. from his office," subject however to certain formalities being observed:—Held, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed, and that they were not bound to summon the master before them or to give him any hearing or opportunity of defending himself against the charges which formed the grounds of his removal. *Doe d. Child v. Willis*, 20 Law J. Rep. (n.s.) Exch. 85; 5 Exch. Rep. 894.

By order made in 1844 on petition, and by a subsequent order made on petition, under Sir Samuel Romilly's Act, 1848, the Court confirmed certain schemes regulating the management of the Free Grammar School at Kidderminster (founded by inquisition taken in 9 Car. 1. to be then existing for the instruction of the children generally of the inhabitants in good literature and learning), and restricting it to forty free boys, from eight to fifteen years of age, of such inhabitants, with a preference to such as were members of the Church of England, and in case of deficiency to children of other persons being members of the Church of England, to be instructed gratuitously in Latin and Greek, and for certain payments in other branches of education, giving the master the privilege of taking boarders to compete with the free boys for the prizes, and power to the trustees to admit any additional number of boys at certain payments, requiring the masters to be members of the Church of England, and the head master to be a graduate of one of the English universities, and in holy orders, and allowing the

latter to occupy a house exchanged for certain of the trust estates under Sir Eardley Wilmot's Act (3 & 4 Vict. c. 77). On information, filed in 1849, to vary the schemes in the above particulars, and to set aside the exchange, the Court varied the scheme as to the religious test (without costs) according to the decree in the *Warwick School case* (1 Ph. 564; 14 Law J. Rep. (n.s.) Chanc. 338), and dismissed the remainder of the information, with costs. *Attorney General v. the Bishop of Worcester*, 21 Law J. Rep. (n.s.) Chanc. 25; 9 Hare, 328.

A railway company took, for the purposes of their act, a piece of land belonging to the corporation of L, but over which the freemen of L had certain rights. By one of the railway acts of the company it was enacted that, out of the purchase-money, the costs of the corporation should be paid, and that such a sum should be appropriated for the corporation as the Court of Chancery should, on the application of the corporation, direct, and that the residue should be applied for the permanent benefit of the freemen as the Court of Chancery should, on the same application, direct, and that notice of such application should be fixed on the door of the town hall. On an application by petition by the corporation of L for a scheme,—Held, that the freemen of L ought to be represented at the hearing. *Ex parte the Mayor, Aldermen and Citizens of Lincoln*, 21 Law J. Rep. (n.s.) Chanc. 621.

A testator gave rents and profits to the parson and churchwardens of a parish, to be given and disposed of to and among the most needy and poor people of it, according to the discretion of the parson and the churchwardens for the time being. By a scheme, half was directed to be applied in maintaining certain schools, and half in pensions to aged and necessitous parishioners. Under the Church Building Act, the parish was divided into thirteen districts, the mother church being one; and the Master directed, in amending the scheme, that the charity estate should be divided among the several districts, and that as the pensions became vacant, the money should be applied by the local incumbents and churchwardens respectively for education of the poor, but so that half the pensions assigned to each district should be retained. One of the Vice Chancellors modified this order by directing that the proceeds of vacant pensions should be at the discretion of the incumbents and churchwardens for education or pensions according to the wants of the districts:—Held, upon appeal, that the view of the Master was correct, and that it was the duty of the Court to have regard to the primary intention of the testator, namely, the benefit of poor and needy persons of the parish. *In re the Lambeth Charities*, 22 Law J. Rep. (n.s.) Chanc. 959.

If a British subject gives a legacy for charitable purposes abroad, this Court will secure the money and appoint trustees of the fund; but though the Court will direct inquiries for its guidance, it will not direct any scheme for effecting the purposes of the testatrix. *Attorney General v. Sturge*, 23 Law J. Rep. (n.s.) Chanc. 495; 19 Beav. 597.

The Free Grammar School of C was founded by royal charter of King Edward the Sixth, for the education and instruction of boys and youths in grammar, and endowed with the lands of certain dissolved chantries. By the charter, the government of the possessions and revenues of the school was vested

in four governors, who were incorporated, with perpetual succession, and had power, with the advice of the bishop of the diocese, to make statutes and ordinances for the regulation of the school; and on the death of a governor, the election of his successor was vested in the survivors, with certain restrictions as to his qualifications. In a scheme for the better regulation of the school, the Court refused to sanction the appointment of a board of trustees to act as a check upon the governors, considering that they had a sufficient check already in the bishop and the Lord Chancellor as visitor of the school. *In re the Chelmsford Grammar School*, 24 Law J. Rep. (n.s.) Chanc. 742; 1 Kay & J. 543.

Religious instruction is a necessary part of education in a grammar school; and where there is reason to believe that such instruction was originally intended to be according to the doctrines and principles of the Church of England, it must be according to those doctrines and principles; and the Court will not sanction the insertion of a clause in the scheme exempting those scholars whose parents conscientiously object thereto from receiving such instruction. *Ibid.*

A scheme for the administration of a charity ordered to stand over for consideration of the Attorney General in the first instance. *In re Wyersdale School*, 10 Hare, App. lxxiv.

Where property was devised in the sixteenth century in trust, to apply the income for the perpetual sustentation of an almshouse for the comfort, placing and abiding of the poor within the city of R., and to provide six beds to harbour or lodge poor wayfaring men no longer than one night, to each of whom fourpence was to be paid; and also in trust to purchase flax, &c. for setting the poor at work according to the 18 Eliz. c. 3; and the income of the property had greatly increased,—Held, that an administration of the charity which made no increase in the number of wayfarers relieved, or in the amount of the viaticum, was not a proper one, and that a scheme ought to be directed upon an information being filed, although it did not pray relief in respect of the administration of this part of the charity. *Attorney General v. the Corporation of Rochester*, 5 De Gex, M. & G. 797.

Quære—whether the payment (after making provision for poor travellers) of the residue of the income to the parish officers in ease of the rates was a proper administration of the charity. *Ibid.*

The revenues of a charity grammar school having increased tenfold, the Court, on a vacancy, restrained the appointment of a new master until something had been settled as to a new scheme. Subsequently liberty was given to appoint a new master, he taking his office subject to any future alterations to be directed by the Court. *Attorney General v. the Warden, &c. of the Louth Free School*, 14 Beav. 201.

Part of the property of a foundation school consisted of an advowson not producing an income. The Court considered that if the parish were within a reasonable distance and the duties of it light, the living might properly be held by the master or usher; but that not being the case, the advowson was ordered to be sold for the benefit of the charity, which the Court considered it had jurisdiction to order. *Attorney General v. the Archbishop of York*, 17 Beav. 495.

The statutes of foundation of a school (1548) directed that the rents of the charity property should not be raised above the yearly rents then payable:—Held, that this direction was simply inoperative, and that the most must be made of the property. *Ibid.*

In a school the first object is to provide a proper remuneration for a competent master, and this ought not to be interfered with by the institution of exhibitions and scholarships, however useful in themselves. *Ibid.*

The provisions in the statutes of foundation as to the period of attendance of the master may be modified by the Court in settling a scheme. *Ibid.*

In the absence of express directions, it is not incumbent on the schoolmaster to reside in the school-house, provided he lives at a convenient distance—semble. *Ibid.*

In raising costs out of charity property by a mortgage, the Court is anxious to provide for its extinction by a sinking fund. *Ibid.*

When the original charter of foundation of a charity does not exist, but copies of it are found in proper places, two of them purporting to be the original charter *in extenso*, and one omitting certain trusts found in the other two, the former must be acted on though it appears that the property of the charity was afterwards diminished, and it is alleged that in consequence thereof the visitor, under the authority given by the original charter, may have limited the trusts as shewn in the third copy. *Ibid.*

The Attorney General attends the settlement of a scheme of a charity to protect the interests of all; and the Court refused to allow a member of a corporation, consisting of a master and thirteen brethren, to attend the settlement of a scheme of the charity, even at his own expense. *Attorney General v. St. Cross Hospital*, 18 Beav. 475.

(b) Trustees.

(1) *Controul over.*

By a grant of King Edward the Sixth, the College House in Ludlow, and divers estates, were vested in the bailiffs, burgesses, and commonalty (who under the Municipal Corporation Act took the name of the Mayor, Aldermen and Burgesses) of the borough of Ludlow, to continue out of the rents, issues and profits the Grammar School in Ludlow, which was to be kept by one master and one usher. In 1838, the Court of Chancery appointed new trustees of the charity estates, and in 1848 a scheme was settled by the Court for the management of the charity, and it provided "that the trustees should have authority from time to time, upon such grounds as they should in their discretion in the due exercise and execution of the powers and trusts reposed in them deem just, to remove the master, usher, &c. from their or his office." The trustees referred to the powers, and upon inquiry and after several meetings they passed a resolution to remove the master from his office, which they confirmed. Upon an application by the master to restrain the trustees from enforcing the resolution,—Held, that the word "trust" in the scheme superadded to the word "power," was to keep in view that it was a trust, for the execution of which the Court was providing. That the word "trusts," especially when considered with reference to the direction to reserve the state-

ment of the grounds of removal, had the effect of restricting the large meaning which might otherwise be given to the word "discretion." That the regulation did not confer upon the trustees an arbitrary power to dismiss the master upon any ground which they might deem just, free from any controul of this Court. That the trustees are not the only and absolute judges of the sufficiency of the grounds of removal. That the trustees, not having instituted any inquiry in the presence of the master, which might have afforded him the means of explanation and defence, the Court, without determining the right or propriety of the conduct of the trustees, granted an injunction to restrain them from enforcing the resolution of removal. *Willis v. Childs*, 20 Law J. Rep. (N.S.) Chanc. 113; 13 Beav. 117.

Real estate was vested in trustees upon trust, that the incumbents of the parishes of A, B, C and D, and their successors, should employ the rents to and for the maintenance and education and keeping at Oxford of a lad, in order to make him a minister of the Church of England, such lad to be chosen out of one of the said parishes, and of such parents who were not of ability to give him such maintenance and education, in case any such lad could be found in any of the said parishes whom the trustees should think eligible; but, if not, then from any parish in England or Wales; but in every instance, where a candidate fit or proper in the judgment of the trustees could be found in any of the said parishes, he was to be preferred. A vacancy occurring, there were two candidates, G a native of one of the said parishes, and J a stranger. The trustees elected J. A petition was presented by the father of G and others, praying a declaration that the election of J was invalid, and that G ought to have been elected; or that a new election might be had. The affidavits of the trustees stated that on the day of election the cases of J and G were fully and impartially considered by all the trustees, and that in the fair and *bonâ fide* exercise of their discretion, without favour or ill-feeling towards any individual or class, they unanimously considered J the proper object for the benefit of the charity; but no reason was given why G was not considered eligible. The Court, upon appeal, refused to interfere with their discretion. *In re Beloved Wilkes's Charity*, 20 Law J. Rep. (N.S.) Chanc. 588; 3 Mac. & G. 440.

Where, in the exercise of a discretion given to trustees, there appears an absence of indirect motive, an honesty of intention, and a fair consideration of the case, the Court will not examine into the accuracy of the conclusion come to by the trustees. Trustees are not bound to set forth the particular grounds of selection; and, *semble*, it is prudent not to do so; but where reasons are stated which do not justify the conclusion, or where it is admitted that they have acted upon an erroneous principle, the Court will interfere. *Ibid*.

It is the duty of trustees of a charitable foundation to give notice of their intention to proceed to an election; but where the fact was notorious to the parties interested, and it was not shewn that any one was prejudiced by the want of formal notice, the Court overruled the objection. *Ibid*.

A college for the education of Presbyterian Protestant Dissenters, governed by a committee of trustees chosen out of subscribers and donors, and

not fixed to any locality, may be removed, at the discretion of a majority of the trustees, from Manchester to London, or to such other place as shall be best calculated to advance the objects and design of the institution; and, notwithstanding such transfer, the rents and income of the trust property may be applied for the institution under the direction of the committee of management. *In re the Manchester College*, 22 Law J. Rep. (N.S.) Chanc. 571; 16 Beav. 610.

By letters patent, in 1637, the mayor, recorder, aldermen, and common council of the city of E. were incorporated and constituted the governors of the Hospital of J. and of its lands, revenues and goods, with power to purchase and take other lands, and to have a common seal. The recorder was not a member of, though elected by the corporation of the city:—Held, that since the passing of the act 5 & 6 Will. 4. c. 76, the corporation of the hospital was so far identical with the municipal corporation as to be within the spirit, if not the letter, of the 71st section of that act, and therefore (without deciding whether the corporation of the hospital any longer existed, or in whom the legal estate of the hospital lands was vested) that the administration of its trust estates was rightly transferred to the trustees, appointed under that act, of the charitable estates of the municipal corporation. *Attorney General v. the Mayor, &c. of Exeter*, 2 De Gex, M. & G. 507.

(2) Appointment of New Trustees.

By an order, the Lord Chancellor, in whom the power of appointing new trustees was vested, referred it to the Master to approve of eight fit and proper persons to be appointed trustees in lieu of those dead or who had left the borough of L, and after his report such further order was to be made as was just. The Master reported that he had approved of eight persons as fit and proper persons to be appointed, &c. This report was confirmed, and in the confirmation the trustees of the charity (naming the said eight persons and the other trustees) were directed to pay the costs of the petition for the appointment of new trustees out of the surplus funds of the charity in their hands. By the private act the property of the trust was vested in the trustees for the time being without any deed of transfer:—Held, that this was a valid appointment of the eight new trustees by the Lord Chancellor. *Doe d. Child v. Willis*, 20 Law J. Rep. (N.S.) Exch. 85; 5 Exch. Rep. 894.

In 1671 an estate was purchased out of funds belonging to a parish, which was conveyed to the rector, churchwardens, and twelve parishioners for the benefit of the poor inhabitants. With some variations, this was managed by the parishioners in vestry. The original deed was lost. By a deed dated in 1701 new trustees were appointed, which, in a recital of the deed of 1671, stated, that when reduced to five the trustees should convey the estate to themselves and eleven other parishioners. New trustees were appointed in 1725, 1769, 1782, and 1806, and the last three deeds contained a proviso that the five survivors should nominate new trustees. New trustees were appointed in 1831 and 1842 by the parties acting as trustees:—Held, notwithstanding the usage, that the trustees ought to

have been appointed by the parishioners in vestry assembled, and that the appointments made were invalid. *Attorney General v. Dalton*, 20 Law J. Rep. (N.S.) Chanc. 569; 13 Beav. 141.

The parish of L having been divided into eight distinct districts, special directions were asked under the Church Building Acts, first, that in settling the scheme, the Master might take these circumstances into consideration; and secondly, as the income had to be distributed by the rector and churchwardens, that special directions might be given for the distribution of the portion allotted to each district. The first was refused; and it was held, that the second did not require any special direction, as the Master had authority to consider it. *Ibid*.

The Vice Chancellors have jurisdiction to make orders for the appointment of new trustees of municipal charities. *In re the Northampton Charities*, 22 Law J. Rep. (N.S.) Chanc. 611; 3 De Gex, M. & G. 179.

The Trustee Act, 1850, does not empower the Court to appoint new trustees of charity property, without the consent of the Attorney General, and his fiat is necessary previously to presenting a petition for that purpose. *In re Rolle's Charity*, 22 Law J. Rep. (N.S.) Chanc. 760; 3 De Gex, M. & G. 760; 10 Hare, App. xxxix.

Under the 31st section of the 1 Will. 4. c. 70. the Vice Chancellors have jurisdiction to appoint new trustees, in the place of the Judges of the Court of Chester, of a charity cast upon such Judges by virtue of their office. *In re Robinson's Charity*, 22 Law J. Rep. (N.S.) Chanc. 841; 3 De Gex, M. & G. 188.

Appointment of new trustees under the provisions of the Municipal Corporation Act may be made by the Vice Chancellors. *In re the Gloucester Charities*, 10 Hare, App. iii.

As to the number of vacancies in a charity trust which will justify an application to the Court. *Ibid*.

Costs of parties appearing on such application for the purpose of aiding the Attorney General, in pursuance of public notice, in securing fit appointments not allowed out of the charity estate. *Ibid*.

Petitions for the appointment of new trustees of charity estates must be entitled in the matter of Sir S. Romilly's Act, and the fiat of the Attorney General must be previously obtained. *In re the Bierton Charity Land*, 10 Hare, App. xxxviii.

(c) Estates.

Previously to the 5 & 6 Will. 4. c. 76. the right of presentation to the mastership of St. John's Hospital, with the chapelry of St. Michael annexed, described as a living presentable with cure of souls, was vested in the corporation of Bath. The hospital was instituted for the benefit of the poor of Bath, and the master had the government of the hospital and the distribution of the funds, and the performance of the ecclesiastical duties of the chapel; and the visitation was in the Lord Chancellor, the Master of the Rolls and the bishop of the diocese:—Held, upon a petition for the appointment of new trustees, that the right of presentation was a hereditament vested in the corporation as charitable trustees, as ancillary to the charitable objects of the hospital, within the meaning of the 71st section of the 5 & 6 Will. 4. c. 76. *In re St. John's Hospital, Bath*, 20 Law J. Rep. (N.S.) Chanc. 458; 3 Mac. & G. 235.

The Court will sanction the sale of a piece of land, which in 1747 was purchased by trustees with charitable funds and conveyed to them, it being plainly advantageous to the charity. It will also sanction the re-investment of the money in real estate; and the Court will confer upon the trustees powers to perpetuate themselves, as well as to lease the land, there being such powers in the deed conveying the land to the trustees originally purchasing. *Ex parte the Overseers of the Poor of Ecclesall Bierlow*, 21 Law J. Rep. (N.S.) Chanc. 729; 16 Beav. 297.

Legacy to a Roman Catholic chapel directed to be paid to the trustees for the necessary repairs of the chapel. *De Windt v. De Windt*, 23 Law J. Rep. (N.S.) Chanc. 776.

If a charity is entitled to a particular sum as a first charge on an estate given to certain persons, and the estate is amply sufficient to secure payment of that sum, the fact that a portion of the estate has been lost by the alleged negligence of the donees of the estate, will not of itself justify an information on behalf of the charity against such donees. *Mayor, &c. of Southmolton v. [the Attorney General]*, 23 Law J. Rep. (N.S.) Chanc. 567; 5 H.L. Cas. 1: reversing *Attorney General v. the Corporation of Southmolton*, 14 Beav. 357.

Where a portion of an estate held under such circumstances was charged to have been improperly sold, the purchasers must be included as parties in any such information. *Ibid*.

Where such portion consisted of land held upon a renewable lease, and the lessors were entitled to refuse a renewal, and the bargain was in fact made with them before the period for renewal arrived, such bargain made under such circumstances does not afford matter of complaint against the donees of the estate. *Ibid*.

A husbandry lease of charity property for 99 years at a fixed rent cannot stand. *Attorney General v. Hall*, 16 Beav. 388.

In the case of a charity lease, the burden of proof of its fairness lies on the lessee. *Ibid*.

A lessee taking a lease of property belonging to a charity, but without notice of that fact, may protect himself as a purchaser for valuable consideration, *semble*. *Ibid*.

A lessee of charity property held to have constructive notice that it was trust property, the circumstances rendering it incumbent on her to inquire as to the lessor's title. *Ibid*.

An order was made in a suit, that the master of a charity should be at liberty to let a farm to the old tenant for 21 years at a rent of 800*l.* a year. After the lease had been approved of, but before it had been executed by the master, an offer was made of an increased rent of 220*l.* but the tenant in the meanwhile had laid out a very large sum in artificial manures for the farm. The Court held, that the offer of so large an increase of rent could not be refused, but that the tenant was entitled to an allowance for his outlay. *Attorney General v. Prettyman*, 19 Beav. 538.

Lease of charity property in a town for 500 years at a fixed rent of 6*l.* set aside, though a large expenditure had been made in rebuilding and repairs on the faith of the lease:—Held, that in such a case the Statute of Limitations, 3 & 4 Will. 4. c. 27, was

inapplicable. *Attorney General v. Davey*, 19 Beav. 521.

Account of lasting improvements allowed from the accruer of the defendant's title, a corresponding account of rents being directed from the same period, and no costs were given. *Ibid.*

As to the period from which an account of rents is directed in setting aside a charity lease. *Ibid.*

(G) JURISDICTION OVER.

(a) *Of the Court of Chancery.*

(1) *In general.*

The jurisdiction of this Court is not taken away though a special or general visitor has been appointed by the founder. The duties and functions of a visitor are wholly ineffectual to preserve the integrity of a charity: and in the present case schemes were directed for the future management of the charities. *Attorney General v. the Master and Brethren of the Hospital of St. Cross*, 22 Law J. Rep. (n.s.) Chanc. 793; 17 Beav. 435.

The Courts of Scotland must determine how a legacy given to erect a bridge there shall be laid out. *Forbes v. Forbes*, 23 Law J. Rep. (n.s.) Chanc. 422; 18 Beav. 522.

Statutes framed by the governors for the regulation of a charity will be varied, though objected to by the governors, who by the letters patent were empowered to frame such statutes in accordance with "their sound discretion." *Attorney General v. the Haberdashers Company*, 24 Law J. Rep. (n.s.) Chanc. 329; 19 Beav. 385.

The appointment of a receiver of the temporalities of an hospital, alleged to be an ecclesiastical benefice, but decided in this court to be a lay foundation, is a sufficient ground for granting an injunction to restrain the churchwarden of the parish of St. Faith (which was said to have been united with such ecclesiastical benefice) from interfering to prevent the nominee of the master of the hospital from performing divine service in the chapel of the hospital, or supposed parish church of the united parishes, although the title of the master is disputed, and although the nominee had no licence from the Bishop of the diocese to serve as curate to the parish. *Attorney General v. the Master and Brethren of the Hospital of St. Cross*, 24 Law J. Rep. (n.s.) Chanc. 148; 18 Beav. 601.

Where a school upon a charitable foundation had been the subject of an information, and a scheme had been settled for its government, the Court at the instance of the vicar of the parish, who, according to the foundation and scheme, was to be preferred for the office of schoolmaster, displaced a schoolmaster appointed by the trustees not in conformity with the scheme or foundation, and after a contest as to the fitness of the petitioner, at once declared the latter entitled to the office. Such a case is certainly within the jurisdiction of a court of equity, whether concurrently with courts of law or not. *Attorney General v. Lord Carrington*, 4 De Gex & Sm. 140.

Where a scheme directed an appointment to be made by a general meeting of trustees,—Held, that an appointment which could not have been made on the day on which the general meeting was held could not be legally made on a day to which that meeting was adjourned. *Ibid.*

Where a person became qualified for the office of schoolmaster in October, and in that month gave to the electors notice of his claim to be appointed,—Held, that this petition, which was presented in the following March for the removal of a master unduly appointed in the previous month of July, and for his own appointment, was not too late. *Ibid.*

The trustees having acted with precipitancy in making the undue appointment so as to exclude the petitioner, and having in the proceedings unsuccessfully impugned his character, were ordered to pay the costs. *Ibid.*

Observations upon the weight to be ascribed to evidence upon affidavit. *Ibid.*

(2) *Under 8 & 9 Vict. c. 70.*

A testator bequeathed a sum of money to trustees for the benefit of the poor of a parish. There was no provision in the will for a perpetual supply of trustees. The money was laid out in the purchase of land. A separate body of trustees had for about 200 years (with some slight exceptions) managed the property and applied the rents.—Held, that notwithstanding this separate management, the charity came within the 22nd section of the 8 & 9 Vict. c. 70, and was apportionable between a district parish and the remainder of the parish. Under the 22nd section of the 8 & 9 Vict. c. 70, the Court has a discretion whether or not to direct an apportionment of charitable gifts made for the benefit of a parish, between a district parish and the remaining part of the parish, and it is not imperative on the Court to make such apportionment. *Ex parte the Incumbent and Churchwardens of Brompton*, 22 Law J. Rep. (n.s.) Chanc. 281; 5 De Gex & Sm. 626.

(3) *On Petition.*

This Court has jurisdiction within the 52 Geo. 3. c. 101. to determine, upon petition, whether resolutions by some of the trustees of a college, &c. for changing its locality would be beneficial to the institution. *In re the Manchester College*, 22 Law J. Rep. (n.s.) Chanc. 571; 16 Beav. 610.

(b) *Of the Visitor.*

Upon an information, filed on behalf of divers dissenters from the Church of England, against the governors of a school founded and endowed by King Edward the Sixth, to obtain a declaration that the religious teaching prevented them from obtaining the advantages of the school, and that it was contrary to the intention of the founder and a breach of trust, and that it might be altered,—Held, that the question related to the internal management of the school, and that it must be left for the consideration of the visitor. *Attorney General v. the Governors of Sherborne Grammar School*, 24 Law J. Rep. (n.s.) Chanc. 74; 18 Beav. 256.

By the statutes of the cathedral of R, it was provided that the head master of a grammar school annexed to the cathedral should be appointed by the Dean and Chapter of R, and it was also ordained that "if any of the minor canons, clerks, or other officer should commit a slight offence, he should be corrected by the dean; but if his offence were more grave (in case it were thought fit so to do),

he was to be expelled by those by whom he was appointed." By another clause, a general power was given to the Bishop of R, in all matters contained in the statutes, or otherwise, concerning the benefit or credit of the cathedral, to oblige the dean, the canons, minor canons, and the other officers, and each and every of them, by oath, to speak the truth about all crimes and offences whatever; and to promote and reform such as should be proved according to the measure of the offence, and to do all things which should appear necessary for the eradication of vice, and whatever is recognized as appertaining to the office of a visitor:—Held, that upon the construction of these statutes, the Bishop of R, and not the Dean and Chapter, was visitor in matters relating to the school. *Regina v. the Dean and Chapter of Rochester*, 20 Law J. Rep. (n.s.) Q.B. 467; 17 Q.B. Rep. 1.

To a mandamus commanding the Dean and Chapter of R to restore a head master whom they had removed from his office, the return set out the statutes, and stated that the prosecutor had not appealed to the Bishop of R. The prosecutor pleaded that the Bishop of R was formerly Dean of W, and that the cause of the removal of the prosecutor from his office of head master was the publishing by him of a pamphlet alleging a misapplication of the funds of the cathedral of R by the dean and chapter of that cathedral, and attributing to the Dean and Chapter of W, during the time when the Bishop of R was Dean of W, the same identical misapplication of the funds of the cathedral of W as were imputed to the defendants with respect to the funds of the cathedral of R; and that the said pamphlet was published with the intention of imputing to the Bishop of R a knowledge of the misapplication of the funds by the defendants, as well as a community of actions and proceedings with the defendants; that the defendants had declared under their common seal that they had removed the prosecutor in consequence of his having published in the said pamphlet libellous passages, directed as well against the defendants as against the bishop of the diocese and against the deans and chapters of other cathedrals; that, by reason of the premises, the Bishop of R had such an interest in the cause of removal of the prosecutor as disqualified him from acting as visitor. On demurrer to this plea,—Held, that the bishop had no interest in the inquiry as to the propriety of the removal so as to prevent his jurisdiction as visitor from attaching. *Ibid*.

The prosecutor also pleaded, that the dean and chapter removed him from his office on account of his publishing the said pamphlet; that they afterwards gave him notice that they had restored him, and afterwards the said dean and chapter adjudged that he had been guilty of a grave offence in publishing the same pamphlet, and again removed him under the powers in the statutes contained; and that there never was any cause for his removal other than publishing the said pamphlet. On demurrer to this plea,—Held, that the publication of the pamphlet might amount to a graver offence within the meaning of the statute, so as to give the dean and chapter jurisdiction to remove for that cause, and that the Bishop of R alone had power to decide whether the removal was in fact rightful or not; and that the mandamus could not be supported. *Ibid*.

DRAST, 1850—1855.

(H) PLEADING AND PRACTICE.

A claim to participate in charity funds, which had been appropriated for 240 years to certain parishes, ought to be brought before the Court by information and not by petition, under Sir Samuel Romilly's Act (52 Geo. 3. c. 101). *In re Magdalen Land Charity*, 21 Law J. Rep. (n.s.) Chanc. 874; 9 Hare, 624.

To avoid the necessity of reciting the settled scheme of a charity, the order may refer to a copy of the scheme settled, approved, prepared and signed by the Judge and filed in the court; and subsequent applications for the appointment of new trustees, and on matters contained in the scheme and connected with the government and management of the charity, may be made to the Judge at chambers by summons on notice to the Attorney General. *In re the Free Grammar School of Thomas Conyers*, 22 Law J. Rep. (n.s.) Chanc. 707; 10 Hare, App. v.

After a decree in an information for the administration of a charity, the relators presented a petition in the name of the Attorney General, praying certain additional inquiries before the Master. The Attorney General appeared, and asked that the petition might be dismissed; and it was dismissed accordingly. *Attorney General v. Wyggeston Hospital*, 22 Law J. Rep. (n.s.) Chanc. 740; 16 Beav. 313.

An information filed against churchwardens, *nominatim*, will not prevent the Court making a decree, though one of them had ceased to hold the office at the time it was made. *Attorney General v. Salkeld*, 22 Law J. Rep. (n.s.) Chanc. 741; 16 Beav. 554.

Order to pay dividends to A, B, C, &c. (trustees of a charity) and the survivor and survivors of them and the trustees for the time being. *Ex parte the Trustees of Shrewsbury Hospital*, 9 Hare, App. xlv.

The rule which requires petitions for the appointment of new trustees of charities to be entitled in the matter of Sir S. Romilly's Act, applies to the case of a petition for the appointment of trustees of a Wesleyan chapel. *In re the Varteg Ironworks Wesleyan Chapel*, 10 Hare, App. xxxvii.

Use of affidavits filed in support of a petition after the title of the petition has undergone alterations since the filing of the affidavits, and therefore differs from the title of the affidavits. *Ibid*.

The Attorney General possesses the entire dominion over every information instituted in his name, whether it be filed *ex officio*, or at the instance of a relator. *Attorney General v. the Haberdashers Company*, 15 Beav. 397.

It is irregular for the solicitors of a relator to proceed in a charity information after the death of the relator. *Ibid*.

The administration of a charity by a Court of equity ought not to be continued after a scheme and final decree. *Ibid*.

(I) Costs.

In an information against the donees of a fund, on which there was a charge for the benefit of a charity, the prayer of the information was granted and inquiries were directed. The House of Lords reversed the decree of the Court below, and ordered the information to be dismissed, but only with costs up to the hearing, upon the ground that the Court

below having directed the inquiries the relator was entitled to proceed upon that direction. *Mayor, &c. of Southmolton v. the Attorney General*, 5 H.L. Cas. 1.

The costs of an application by a new master of an hospital for payment of the income of a fund in court held payable out of the income. *Attorney General v. Smythies*, 16 Beav. 385.

Trustees of a charity, who had greatly exceeded the estimate authorized by the Court for erecting a school, were disallowed the costs of an inquiry whether it was for the benefit of the charity. *Attorney General v. Armitstead*, 19 Beav. 584.

The executor and trustee of a residue given for a charity to be administered with the approbation of the rector and churchwardens did not communicate the fact of the bequest to them, but held the trust fund in stock in his own name from 1849 till 1852. The rector and churchwardens accidentally heard of the bequest in 1852, and were proceeding to file an information when the trustee, who admitted possession of the fund, invested it in 3l. 5s. per cent., and transferred it into court under the Trustees' Relief Act. The Court, holding such conduct to be a gross neglect of duty, repudiated the investment, and charged the defendant with the balance in his hand as cash, with interest at 5l. per cent., with usual rests, and refused to allow him his costs up to the hearing. On appeal, the decree was varied as to the interest from the rate of 5l. per cent. with rests to 4l. per cent. without rests, and as to costs by charging the defendant with them up to the hearing. *Attorney General v. Alford*, 2 Sm. & G. 488.

There must be a substantial ground for an appeal on the part of defendants to a charity information to exempt them from payment of costs, and the intimation of the opinion of the Court below upon the substance of the case, in pronouncing a decree which contained no declaration, and merely directed a scheme, was not held to constitute such a ground. *Attorney General v. the Corporation of Rochester*, 5 De Gex, M. & G. 797.

CHEQUE.

[See **BILLS AND NOTES.**]

CHILDREN.

[See **ABDUCTION—CONCEALMENT OF BIRTH—INFANT**—Statute 16 & 17 Vict. c. 30. as to assaults upon children.]

CHURCH.

[Cathedral Church; Visitor, see **CHARITY (G) (b)**—Church Building Acts, 14 & 15 Vict. c. 97; 17 & 18 Vict. cc. 14. and 82; 18 & 19 Vict. c. 127—**BURIAL—CLERGY—RATE—SEQUESTRATION.**]

(A) **CHURCHYARD AND CONSECRATED GROUND.**
(B) **PEWS.**

(A) **CHURCHYARD AND CONSECRATED GROUND.**

No Judge has power by the general law to grant a faculty to convert a part of a churchyard into a

highway required to be widened for the public benefit, though consent be given by all persons interested. *Rector and Churchwardens of St. John's, Walbrook, v. the Parishioners*, 2 Rob. Ec. Rep. 515.

No Judge has power, by the general law, to grant a faculty to sanction the use of consecrated ground for secular purposes; but, as a vestry-room is employed for ecclesiastical as well as secular uses, a faculty, after some hesitation, was granted for the erection of a vestry-room on consecrated ground. *Campbell v. the Parishioners of Paddington*, 2 Rob. Ec. Rep. 558.

(B) PEWS.

On an application for a faculty to repair and repew a church, a parishioner appeared to the decree and prayed a faculty might not be granted without a proviso that a pew, claimed to be held by him by prescription, should not be removed or altered. The prescription was denied:—Held, that a *prima facie* title by prescription was established, and that the faculty should be issued with the proviso prayed. *Knapp v. St. Mary, Willesden*, 2 Rob. Ec. Rep. 358.

Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been made within the period of any one living. *Ibid.*

To a declaration alleging the plaintiff's right to the use of a pew in a parish church, by reason of his possession of a house in the parish, and complaining of disturbances in such pew on the 1st of January 1849, and on divers other days and times, the defendant pleaded, thirdly, leave and licence generally; and, fourthly, that before any of the trespasses, it was agreed between the plaintiff, and the defendant and J A the churchwardens of the said parish, that the defendant and J A should partition the said pew into two small pews, and should have full licence, by themselves or others, to enter and continue in one of such small pews during divine service; and that the said defendant and J A did, in pursuance of the agreement and licence, so divide the pew, and commit the other alleged grievances as the defendant lawfully might. To the third plea, so far as related to the grievances committed before a certain day, to wit, the 8th of February 1849, the plaintiff replied *de injuriis*; and to the residue of the grievances, that before they were committed the plaintiff revoked the said alleged leave and licence. To the fourth plea, the plaintiff replied, as to the grievances before a certain day, to wit, the 8th of February 1849, that there was no such agreement as alleged; and as to the residue of the grievances, a revocation of the licence in that plea alleged:—Held, upon special demurrer, first, that the second part of the replication to the third plea did not amount to an argumentative traverse of the alleged licence; but that if it did, the first part of the replication would not, therefore, have been vitiated, inasmuch as the plea was in its nature divisible. Secondly, that the fourth plea was not divisible in its nature, and therefore, first, that the whole replication being double was bad, and secondly, that the two parts of the replication taken separately were bad, on the ground that each was replied to a part of the plea only, whilst, if true, they were respectively an answer to the whole; and, thirdly, that the latter part was bad as a new assignment, for informality. *Adams v. Andrews*, 20 Law J. Rep. (n.s.) Q.B. 33; 15 Q.B. Rep. 284, 1001.

Held, also, that the plaintiff had a right to revoke the alleged licence. But, *quære*, whether if the defendants had justified in their character of churchwardens, the plaintiff's right in that respect would have been different. *Ibid*.

CHURCHWARDENS AND OVERSEERS.

[See title POOR.]

(A) ELECTION AND APPOINTMENT.

(B) DUTIES AND LIABILITIES.

(A) ELECTION AND APPOINTMENT.

In the parish of B the owners and not the occupiers of tenements, the value of which did not exceed 6*l.*, were assessed to and paid the rates for the relief of the poor, under 13 & 14 Vict. c. 99. At the election of a churchwarden for the parish, the votes of certain occupiers of tenements not exceeding the value of 6*l.* were rejected on the ground that they were not entitled to vote, and one of the candidates was declared elected:—Held, that as the election could not, on this ground, be considered as null and void, and it was not shewn that the result of the election would have been different, an application for a mandamus could not be entertained. *Ex parte Joyce, or Mauby*, 23 Law J. Rep. (N.S.) M.C. 153; 3 E. & B. 718.

(B) DUTIES AND LIABILITIES.

Under the Municipal Corporation Act, 5 & 6 Will. 4. c. 76. s. 15, each of the overseers, including the churchwardens, is bound to make out, sign and deliver the Burgess list of the parish. *Clarke v. Gant*, (in error) 22 Law J. Rep. (N.S.) Exch. 67; 8 Exch. Rep. 252.

In an action for a penalty against a churchwarden for neglecting to sign the Burgess list, though the declaration contained no averment that there were any persons in the parish entitled to be put on the Burgess list, the Court, after verdict for the plaintiff, held the declaration good. *Ibid*.

In the parish of K a district for ecclesiastical purposes had been assigned under the 1 & 2 Will. 4. c. 38. to the chapel of B, for which chapelwardens were appointed, but they had authority only in ecclesiastical matters, all parochial business of the district being always transacted by the churchwardens of K at large. A notice, convening a meeting for the purpose of considering whether the 3 & 4 Will. 4. c. 90. (the Watching and Lighting Act) should be adopted in the B district, was upon a requisition of the ratepayers of the district issued by the district chapelwardens. The meeting was held and the act adopted in the district; and inspectors were appointed, who made orders on the overseers of K to levy certain sums of money for the purposes of the act. The overseers having neglected to obey these orders, an application was, more than two years after the adoption of the act, made to Justices for a distress warrant against the overseers, but they refused to issue it:—Held, that the act had never been legally adopted in the district, as the notice for convening the meeting could only be properly given under the act by the churchwardens of the parish at large, who were the persons usually

calling meetings on parochial business, and that consequently the Justices were not bound to issue their distress warrant. *Regina v. the Overseers of Kingswinford*, 23 Law J. Rep. (N.S.) M.C. 174; 2 E. & B. 689.

Held, also, that the whole of the proceedings being void, the objection was open notwithstanding the time which had elapsed. *Ibid*.

A local act (50 Geo. 3. c. cxlix., St. Luke's, Middlesex, Paving Act) empowered the vestrymen or trustees to assess towards any paving rate "the parish church, parochial and other chapels, meeting-houses, places for religious worship, hospitals, public schools, and other public buildings within the said parish which now are or hereafter may be built;" the assessments for the said parish church to be paid by the churchwardens or chapelwardens for the time being. . . "and the persons having the care or conduct for the time being of such other public buildings." The 57 Geo. 3. c. xxix. (the Middlesex Paving Act) empowered the trustees having the controul of the pavements in any parochial or other district within the jurisdiction of the act to rate any cathedral, collegiate or other church or churches, parochial or other chapel, meeting-houses, places for religious worship, hospitals, public schools, and all other public buildings within each of such parochial or other districts which now is or hereafter may be built, and all other places which by any local act or acts of parliament, relating to any parochial or other district, may be or are or is liable to be rated," in certain specified proportions, and enacted that the rates "of and for any church or parochial chapel are to be paid by the churchwardens or chapelwardens respectively for the time being, and the rates for any other public buildings by the housekeeper or other person or persons having the care of such other public buildings for the time being," &c. St. Matthew's church was duly made a district church of St. Luke's parish under the 6 & 7 Vict. c. 37, under which act churchwardens are elected annually, but they are not overseers in respect of their office as churchwardens. The trustees acting under the 57 Geo. 3. c. xxix. made a paving rate, and rated the district church of St. Matthew, and claimed the amount from the churchwardens for the time being. No pew-rents were payable in respect of the pews in the church, nor had the churchwardens any funds out of which to pay the rates:—Held, that the district church was liable to be rated, and that the churchwardens were bound to pay the rate. *Mills v. Rydon*, 23 Law J. Rep. (N.S.) Exch. 305; 10 Exch. Rep. 67.

CLERGY.

[See BURIAL—PARISH CLERK—SIMONY—SLANDER.]

- (A) DISCIPLINE.
- (B) NON-RESIDENCE.
- (C) TRADING.
- (D) DILAPIDATIONS.
- (E) BENEFICES.
 - (a) *Union of.*
 - (b) *Charging.*
- (F) CURATE.

(A) DISCIPLINE.

A bishop being the patron of a living held by a clerk charged with an ecclesiastical offence has the power to send letters of request to the Court of Appeal of the province under the 24th section of the 3 & 4 Vict. c. 86. *Cooper v. Dodd*, 2 Rob. Ec. Rep. 270.

It is not necessary, when the Court has a general jurisdiction over the subject-matter, that the promoter of the office of the Judge should negative, in pleading, exceptions: it is for the defendant so to do, as a defence to the charge against him. *Ibid*.

The 68th canon, provided that the warning be convenient, does not require any precise form of notice to be given. *Ibid*.

In a suit by letters of request, under the 3 & 4 Vict. c. 86, the "two years" (sect. 20), within which a suit or proceeding must be commenced against a clerk in holy orders for an offence against the laws ecclesiastical, date back from the day on which the decree or citation is issued from the Court of Appeal of the province, and not from the day on which the Commissioners gave notice (sect. 4) to the clerk of their intention to meet to hold an inquiry into the offence charged. *The Bishop of Hereford v. Anon.*, 2 Rob. Ec. Rep. 595.

A commission of inquiry had issued under the Church Discipline Act (3 & 4 Vict. c. 36) against a clerk in holy orders upon a charge for which, if substantiated, a sentence of deprivation might be pronounced, and the Commissioners having reported to the bishop of the diocese that a *prima facie* case was made out for instituting further proceedings, the clerk submitted to sentence being pronounced against him without any further proceedings, according to a provision in the act, which enables the bishop in such a case to pronounce such a sentence as might be pronounced after a full investigation. The bishop accordingly decreed that the clerk should be suspended from all discharge and function of his clerical offices for three years; and directed by the decree that at the expiration of the said three years he should procure a certificate, signed by three beneficed clergymen, of his good behaviour and morals during his suspension; and that such certificate should be approved of by the bishop before the suspension should be taken off:—Held, that the bishop had jurisdiction to annex this condition to the sentence of suspension, and a motion for a prohibition was refused. *Ex parte Rose*, 21 Law J. Rep. (N.S.) Q.B. 339; 18 Q.B. Rep. 751.

Upon a charge preferred against a clerk in orders of having affirmed and maintained doctrines repugnant to the Thirty-nine Articles, the bishop of the diocese has no power of proceeding, personally and without process in court, to hear and adjudicate upon such charge under the 13 Eliz. c. 12. s. 2. *Ex parte Denison, Archdeacon of Taunton*, 24 Law J. Rep. (N.S.) Q.B. 34; 4 E. & B. 292.

The proceedings in such a case must be instituted and conducted as required by the Church Discipline Act, 3 & 4 Vict. c. 86. *Ibid*.

A charge of erroneous doctrine was formally presented to the Bishop of Bath and Wells against the Archdeacon of Taunton, who was also vicar of East Brent, of which living the Bishop was patron, with a request that the Bishop would send the charge for

decision in the Arches Court by letters of request. The Bishop sent a copy of the charge to the Archdeacon, and called upon him, by letter, in which he expressed his view of the charge, to give such explanations of his doctrine as might satisfy him (the Bishop) that, with a due vigilance over the purity of his teaching, he could abstain from granting letters of request. The Archdeacon, in compliance with this requirement, sent a statement of his doctrine, and in reply, the Bishop wrote another letter, in which, after stating that he rejoiced to find that the Archdeacon re-affirmed all the doctrinal statements of the Church of England, and agreed to the positions laid down in his the Bishop's former letter, but also expressing his regret as to the tenour of certain speculations in the Archdeacon's sermons, and the error of requiring assent to them as the dogmatic teaching of the Church, he proceeded to say, "The question, then, before me is this: are these errors, as I esteem them, of so grave a character as to render it my duty to allow my office to be used to promote an attempt to eject you from the ministry of the English Church? Now, as to the first of these, though I esteem your opinion erroneous, still it does not appear to me to be one which the Church has censured. * * * And I do not consider it my duty to seek in the ecclesiastical courts for an authoritative decision thereon. * * * As to the second error, I see with much pleasure from your statement to me, that you admit that it is not for you to say what statements of doctrine may or may not justify exclusion from the ministry; and I trust, therefore, that without my having recourse to any further steps, I may rest on the assurance that you will herein submit to my judgment when I admonish you, as I now do":—Held, that there had been no adjudication by the Bishop upon the charge preferred against the Archdeacon, so as to make the issuing of a commission to inquire into the charge by the Archbishop of Canterbury, under the power given by section 24. of the Church Discipline Act, an excess of jurisdiction. *Ibid*.

(B) NON-RESIDENCE.

[See *Daniel v. Morton*, *post*, (E) (a).]

A writ of sequestration issued under the stat. 1 & 2 Vict. c. 106, to compel a clergyman to reside on his benefice is not merely in the nature of a distress to compel residence, but is also a penal proceeding against him, as it is one step towards the forfeiture of the benefice. The bishop, therefore, ought to give the clergyman an opportunity of being heard before directing the sequestration. *Bonaker v. Evans* (in error), 20 Law J. Rep. (N.S.) Q.B. 137; 16 Q.B. Rep. 162.

If, in obedience to a monition issued by the bishop, a clergyman goes into residence and again ceases to reside, the bishop may serve him with an order to reside; but if that order be disobeyed, the bishop is not justified in directing a sequestration at once, and the sequestration will be void, unless before issuing it he gives the clergyman an opportunity of rebutting the supposed facts, or of offering lawful excuse for his disobedience to the order to reside. *Ibid*.

Semble—that a summons to shew cause should precede the issuing of the monition, as it has a penal character; and that the sequestration should recite

the delinquency on account of which it is issued, and also the bishop's adjudication on the same. *Ibid.*

The 1 & 2 Vict. c. 106, s. 54. (Plurality of Benefices Act) enables the bishop to issue a monition to any clergyman within his diocese, who does not reside on his benefice, requiring him to reside, and to make a return to the monition; and if no return or an unsatisfactory return be made, the bishop may issue an order to him to reside, and in case of non-compliance with such order, may sequester the benefice:—Held, that the monition there mentioned is in the nature of process to bring in the party to answer, and need not be preceded by any citation or summons to shew cause why it should not issue—qualifying *Bonaker v. Evans*. *Bartlett v. Kirkwood*, 23 Law J. Rep. (N.S.) Q.B. 9; 2 E. & B. 771.

The plaintiff, a beneficed clergyman in the diocese of H, was, in November 1846, sentenced to be imprisoned for two years for libel. In December 1846, the Bishop of H, under the above act, issued a monition to him to reside, and to make a return to the monition. The plaintiff returned that there was no house of residence on his living, and that he had a legal cause of non-residence by reason of his detention in prison under the judgment, upon which he was about to bring a writ of error. After this return, the bishop, on the 10th of March 1847, issued an order to the plaintiff to reside; and on the 14th of April 1847, the plaintiff, in reply thereto, sent to the bishop an affidavit that he was still prosecuting the writ of error. On the 27th of May 1847, a writ of sequestration issued:—Held, that the sequestration was valid, as the plaintiff before it issued had an opportunity of being heard, and was heard, in answer to the charge against him. *Ibid.*

By section 58. of the 1 & 2 Vict. c. 106, if the benefice of a spiritual person continues "for the space of one whole year" under sequestration issued under that act for non-residence, such benefice shall become void, and the patron may appoint thereto:—Held, that this means the space of one whole year from the day upon which the sequestration issued; and not a year commencing on the 1st of January, under section 120. *Ibid.*

(C) TRADING.

The 1 & 2 Vict. c. 106. ss. 29, 31, which renders it illegal for a spiritual person holding a benefice to engage in or carry on trade, allows a contract so entered into to be enforced, although the party with whom it was made was at the time aware that the other party was a spiritual person holding a benefice. *Lewis v. Bright*, 24 Law J. Rep. (N.S.) Q.B. 191; 4 E. & B. 917.

(D) DILAPIDATIONS.

[Agreement to forego, on an exchange of benefices, see *Goldham v. Edmonds*, title SIMONY.]

The right of a succeeding rector to bring an action for dilapidations against the executor or administrator of his predecessor rests upon particular custom, derived from ecclesiastical law; and it is an incident of such custom, that the claim in respect of dilapidations is to be postponed in the distribution of assets to the payment of specialty and simple contract debts. *Bryan v. Clay*, 22 Law J. Rep. (N.S.) Q.B. 23; 1 E. & B. 38.

Where therefore a declaration in case, upon the

custom, the defendant, an executor, pleaded that, after the commencement of the suit, and before plea, he had paid and satisfied a bond debt, and several other debts due from the testator at his death, and that at the commencement of the suit he had fully administered all the goods and chattels of the testator at the time of his death, which had come to his hand to be administered, except goods and chattels of a value which were not sufficient to satisfy the said bond and other debts paid by the defendant:—Held, on demurrer, that the plea was a good answer to the plaintiff's claim for dilapidations. *Ibid.*

A declaration stated that the plaintiff, rector of F, agreed with the executrix of the late incumbent that dilapidations should be valued as between them, by valuers to be appointed on each side, and in case the valuers disagreed, by an umpire to be appointed by the valuers, and that such valuation should be final and conclusive; that the plaintiff, at the request of the defendants, employed them as valuers, for reward, to value the dilapidations on his behalf, and to use their best endeavours to procure the same to be settled at a reasonable amount as between the plaintiff and the executrix, and the defendants accepted the employment, and entered upon it, with a valuer appointed by the executrix on her behalf. Breach, that through the defendants' negligence the amount of dilapidations was settled by them and the said valuer at a less sum than they ought to have been settled at, whereby the plaintiff was obliged to accept from the executrix a smaller sum than he ought to have received. The evidence was, that the defendants were employed as alleged, and had agreed with the valuer of the executrix in valuing the dilapidations at too small a sum, having, through ignorance, valued as between incoming and out-going tenant, instead of as between incoming and out-going incumbent:—Held, first, that the defendants were not sued as quasi arbitrators; but that the cause of action was their undertaking that they were competent, and the breach of that undertaking; and, secondly, that, although the defendants could not be expected to supply minute and accurate knowledge of the law, they ought to have known the broad distinction between the case of an in-coming and out-going tenant and the case of an in-coming and out-going incumbent, and that their ignorance in that respect was a breach of their engagement. *Jenkins v. Betham*, 24 Law J. Rep. (N.S.) C.P. 94; 15 Com. B. Rep. 168.

Quere—whether an action will lie against an arbitrator for anything done by him while acting strictly in that capacity. *Ibid.*

Semble—Sections 34. and 35. of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125.) are not retrospective. *Ibid.*

(E) BENEFICES.

(a) Union of.

[See 18 & 19 Vict. c. 127.]

The union of two or more benefices cannot be effected without the assent of the patrons. *Daniel v. Morton*, 20 Law J. Rep. (N.S.) Q.B. 98; 16 Q.B. Rep. 198.

Quere—whether a union of two benefices during the life of the incumbent is valid. *Ibid.*

A, being perpetual curate of W S, a benefice with cure of souls, was subsequently presented, instituted, and inducted to a rectory, C, also with cure of souls; both benefices being in the diocese of N, and fifty miles apart from each other. Concurrently with his presentation and institution to the latter benefice the bishop of N, by an instrument under his episcopal seal, addressed to A, as perpetual curate of W S, and rector of C, which recited that good causes had been alleged and allowed, *united, annexed and incorporated* the rectory with the perpetual curacy during the incumbency of A in the latter and so long as he should be perpetual curate there and no longer, by the bishop's ordinary authority, provided that A should keep a sufficient curate, to instruct and teach the people of the parish in which he should not reside:—Held, that the legal effect of this instrument was not to create an union of the two benefices in the proper sense of the term, so that residence in the one produced a non-residence in the other of the two benefices; and that the bishop had jurisdiction, under the 1 & 2 Vict. c. 106, to appoint a curate for the parish in which A did not *de facto* reside, and to enforce payment of the stipend assigned to him, under sect. 83. of that act. *Ibid.*

A monition was issued by the bishop, which recited that a complaint had been made by the curate that arrears of stipend were due to him, which A had wilfully neglected and refused to pay, and that A and the curate having appeared before him, the bishop heard summarily the said differences, and that the said complaint was duly proved before him, and that he adjudged the same to be true; it then admonished and required A to pay the said arrears. Default being made in payment, a sequestration issued, under which the fruits of the benefice were seized to satisfy the arrears of the stipend:—Held, that A could not, after the sequestration issued, object that he had not been guilty of a refusal to pay the stipend, or that he had no notice of the curate being appointed by the bishop. *Ibid.*

A declaration in *quare impedit* stated that S H was seised in fee of a moiety of the advowson of the church of B with D and A, as in gross by itself as of fee and right, and was entitled to present to the same every alternate turn; the other moiety of the said advowson belonging to the Earl of B. Plea, "that S H was not seised of a moiety of the advowson of the church of B with D and A," &c. Issue thereon. By a special verdict it was found that, before 1818, B with D was a parish and rectory, and A a separate parish and vicarage. That the Earl of B was seised in fee of the advowson of the rectory of B with D, and that R G was seised as of fee in gross of the advowson of the vicarage of A. That by an act of union in 1718, made on the petition and by the consent of the respective patrons and the incumbent (the same clerk being then incumbent of both benefices), the bishop did consolidate, unite, and annex the vicarage and parish church of A to the rectory and parish church of B, and willed and decreed that the said united churches should from that time be thereafter held and reputed as one benefice only, and that one fit person, at the alternate presentation of the Earl of B. and R G, and their heirs, should be canonically instituted in the same, and that it should be lawful for the then incumbent and his successors to take possession of both parish churches, and them

to continue and retain as one church and one benefice. By a deed of 1760 R G's heir conveyed to S H "all that the perpetual advowson, nomination, donation, or alternate right of presentation and free disposition of and to the vicarage of the parish church of A," &c.:—Held, that by virtue of the act of union, the two churches of B with D and A were united, and a new presentative benefice was created, and given, as provided in the act of union, to the owners of the former advowsons in turns; but that the old advowsons remained unchanged and were to be conveyed as before; and that a conveyance of one of the old advowsons would carry with it the patronage of the alternate turns of the whole presentative benefice: consequently, that as the deed of 1760 conveyed to S H the advowson of the old vicarage of A, such conveyance conveyed also what was inseparably annexed, a moiety of the advowson of the newly-created church of B with D and A. *Robinson v. the Marquis of Bristol* (in error), 22 Law J. Rep. (N.S.) C.P. 21; 11 Com. B. Rep. 241; in the Court below, 20 Law J. Rep. (N.S.) C.P. 208; 11 Com. B. Rep. 208.

(b) *Charging.*

To an action by a sequestrator of the living of S upon a covenant to pay the yearly rent of 980*l.*, contained in a lease of the rectory and tithes (with certain exceptions) of the living of S granted by the rector of S to the defendant before the sequestration, the defendant pleaded, seventhly, that the rector being indebted to V and M in large sums of money, and requiring time to pay the said debts, V and M at the request of the rector consented to give time, and V consented to advance him a further sum upon condition of the said lease being granted to the defendant, and of another deed being executed by which the rector appointed the defendant receiver of all the tithes, &c. demised by the said lease, and authorizing him, after deduction of a per-centage, to pay therefrom the debts of V and M, and to keep up certain policies of insurance for the benefit of V and M, and also certain other policies, and to carry out other purposes connected with the arrangement. The plea alleged that the lease was executed as part of the same transaction, and that the rector knew at the time of the deeds being executed that the defendant was attorney and agent for V, and that the second deed was made to enable him to apply the rent reserved by the first deed in the manner above mentioned; that there was due from the rector to V and M more than was claimed in the action, and that he, the defendant, had applied the tithes, &c. received by him, as directed by the second deed. The defendant pleaded, eighthly, that before the execution of the lease the rector of S was indebted to V and M and others, and that in consideration thereof and of a further advance by V, the rector agreed to charge the living of S by executing the lease declared on, and by appointing the defendant agent and receiver by the deed set out in the seventh plea; and that the lease was part of the same transaction to charge the living:—Held, that the seventh plea did not shew any defeasance of the covenant to pay the rent contained in the lease: but also, held, that there was an equitable assignment of the rent so far as necessary to pay V and M, and that, therefore, the lease was void as being part of a transaction by which the living

was charged, contrary to the provisions of the 13 Eliz. c. 20; and that both the seventh and eighth pleas were good. *Walthew v. Crafts or Crafts*, 20 Law J. Rep. (N.S.) Exch. 257; 6 Exch. Rep. 1.

The representatives of a deceased incumbent of a rectory who has, out of his own estate, redeemed the land-tax prior to 1799, are entitled to recover, from the succeeding incumbent, the interest of the purchase-money, at the rate of 3*l.* per cent. on such purchase-money. *Kilderbee v. Ambrose*, 24 Law J. Rep. (N.S.) Exch. 49; 10 Exch. Rep. 454.

Semble—that the Court of Chancery would not interfere to enforce the charge on the benefice as to the principal stock. *Ibid.*

(F) CURATE.

[See *Daniel v. Morton*, ante, (E) (a).]

The vicar of a parish had been suspended by the diocesan *ab officio et beneficio* for two years, and until a satisfactory certificate of his good conduct should be obtained, and the diocesan, by the ordinary form of licence, appointed K, during the suspension, "to perform the office of stipendiary curate in the parish in reading the common prayer and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer, and the Canons and Constitutions in that behalf lawfully established." Whilst the suspension continued, the office of parish clerk became vacant, and the plaintiff was appointed by K to hold the said office during the continuance of the suspension.—Held, in an action to recover certain fees of office received by the defendant, who had been subsequently appointed to the same office by the vicar, that K, as minister of the parish for the time being, within the terms of the 91st Canon of 1603, had the right to appoint to the office, and that the plaintiff was therefore entitled to recover in the action. *Pindar v. Barr*, 24 Law J. Rep. (N.S.) Q.B. 30; 4 E. & B. 105.

And, *semble*, that the appointment of the plaintiff was in point of form valid, though to hold the office only during the suspension. *Ibid.*

CLERK OF THE PEACE.

[See SESSIONS.]

CLUB AND CLUBHOUSES.

[See COMPANY.]

At the trial of an action for contribution brought by one member of the managing committee of a club against another, it appeared that at a meeting of the committee, at which the defendant was present, a resolution was passed that an immediate loan of 3,000*l.* was requisite, and that the members of the club should be invited to guarantee the committee in consideration of their becoming liable for the loan. The defendant was afterwards present at a meeting of the committee, when a draft of their annual report was read and moved. At the general annual meeting which followed, and at which the defendant was *not present*, the report was read, and it stated that the committee were prepared, with the sanction of the meeting

and under the guarantee of the members, to borrow 4,000*l.*; and a resolution was accordingly passed, empowering the committee to raise that sum. The defendant was afterwards present at a meeting of the committee, when the foregoing resolution was discussed, and at a second general annual meeting, where it was again passed. At a meeting of the committee after this (on the 3rd of August), at which the defendant was *not present*, arrangements were made for accepting an offer of a loan of 4,000*l.* from the C Bank. The loan was effected, and the account of the club transferred to the C Bank from the L J S Bank. The defendant, who before this had signed cheques on the L J S Bank as a member of the committee, afterwards signed various cheques on the C Bank, from which all the 4,000*l.* was drawn out. The C Bank sued the plaintiff for the amount and recovered judgment against him, and he paid 2,500*l.* :—Held, that the proceedings at the meeting of the committee of the 3rd of August were admissible in evidence against the defendant in the action for contribution, though he was not present; and that there was evidence both of previous authority for the loan, and of subsequent ratification by the defendant, sufficient to render him liable. *Mountcashel v. Barber*, 24 Law J. Rep. (N.S.) C.P. 43; 15 Com. B. Rep. 512.

COALS.

[See 14 & 15 Vict. c. 78. and 18 & 19 Vict. c. 108.]

In a special action on the case the declaration alleged that the corporation of L had, from time immemorial up to the 1st of January 1836, by persons deputed and appointed by them, the sole and exclusive privilege of measuring, and from the 1st of January 1836 of weighing, all coals imported into the port of L. It then set out a like right, at the pleasure of the corporation, to fix and determine a reasonable rate of payment for the labour of the coal-meters, to be proportioned previous to the said 1st of January 1836, to the measured quantity of the coals and subsequent to that day to their weight, the payments being to be made by the coal owner and to be for the use and benefit of the coal-meter. It then averred that the corporation had deputed and appointed a reasonable number of coal-meters, of whom the plaintiff was one. The pleas traversed the right of the corporation to weigh the coals and the appointment of the plaintiff as a coal-meter. Evidence was given of a custom of measuring all coals imported into the port of L before the 1st of January 1836, and that after that date the corporation ordered that the coal-meters should be paid a sum per ton on the coals weighed instead of per chaldron as before, and that subsequent to the 1st of January 1836 the coal-meters had weighed the coals instead of measuring them. In proof of the plaintiff's appointment an entry in the corporation books, stating that he was appointed a coal-meter, was put in. The entry was in the form always made respecting the appointment of coal-meters. There was no evidence of any appointment of the plaintiff under the seal of the corporation. The plaintiff had acted as coal-meter for many years :—Held, that the right of the corporation by custom by means of their deputies to measure all coals

imported into the port was not converted into a right to weigh them by the statute 5 & 6 Will. 4. c. 63. *Smith v. Cartwright*, 20 Law J. Rep. (n.s.) Exch. 401; 6 Exch. Rep. 927.

Held, also, that as the coal-meter claimed fees for his own benefit by the custom, he was an officer and not a mere servant of the corporation; that the appointment therefore ought to have been under the seal of the corporation, no custom being alleged of appointing such an officer without deed. *Ibid*.

Patent fuel, an article composed of coal-dust mixed with 13 per cent. of pitch and lime, is not liable to the duties imposed upon "coals" imported into the port of London, by the statute 1 & 2 Will. 4. c. lxxvi. ss. 23, 60, (continued by the 1 & 2 Vict. c. ci.), notwithstanding that there is no purpose to which coal-dust, without mixture of pitch and lime, could not also be applied. *Mayor of London v. Parkinson*, 10 Com. B. Rep. 228.

COIN.

[See Stat. 16 & 17 Vict. c. 102.]

The prisoner in payment for some goods at a shop, put down on the counter a counterfeit shilling. The shopman took it up and said that it was bad. The prisoner then quitted the shop, leaving the coin there:—Held, that the prisoner had "uttered and put off" the counterfeit shilling within the meaning of the statute. *Regina v. Welch*, 20 Law J. Rep. (n.s.) M.C. 101.

An accessory before the fact in a misdemeanour, though absent at the commission of the offence, may be indicted and convicted as a principal. There is no exception to this rule in the case of uttering bad money. *Regina v. Greenwood*, 21 Law J. Rep. (n.s.) M.C. 157.

On an indictment for uttering a counterfeit crown piece knowing it to be counterfeit, proof that the prisoner, on a day subsequent to the day of such uttering, uttered a counterfeit shilling, is admissible to prove the guilty knowledge of the prisoner. *Regina v. Foster*, 24 Law J. Rep. (n.s.) M.C. 134; 1 Dears. C.C.R. 456.

COLLEGE.

[See UNIVERSITY.]

King James I. by a charter in 1619, granted to E A licence to found a college, which should consist of one master, one warden, four fellows, six poor brethren, six poor sisters and twelve poor scholars, to be maintained, &c. according to such ordinances, &c. as should be made by the said E A, with power to the said E A to make ordinances, &c. for the maintenance, rule, government, &c. of the said master, warden, &c., which should be a body corporate. E A by deed in 1619 created the college, to consist of the several persons named in the charter, and by an indenture dated in 1620, he endowed the college with lands in three parishes. By an instrument made in 1626, E A by virtue of the power given to him by the charter, made certain ordinances, &c. for the government of the said college. These ordinances provided that the churchwardens of the three parishes where the college lands were situate

should be assistants to the master, warden and fellows of the said college in the governing thereof, and gave them power to elect the poor brethren, sisters or scholars from the parishes to which they respectively belonged. They also provided that if the place of warden should be void, "the master, assistants and fellows" should go into chapel and "proceed to the election of a new warden," and that, after the senior fellow had read the statutes relating to the person to be elected, "the electors should make the said election indifferently," &c. If both the places of master and warden should be void at one time, notice was to be given by the senior fellow to the assistants to repair to the college within three days "to join with the fellows in the election of a new master, which should be in all points as he formerly described in the election of a warden." The assistants had always, from the foundation of the college, been accustomed to vote at the elections of wardens:—Held, first, that by these ordinances, coupled with the invariable usage, the assistants had a voice in the election of a warden; and, secondly, that E A, although he could not alter the constitution of the college, had power to give the assistants, who were not members of the corporation, a right of voting for a corporate officer; and, thirdly, that the lapse of time after the foundation of the college did not take away his right to make such an ordinance. *Regina v. the Master, Fellows, and Assistants of the College of God's Gift in Dulwich*, 21 Law J. Rep. (n.s.) Q.B. 36; 17 Q.B. Rep. 600.

COLONY.

[See Stats. 15 & 16 Vict. c. 39—18 & 19 Vict. cc. 54, 55, 56, 91. And see *The Bank of Australasia v. Nias*, title ACTION (A) (c).]

COMMISSION TO ASCERTAIN BOUNDARIES.

By agreement, dated in 1634, the Earl of P, owner of the R estate, agreed to pay to the churchwardens and overseers of the poor of the parish of P a yearly rent of 6l. for certain charity lands belonging to the parish, which were lying intermixed with his estate, and to set out sufficient land of a better value for performance thereof, which he should either tie for the said yearly rent, or otherwise assure and convey to such persons as should be nominated to be feoffees in trust for the same. No land appeared to have been set out or assured in accordance with this agreement, and the successive owners of the R estate continued to pay the rent of 6l.; but in the course of time the estate became greatly subdivided, and upon a division and settlement of the property in 1786 a portion thereof was conveyed to the person through whom the present owner claimed it. Upon the title-deeds of this portion the annual payment of 6l. was recited to be due to the parish of P; and the owners of the other portions were indemnified against the payment. The portion of the estate which as between the several owners was liable to the payment was bought by the father of the present owner. The 6l. was regularly paid by the purchaser and by the present

owner when he came into possession, and a receipt for the money was expressed to be "for rent of parish lands." Upon an information filed at the relation of the churchwardens and overseers of the parish, charging that the boundaries had been confused, and praying for a commission to set out the parish lands, or other lands of equal value,—Held, first, that the agreement of 1634 did not amount to a sale of the lands in consideration of a rent-charge, but with the entries and receipts conclusively established a tenancy from year to year, at a rent of 6*l*. Secondly, that the want of privity between the successive owners did not preclude the right of the parish to a commission to ascertain boundaries. Thirdly, that the acceptance by the defendant's father of the receipt for rent was a sufficient admission not only that the money was payable as rent, and not as a rent-charge, but also that the portion of the property held by him comprised the land subject to the rent. *Attorney General v. Stephens*, 24 Law J. Rep. (N.S.) Chanc. 694; 1 Kay & J. 724.

COMMITMENT.

[See INFERIOR COURT—INSOLVENT—JUSTICE OF THE PEACE.]

COMMON.

[See INCLOSURE.]

- (A) CLAIM TO, AND RIGHTS OF COMMONERS.
(B) ENCROACHMENTS.

(A) CLAIM TO, AND RIGHTS OF COMMONERS.

A commoner may pull down a building wrongfully erected upon the common, and which prevents his exercising his right as fully as he otherwise might, provided he does no unnecessary damage. *Davies v. Williams*, 20 Law J. Rep. (N.S.) Q.B. 330; 16 Q.B. Rep. 546.

To a declaration which charged a pulling down a dwelling-house in which the plaintiff was then actually inhabiting, a plea justifying the abatement of the house by a commoner as a nuisance wrongfully erected upon the common, alleged that the defendant had notice and was requested to remove his house, which he refused to do:—Held, that the plea was an answer to the action. *Ibid*.

Where, to an action of trespass, a claim of right acquired by thirty years' user without interruption is set up extending over a space larger than, but including, the *locus in quo*, and an interruption acquiesced in for a year is shewn to have existed as to the *locus in quo*, but as to no other part of the space over which the right is claimed, the right under 2 & 3 Will. 4. c. 71. is disproved as between the parties to the action, and affords no justification of the trespass complained of. *Ibid*.

An interruption of a right acquired by user within the meaning of 2 & 3 Will. 4. c. 71. s. 4. may be caused by the act of a stranger, and not the owner of the servient tenement. *Ibid*.

A plea claiming an immemorial right of common by prescription in the occupiers for the time being of

a message is bad in substance, and cannot be supported even after verdict. *Ibid*.

Trespass for breaking and entering a close of the plaintiff, and breaking down a wall. Pleas, justifying the alleged trespass under the exercise of a right of common of turbary enjoyed by prescription in, upon, and throughout Gidley Common, whereof the said close in which, &c. was parcel, and from which it had been wrongfully inclosed. Replications, traversing the "said common of turbary in, upon, and throughout the said close in which, &c. *modo et forma*." Common of turbary had existed and had been exercised over Gidley Common generally; but with respect to the spot in question, before it was inclosed, the jury found that within living memory it had not been capable of growing turf for fuel, or anything in the nature of turf:—Held, that under the issues raised, the exercise of the right over the common generally was admissible evidence, from which it might have been inferred that the original presumed grant extended to the *locus in quo*, and that the defendants were not tied down to shew an actual exercise of the right over the particular spot; but that such inference could not be made, when it appeared in effect that from time immemorial it had been impossible to exercise the right over the *locus in quo*. *Pearson v. Underhill*, 20 Law J. Rep. (N.S.) Q.B. 133; 16 Q.B. Rep. 120.

Where a manor was part of a royal forest, and the Crown had the right to turn deer upon the wastes to an unlimited extent, but for upwards of twenty years no deer had been seen there, and the lord of the manor enclosed a portion of the waste, —Held, that, in determining whether sufficient common was left, the right of the Crown was not to be taken into consideration. *Lake v. Plaxton*, 24 Law J. Rep. (N.S.) Exch. 52; 10 Exch. Rep. 196.

(B) ENCROACHMENTS.

Where a tenant encloses a portion of land which does not belong to his landlord, and occupies it for upwards of twenty years with and as parcel of the demised premises, the presumption at the expiration of the lease is, that as against the tenant it is included in the tenancy, and not that the encroachment was made for the benefit of the landlord. This presumption is one of fact, not of law. *Andrews v. Hailes*, 22 Law J. Rep. (N.S.) Q.B. 409; 2 E. & B. 349.

The defendant being tenant from year to year to the plaintiff (who was not lord of the manor) of a house and land abutting on a highway, enclosed a piece of the waste lying on the opposite side of the highway, and built thereon a bakehouse and other buildings, which he held and used together with and for the purposes of his occupation of the demised premises, without paying any increased rent, for more than twenty years. He was always rated separately for the house and land, and for the bakehouse, &c.: —Held, that at the expiration of the tenancy it was to be presumed that the defendant held the bakehouse, &c. as part of the demised premises, and that the plaintiff was, therefore, entitled to recover them in ejectment. *Ibid*.

Where by a deed reciting that several persons, parties of the first part, had encroached on a common and enclosed land, and built cottages, those parties jointly conveyed all their interest in the land and

cottages to trustees for the commoners, reserving to themselves the right to occupy the premises respectively for the lives of themselves and their wives, paying 1s. a year to A B, one of the trustees:—Held, first, that one conveyance stamp was sufficient, there being a community of the same subject-matter as to all the parties of the first part. Secondly, that the proviso for the occupation by the grantors during their own and their wives' lives was not a re-grant requiring a second stamp. *Doe d. Croft v. Tidbury*, 23 Law J. Rep. (N.S.) C.P. 57; 14 Com. B. Rep. 304.

One of the grantors, after the date of the conveyance, and while he was in the possession of part of the premises conveyed, made fresh encroachments on the waste:—Held, that it must be taken, in the absence of clear evidence to the contrary, that he took the land for the aggrandisement of the estate, and that it was part of the estate at the determination of the tenancy—confirming *Andrews v. Hailes*. *Ibid*.

COMPANY.

[For Banking Companies, see **BANKER AND BANKING COMPANY**—Canal Companies, see **CANAL AND CANAL COMPANY**—Mining Companies, see **MINE**—Limited Liability Companies, see Stat. 18 & 19 Vict. c. 133—As to compensation, see **LANDS CLAUSES CONSOLIDATION ACT**—For matters relating to the construction of railways, crossing roads, &c., see **RAILWAY**—As to service of writ of summons on railway companies, see **PRACTICE**. And see **COMPANIES CLAUSES CONSOLIDATION ACT**—**LAND TAX**—**USE AND OCCUPATION**.]

- 1.—**RAILWAY AND OTHER INCORPORATED COMPANIES.**
- 2.—**JOINT-STOCK COMPANIES.**
- 3.—**DISSOLUTION AND WINDING UP OF COMPANIES.**
- 4.—**EXECUTION AGAINST SHARE-HOLDERS.**

1.—RAILWAY AND OTHER INCORPORATED COMPANIES.

- (A) **STATUTES, CONSTRUCTION OF.**
- (B) **CHARTER OF INCORPORATION.**
- (C) **REGISTRATION OF** [See *post*, 3—(A) (b)].
- (D) **SHARES.**
 - (a) *Register of Shareholders.*
 - (b) *Transfer.*
 - (1) *In general.*
 - (2) *Compelling Registration of.*
 - (c) *Forfeiture.*
- (E) **DIVIDENDS.**
- (F) **CALLS.**
 - (a) *Form and Validity, in general.*
 - (b) *Who liable, in general.*
 - (c) *Infants.*
 - (d) *Trustees.*
 - (e) *Power to make.*
 - (f) *Actions for.*
 - (1) *Limitation of Time for suing.*
 - (2) *Declaration.*

(G) POWERS, DUTIES AND LIABILITIES OF COMPANIES.

- (a) *As to Shareholders generally.*
- (b) *As to other Persons generally.*
- (c) *Appropriation of Funds.*
- (d) *Compliance with deposited Plans.*
- (e) *Making and completing the Line.*
- (f) *Making and maintaining Fences.*
- (g) *On opening the Line.*
- (h) *Covenant to compensate for Lands.*
- (i) *Making and enforcing Bye-laws.*
- (j) *Distraint of Uncertificated Engines.*
- (k) *Amalgamation.*
- (l) *Acts of Servants.*
- (m) *Contracts generally.*
- (n) *Traffic and Toll Agreements.*
- (o) *Leasing and working Contracts.*

(H) POWERS, DUTIES AND LIABILITIES OF DIRECTORS.

(I) LIABILITY OF PROVISIONAL COMMITTEE-MEN.

- (a) *For Deposit.*
- (b) *Upon Insufficiency of Funds.*
- (c) *For Contribution.*

(J) BORROWING POWERS.

2.—JOINT-STOCK COMPANIES.

(A) REGISTRATION.

- (a) *When necessary.*
- (b) *Provisional Registration.*
- (c) *Complete Registration.*
 - (1) *Deed of Settlement.*
 - (2) *Certificate of.*

(B) DIRECTORS

- (a) *Power to contract.*
- (b) *Rights and Liabilities.*

(C) SHARES.

- (a) *Certificate of Proprietorship.*
- (b) *Sale of.*
- (c) *Transfer of.*

(D) INVESTMENT OF MONEY PAID INTO COURT.

(E) APPROPRIATION OF FUNDS.

(F) DIVIDENDS.

3.—DISSOLUTION AND WINDING UP OF COMPANIES.

(A) WHEN AND TO WHAT COMPANIES THE WINDING-UP ACTS WILL BE APPLIED.

- (a) *In general.*
- (b) *Railway Companies.*
- (c) *Clubs.*
- (d) *Loan Societies.*
- (e) *Pending Suit for winding up.*

(B) ORDER FOR WINDING UP.

- (a) *On whose Petition made.*
- (b) *Effect of.*

(C) INTERIM MANAGER.

(D) OFFICIAL MANAGER.

(E) FUNDS.

- (a) *Misapplication of.*
- (b) *Distribution of.*

(F) COMPROMISE.

(G) ACTIONS AND SUITS AGAINST THE COMPANY OR CONTRIBUTORIES.

(H) CLAIMS.

- (a) *In general.*
- (b) *Advances by Directors.*
- (c) *Solicitors' Bills.*
- (d) *Salaries.*
- (e) *Costs of obtaining Act of Parliament.*
- (f) *Policies.*
- (g) *Advertisements.*
- (h) *When barred by Statute of Limitations.*

(I) CONTRIBUTORIES.

- (a) *Who may be.*
 - (1) *Directors.*
 - (2) *Provisional Committee-men.*
 - (3) *Devisees.*
 - (4) *Trustees.*
 - (5) *Executors.*
 - (6) *Bankrupts.*
 - (7) *Allottee of Shares.*
 - (8) *Persons accepting Shares.*
 - (9) *Former Holder of Shares.*
 - (10) *Adventurer who had relinquished his Shares.*
 - (11) *Where Shares have been forfeited.*
 - (12) *Transferor under invalid Transfer of Shares.*
 - (13) *Transferee of Shares.*
 - (14) *Where Object of Company altered.*
- (b) *Extent of Liability of.*
 - (1) *In general.*
 - (2) *Debts and Losses before Transfer.*
 - (3) *Borrowed Money and Advances.*
 - (4) *Guarantee to return Deposit.*
 - (5) *Costs of Winding up.*
- (c) *Rights of.*

(J) CALLS.

(K) ACTIONS.

(L) PRACTICE.

- (a) *Winding up in Chambers.*
- (b) *Advertisement of Petition.*
- (c) *Rehearing.*
- (d) *Appeal.*
- (e) *Order to stay Proceedings.*
- (f) *Discharging the Order.*
- (g) *Form of Master's Certificate.*
- (h) *Reviewing Master's Report.*
- (i) *Proof of Debt.*
- (j) *Service of Notice.*
- (k) *Costs of Witnesses.*

4.—EXECUTION AGAINST SHARE-HOLDERS.

(A) RAILWAY AND OTHER INCORPORATED COMPANIES.

(B) JOINT-STOCK COMPANIES.

(C) LIMITED LIABILITY COMPANIES.

1. RAILWAY AND OTHER INCORPORATED COMPANIES.

(A) STATUTES, CONSTRUCTION OF.

The European and American Electric Printing Telegraph Company's Act (14 & 15 Vict. c. 135. s. 37.) provides that the company may lay down and place their pipes, &c. under any public roads, streets, and highways, and along or across such

places for the purpose of the telegraph, and break up the pavement or soil for that purpose; but that nothing in this provision contained shall extend to any railway or canal, except that it shall be lawful for the company to carry their wires, pipes, &c. "directly, but not otherwise, across any railway or canal." The South-Eastern Railway Company, in pursuance of the provisions of their act, had carried their railway on a level across a part of the public highway in the city of Canterbury, the public having the full use of the highway, except when the trains were passing:—Held, that the highway was not a highway within the meaning of the European and American Electric Printing Telegraph Company's Act, and that it was an act of trespass to dig and bore under the railway for the purpose of carrying the telegraph under the spot where the railway crossed the highway. *The South-Eastern Rail. Co. v. the European and American Electric Printing Telegraph Co.*, 23 Law J. Rep. (N.S.) Exch. 113; 9 Exch. Rep. 363.

A market company obtained a special act, the preamble of which recited that a convenient site might be obtained, between certain streets on the east and certain other streets on the west, and which enacted that the Market and Fairs Clauses Act was incorporated therewith. The 24th section authorized the erection of a market-house on land described in the deposited plans, and by the 25th the company were enabled to alter and widen streets in the way pointed out on the deposited plans, and by the 30th, to buy additional lands, not exceeding two acres. A B was the owner of land on the west side of one of the streets on the western boundary of the area spoken of in the preamble, and his land was described in the deposited plans, but it did not thereby appear that more was intended to be taken than enough to widen one of the streets named in section 25. The company proceeded to take the whole land of A B compulsorily, and to build upon it a covered building, in addition to the market-house authorized by section 24, whereupon A B filed his bill for an injunction, which was granted, the Master of the Rolls deciding that the company could only erect one market-house, and not two, and that on the east side; and that although the preamble could not controul the enactments, it might be resorted to to remove obscurity. The company appealed:—Held, that as the land of the plaintiff was described in the plan, and as therefore it might be wanted, the company were authorized to take it; and as by the general act "the singular may mean the plural," the company were not restricted by the word "market-house"; that the enactments of the special act did not require a reference to the preamble to explain them, and the injunction must be dissolved, the company being the proper judges of what lands were necessary for the works. *Richards v. the Scarborough Public Market Company*, 23 Law J. Rep. (N.S.) Chanc. 110.

Powers were conferred by act of parliament on a harbour company to execute certain works, with authority to raise money by mortgage of the same; but the act required that all mortgages and transfers of them should be indorsed by the clerk of the company, or otherwise should be void. The company borrowed money, but the mortgages and the subsequent transfers were not indorsed. The interest fell

into arrear. The company borrowed money of the Exchequer Loan Commissioners; and by an agreement, executed at the same time, the prior mortgages agreed that the Commissioners should have priority as to interest over the interest on the prior mortgages, and as to principal over the principal of these prior mortgages. The Commissioners, on the interest becoming in arrear, entered into possession and took the tolls, &c.; and, acting under the powers of several public acts of parliament, under some or one of which they had powers of sale over property mortgaged to them in default of payment of interest on the money advanced by them, sold the mortgaged property to a railway company. Interest on the prior mortgages fell into arrear in 1818; and in 1831 the treasurer of the company wrote to the holder of prior mortgage securities, treating him as holder thereof, and expressing regret at the non-payment of interest. The owner of some of the original mortgages, who was also transferee of others, bequeathed the same, and the legatee filed a bill to enforce the agreement as to priority, and one of the Vice Chancellors made a decree accordingly in the plaintiff's favour. On appeal, affirming the decision of the Court below,—Held, that the Commissioners had no power to sell discharged from the prior mortgages; that the railway company purchased with notice of the want of their indorsement, and had treated them as valid; that the letter was sufficient acknowledgment to take the case out of the operation of the Statute of Limitations, 3 & 4 Will. 4. c. 27; and that the plaintiff was entitled to an account of the tolls, &c. while the Commissioners and their purchasers had been in possession. *Jortin v. the South-Eastern Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 343; 6 De Gex, M. & G. 270; 2 Sm. & G. 48.

The effect to be given to such clauses as that rendering deeds void for want of indorsement or other formal matters, depends much on the purpose of the act in which they are contained; and if the act be one of general public concern, they are to be construed largely, to defeat the mischief which the act is intended to prevent; but if the act be not such, then the effect to be given to such provisions is to be limited by the purpose for which they are inserted. *Ibid.*

By a local and personal act transfers of debentures were to be by indorsement, by deed, and in a given form, and were to be entered in the books of the company, and "after such entry, but not till then, the assignee was to be entitled to the benefit":—Held, that this did not apply to a transfer by act of law as in the case of bankruptcy. *Lane v. Smith*, 14 Beav. 49.

(B) CHARTER OF INCORPORATION.

A charter of incorporation was granted by the Crown to certain persons to form a company for the purpose of purchasing and making a profit of lands and of working mines in the island of L, &c. It directed that 100,000*l.*, half the intended capital of the corporation, should be subscribed within twelve months, and 50,000*l.* of it paid up within the same period; and that the corporation should not begin business until it should have been certified to the Board of Trade, by three directors, that the required capital had been subscribed and the 50,000*l.* paid

up. There were other directions respecting the preparing, executing, and depositing a deed of settlement. Then followed a proviso to the effect that if the corporation should fail to enter into, execute, and deposit the deed of settlement within the time prescribed, or "shall not comply with any other the directions and conditions in our said letters patent contained, it shall be lawful for us, our heirs or successors, to revoke and make void our said royal charter, and every clause, matter and thing therein contained, either absolutely or under such terms and conditions as we or they shall think fit." A second proviso empowered the Crown, at any time after the expiration of twenty-one years, to revoke and make void the charter or add modifications or conditions. The charter concluded with a statement that it was granted on the express condition, that the corporation should conform to the directions of a Secretary of State with regard to their intercourse and dealings with foreign powers. The company commenced business without having 50,000*l.* of their capital paid, but three directors of the company had knowingly sent in a certificate to the Board of Trade, falsely stating that it had been paid up:—Held, by some of the Judges, that the sending in the false certificate was a breach of a condition in the charter: by others, that though not a breach of a condition, it was a misuser and abuse of their franchise by the corporation; but that on either view the sending the certificate and commencing business without the prescribed capital rendered the charter liable to forfeiture. Held, by all (excepting *Parke, B.*), that the first proviso did not limit the power of repealing the charter by *scire facias*, but was intended (though possibly without effect) to give the Crown an additional power of revocation; consequently, that a party aggrieved might, on the fiat of the Attorney General, proceed by *scire facias* to repeal the charter without having previously obtained a revocation of it by the Crown under the Great Seal or sign manual. *Parke, B.*, however, was of opinion that the non-payment of the capital and the giving the false certificate were breaches of directions and conditions in the charter; that by the proviso it became necessary for a party seeking to avoid the charter for such breaches to obtain first a revocation in writing under the Great Seal or sign manual; and that it was lawful for the Crown to annex such a condition to the charter. *The Eastern Archipelago Co. v. the Queen* (in error), 23 Law J. Rep. (N.S.) Q.B. 82; 2 E. & B. 857.

A power for a corporation to accept and take, and for persons to give, for its benefit, real estate, notwithstanding the Statutes of Mortmain, and so far as they are not restrained by law, is a power for the corporation to take land, provided the grant is made in the form prescribed by the Statutes of Mortmain. *Robinson v. the Governor of the London Hospital*, 22 Law J. Rep. (N.S.) Chanc. 754; 10 Hare, 19.

A subsisting charter of incorporation is valid until it is impeached and disturbed; and the rights of parties under it are to be dealt with by the Court, irrespectively of what might be the result of future proceedings by the Attorney General or the Crown to set it aside. *Ibid.*

Semble.—That the annual income of the corporation of the London Hospital is not limited by its charter to 4,000*l.* *Ibid.*

Semble—That the shares of the London Assurance Company and Bank of England stock are personality. *1 bid.*

The subscription contract of a projected banking company, after reciting that the capital was agreed to consist of 1,000,000*l.*, with power to increase it to 3,000,000*l.*, and that application had been made to the Crown for a charter nominating certain persons directors until the charter should be obtained, with power for them to arrange the terms of the charter in such manner as they should think necessary in compliance with the requisition of the government, and to narrow or extend the objects of the company as might be necessary. When the charter should have been sealed the directors were empowered to prepare a deed of settlement, and to call for the first instalment from the subscribers, and to declare a forfeiture of the shares of any subscribers who did not execute the deed of settlement. A charter was obtained incorporating the company, with a capital of 644,000*l.*, and power to increase it to 1,000,000*l.* with the consent of the Lords of the Treasury. A call was made and a deed of settlement prepared, reciting the charter, the call and its payment by the parties to the deed of settlement:—*Held*, first, that the power of the directors was not terminated on the grant of the charter; secondly, that the charter was not consistent with the subscription contract; thirdly, that the call was properly made; fourthly, that the deed of settlement was binding on the subscribers to the subscription contract; but, fifthly, that as the deed of settlement made the payment of the call a requisite preliminary, and the subscription contract did not make non-payment of the call a ground for forfeiture, the directors could not declare a forfeiture for non-execution of the deed of settlement. *Norman v. Mitchell*, 5 De Gex, M. & G. 648; 19 Beav. 278.

Upon the dissolution of a chartered company, the distribution of its assets among the shareholders must be regulated by a consideration of the entire contract *inter se* created as well by the dealings of the company as by the terms of their charter and acts of parliament. *Somes v. Currie*, 1 Kay & J. 605.

The charter of the New Zealand Company, after reciting that 100,000*l.* had been subscribed as the company's capital by paid-up shares of 25*l.* each, and that 200,000*l.* more was to be raised, declared that the capital of the company should be 300,000*l.*, in shares of 25*l.* each, of which at least two-thirds should be paid up within twelve months from the date thereof, but that the charter should be in full force notwithstanding the remaining one-third should not have been paid up; and it provided that the proprietors, before or after any call, might pay money in advance upon their shares, and that the company should pay interest upon the monies so paid in advance, and that every shareholder should be entitled to the "profits and advantages" attending the capital, in proportion to the number of shares held by him. By the deed of settlement it was provided that the concurrence of three-fourths of the shareholders should be necessary to enable the directors to make calls. The company afterwards raised an additional 100,000*l.* by 8,000 25*l.* shares, on which only 12*l.* 10*s.* was paid. They divided profits in proportion to the amount actually

paid. On the dissolution of the company,—*Held*, that the assets were divisible on the same principle, and that the shareholders who had paid up 25*l.* per share were not entitled to have 12*l.* 10*s.* per share first paid to them, nor were they entitled to be paid interest on that sum. *Ibid.*

(C) REGISTRATION OF.

[See *post*, 3—(A) (b).]

(D) SHARES.

[Action for not re-delivering, see *STOCK*.]

(a) Register of Shareholders.

The prisoner was indicted for forging a transfer of railway shares from H to himself, with intent to defraud. It was stated on the trial, before the Recorder of London, by a witness, that the shares had been transferred to H without consideration, but no evidence of a transfer was given. The only evidence of H's title was the register of shareholders in which his name was inserted. Objection was taken to the admissibility of the register, and it was also objected that the transfer to H should have been proved. The Recorder overruled the objection, and told the jury, upon the question of the intention to defraud, that it was not necessary to find an intent to defraud any one in particular, but they must have in view some person who could be defrauded, so that the consequence of the prisoner's act would necessarily or possibly be to defraud some person, and it was for them to say whether as H would be the person to whom the dividends, if any (of which there did not seem to be much probability), would legally be payable, he might not have been defrauded if the company got into better circumstances, or whether the company might not have been defrauded if they had been induced by the forgery to insert P's name on the register, and had made a call (which they appeared about to do), or whether any person might not have been defrauded if induced to advance money on the shares in anticipation of the company coming round, and on the faith that P was the real owner of them:—*Held*, that though the register did not prove H's title to the dividend, it was admissible in evidence; that it was not necessary to prove H's title as a shareholder; and further, that the direction, though possibly open to objection in some respects, was sufficient considered with reference to the intent to defraud H. *Regina v. Nash*, 21 Law J. Rep. (n.s.) M.C. 147; 2 Dears. C.C.R. 493.

The register of shareholders of a company within the Company's Clauses Consolidation Act, authenticated by its seal, is admissible in evidence without any proof that such seal was affixed at an ordinary meeting of the company pursuant to the 9th section. *The North-Western Rail. Co., or The London and North-Western Rail. Co. v. M'Michael*, 20 Law J. Rep. (n.s.) Exch. 6; 5 Exch. Rep. 855.

(b) Transfer.

(1) In general.

The holder of shares in an incorporated company under the operation of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, is not entitled to execute an effectual transfer by deed of his shares, until all calls due at the time upon such shares have actually been paid, and the secretary of the company

is warranted in refusing to register under the 15th section, a deed of transfer executed whilst calls remain due. *Re Hall v. the Norfolk Estuary Co.*, 21 Law J. Rep. (N.S.) Q.B. 94; *nom. Regina v. Wing*, 17 Q.B. Rep. 645.

(2) *Compelling Registration of.*

At a general meeting of the shareholders of a railway company a resolution was passed deferring the construction of the railway, and for a return of 14s. per share of the paid-up capital to the shareholders, which was afterwards confirmed by resolutions passed at subsequent meetings. These resolutions were published in the public papers, and in pursuance of them an instalment of 10s. per share was returned and received by the several shareholders, and the certificates of the shares bore an indorsement to that effect, signed by the company's secretary. Subsequent to this return being made, and after the time allowed for the compulsory purchase of land by the company had expired, W P became the purchaser of five shares from one of the shareholders who had agreed to the above resolutions and had received the instalment of 10s. per share in respect of the said five shares, and a deed of transfer of the same was duly executed. This deed W P delivered with the certificates of the shares to the secretary of the company, and required him to register the same in the manner provided by the 8 & 9 Vict. c. 16. s. 15, which the secretary refused to do:—Held, that W P was not entitled to a writ of mandamus to compel the registering of such transfer deed under the above section. That as one of the public he had no right whatever to the writ, and that the circumstances under which he had become a purchaser of the shares shewed that he was not proceeding *bona fide* for the purpose of enforcing the rights of a shareholder. *Regina v. the Liverpool, Manchester and Newcastle-upon-Tyne Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 284.

A declaration alleged that N, who appeared by "the register of shareholders" to be the holder of 300 shares, transferred them to the plaintiff, and that the plaintiff delivered the deed of transfer to the defendants for the purpose of entering a memorial of it in "the register of transfers," and required the defendants to make such entry. Breach, that the defendants did not make such entry, whereby the plaintiff was deprived of his right to appear in the books of the company as a shareholder, and by reason of N still appearing to be the holder of the said shares, and failing to pay calls made on him after the delivery of the transfer to the defendants, the defendants forfeited the said shares, and confirmed the forfeiture and sold the shares. The second count alleged that the plaintiff was the lawful holder of and entitled to 300 shares, and that the defendants wrongfully, and in pretended exercise of the powers of the Companies Clauses Consolidation Act, declared the said shares forfeited, and confirmed the said forfeiture and sold the said shares, alleging special damage:—Held, that the declaration shewed a good cause of action, and that it was not necessary in the first count to allege that a reasonable time had elapsed before the commencement of the suit. *Catchpole v. the Ambergate, Nottingham, and Boston and Eastern Junction Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 35; 1 E. & B. 111.

(c) *Forfeiture.*

Notwithstanding the forfeiture and cancellation of shares, and the issuing of new ones, the right to recover, in an action for calls, remains unimpaired in the company. *Inglis v. the Great Northern Rail. Co.*, 1 Macq. H.L. Cas. 112.

Directors had power, on non-payment of calls, to sue for them or forfeit and sell the shares. They proposed to a shareholder to relieve him from further liability, on his consenting to an absolute forfeiture. He assented, but the directors having afterwards discovered that he was in good circumstances, refused to complete. The Court declined to compel the directors specifically to perform the contract. *Harris v. the North Devon Rail. Co.*, 20 Beav. 384.

The discretion of directors to forfeit shares for non-payment of calls is a trust, to be exercised for the benefit of all the shareholders. *Ibid.*

(E) *DIVIDENDS.*

[*Carlisle v. South-Eastern Rail. Co.*, 6 Law J. Dig.; 13 Beav. 295. And see *Dalton v. the Midland Counties Rail. Co.*, title *BARON AND FEME*, (E) (a).]

(F) *CALLS.*

(a) *Form and Validity, in general.*

Held, on error, that a call payable by instalments is valid. *The London and North-Western Rail. Co. v. M'Michael*, 20 Law J. Rep. (N.S.) Exch. 233; 6 Exch. Rep. 273: s.p. *The Birkenhead, Lancashire, and Cheshire Rail. Co. v. Webster*, 20 Law J. Rep. (N.S.) Exch. 234; 6 Exch. Rep. 277. Also, *The Ambergate Rail. Co. v. Norcliffe* (in error), 20 Law J. Rep. (N.S.) Exch. 234; 6 Exch. Rep. 629.

Debt for calls. Plea, that the call was not made by any persons having authority on behalf of the company to make it. By the Swansea Dock Act, passed in July 1847, certain persons were named as directors, who subsequently resolved that the principal place of business should be Swansea. On the 5th of October, at a meeting of some of the directors held in London, it having been then resolved to call an extraordinary general meeting of the company to be held in London on the 20th of October, a notice was, on the 5th of October, inserted in the third edition of the *Sun* newspaper, published and circulated in London on that day, and subsequently published in other newspapers, calling a meeting of the company in London on the 20th of October. At the meeting held on the 20th of October, the directors appointed in July were discharged, others being appointed. By the 71st and 138th sections of the Companies Clauses Consolidation Act, 1845, fourteen days' notice of all public meetings is to be given by advertisement in a paper circulating in the district of the company's principal place of business. There was no evidence to shew that the third edition of the *Sun* newspaper of the 5th of October ever reached Swansea. On the 21st of October 1847 and the 31st of January 1848, meetings of shareholders were held at Swansea, when the number of directors was reduced to nine, and on the 10th of February 1848, three of those directors made the call in question:—Held, that as it was not proved that the *Sun* newspaper of the 5th of October reached Swansea, the notice was bad, and the meeting of the 20th of October, which discharged the directors by

whom the call was afterwards made, was invalid, and consequently the call was good. *The Swansea Dock Co. v. Levien*, 20 Law J. Rep. (N.S.) Exch. 447.

A company was authorized by three acts of parliament to make three distinct railways (not forming one line), with separate amount of capital for each. Another railway company was, by a fourth act of parliament, authorized to take a lease of the three lines, and did so; and the whole undertaking was placed under the controul of a joint committee of directors of all the companies. One of the three lines was sufficiently completed to be, and was, opened, and the directors made calls for the purpose of entirely finishing the opened line, the other two being abandoned. An injunction was granted at the Rolls, restraining the application of money and the making of calls for any purposes not authorized by the three acts, excepting only for the purposes of ordinary repair:—Held, on appeal, that on an interlocutory application, in the absence of the lessee company, the opened line being worked under the direction of the joint committee, the injunction must be dissolved. *Hodgson v. Earl of Powis*, 21 Law J. Rep. (N.S.) Chanc. 17; 1 De Gex, M. & G. 6; 12 Beav. 392, 529.

(b) *Who liable, in general.*

[See *Wylam Steam Fuel Co. v. Street*, title BANKRUPTCY, (M) (g).]

The defendant obtained for and obtained shares in a projected company, the capital of which was to consist of 500,000l. in 50,000 shares, and paid the deposits thereon. The company was completely registered under the 7 & 8 Vict. c. 110, and the defendant's name was entered as a shareholder in the register of shareholders and in the schedule to the deed of settlement, but he never executed the deed of settlement, or any deed referring to it. The full amount of capital never was subscribed, but the company began business with less; but not succeeding, a private act of parliament was passed for the purpose of winding up the concern. This act recited the deed of settlement, and the facts as to the deficiency in the subscribed capital, and authorized the directors to make calls upon the shareholders and bring actions to recover such calls, and enacted that in such actions it should be sufficient to prove that the defendant was a holder of shares at the time of the call, and that the production of the register of the shareholders of the company should be *prima facie* evidence of the number of shares held by him. It also enacted, that except as otherwise provided by the act, every such call should be made according to the deed of settlement, and as regarded the liabilities of the shareholders, the forfeiture of shares, and otherwise, should be deemed to have been made under such provisions; and also that nothing in the act contained, except as therein expressly enacted, should render any shareholder or other person liable to the company, if such shareholder or other person would not have been liable thereto if the act had not passed:—Held, in an action for a call under the private act, that the defendant was not liable as a shareholder or otherwise, as he had not executed the deed of settlement, or any deed referring thereto, and the private act only extended to such shareholders. Held, also, that even had the private act extended to persons who

had agreed to take shares, he would not have been liable, as the acceptance of the shares was conditional upon the full capital being subscribed, and this condition had not been performed or waived. *The Galvanized Iron Co. v. Westoby*, 21 Law J. Rep. (N.S.) Exch. 302; 8 Exch. Rep. 17.

Where a person applies for shares, and undertakes in the usual way to accept a less number, pay the deposit, and execute the requisite deeds, and receives in return a letter of allotment notifying that a deposit is to be paid by a certain day on the number allotted to him, and that scrip certificates will be delivered to him in return for the bankers' receipt for such deposit after execution of the parliamentary contract and subscribers' agreement, and that the shares allotted will be considered as forfeited if the deposit be not paid and the parliamentary contract and subscribers' agreement executed within a certain time, he does not become a shareholder entitled to be put upon the register of the company by the due payment of the deposit, if he does not execute the deeds within the time required. *The Waterford, Wexford, Wicklow and Dublin Rail. Co. v. Pidcock*, 22 Law J. Rep. (N.S.) Exch. 146; 8 Exch. Rep. 279.

In debt for calls, the register of the company was produced, which contained the defendant's name as a shareholder:—Held, that evidence that the defendant had only paid the deposit under the above circumstances, rebutted the *prima facie* proof of the register. *Ibid.*

(c) *Infants.*

An infant, being a shareholder in a railway company, is liable to an action for calls until he waives or repudiates the ownership of the shares. Therefore, to such an action a simple plea of infancy was held bad after verdict. *The London and North-Western Rail. Co. v. M'Michael*, and *The Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Pilcher*, 20 Law J. Rep. (N.S.) Exch. 97; 5 Exch. Rep. 114, 121.

Held, also, that a plea further averring that the infant had never ratified or confirmed the purchase, and that he had derived no profit or advantage from the shares, and that they were wholly useless to him, did not free him from the obligation to pay the calls. *Ibid.*

Quære—whether the plea would have been good had it averred that the defendant was still a minor. *Seemle*—It did not sufficiently shew that the contract was a losing one. *Ibid.*

To an action for calls the defendant pleaded, that before the plaintiffs were incorporated the defendant, being then an infant, contracted to take the shares; that after he was of age he disaffirmed and repudiated the contract, and that after he was of age he never satisfied or affirmed the contract, or derived any benefit from the shares or acted as the holder of them:—Held, that the plea was bad, for not averring that the repudiation was within a reasonable time after the defendant became of age. *Dublin and Wicklow Rail. Co. v. Black*, 22 Law J. Rep. (N.S.) Exch. 94; 8 Exch. Rep. 181.

(d) *Trustees.*

Messrs. M advanced money to C, a sharebroker, to enable him to purchase railway shares; C being unable to pay the advances, at the request of Messrs.

M, transferred the shares to S, upon trust to secure to Messrs. M the money advanced by them, and subject thereto for C. The shares were registered by the railway company in the name of S, who subsequently died insolvent. Upon a bill by the railway company against Messrs. M, to obtain payment of arrears of calls made on these shares:—Held, that the party whose name is on the share-list is alone liable to the company for the calls: and that the Companies Clauses Consolidation Act contemplates legal rights only, and does not entitle the company to recover calls against an equitable owner; and the bill was dismissed, with costs. *The Newry, Warrenpoint and Rostrevor Rail. Co. v. Moss*, 20 Law J. Rep. (N.S.) Chanc. 633; 14 Beav. 64.

(e) *Power to make.*

The 22nd section of the Waterford, Wexford, &c. Railway Act enacts, that when 1,500,000*l.* shall have been subscribed, it *shall be lawful* for the company to put in force all the powers of the act and of the acts therein recited, as regards that portion of the said railway situate, &c.:—Held, that the raising of this sum was not a condition precedent to the power of the company to make calls, but only to their exercising the compulsory powers of taking lands, &c. *The Waterford, Wexford, Wicklow and Dublin Rail. Co. v. Dalbiac*, 20 Law J. Rep. (N.S.) Exch. 227; 6 Exch. Rep. 443.

(f) *Actions for.*

(1) *Limitation of Time for suing.*

An action against a shareholder of a company for calls, in which the company declares in the general form given in the 26th section of the Companies Clauses Consolidation Act, 1845, is an action on the statute; and therefore a plea alleging that the action is on contract without specialty, and that the causes of action accrued within six years, is bad. *The Cork and Bandon Rail. Co. v. Goode*, 22 Law J. Rep. (N.S.) C.P. 198; 13 Com. B. Rep. 826.

(2) *Declaration.*

In an action by a railway company for calls, a declaration framed on section 26. of the statute 8 & 9 Vict. c. 16, alleged that the defendant "is the holder of ten shares, and is indebted to the company in 100*l.* in respect of a call of 10*l.* upon each of the said shares:—Held, good, on special demurrer, by the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, although it was objected that the declaration did not allege that the defendant was the holder of such shares at the time the calls were made. *Wilson v. the Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (in error), 20 Law J. Rep. (N.S.) Exch. 306; 6 Exch. Rep. 626.

G) POWERS, DUTIES AND LIABILITIES OF COMPANIES.

(a) *As to Shareholders generally.*

Upon the establishment of the West Flanders Railway, a person who had been instrumental in forming the company, and in procuring the grant from the Belgian government, obtained from the directors an agreement to pay him a large percentage upon the capital of the company, to allot him 4,000 shares, and to guarantee him a salary of 500*l.*

a year as general manager of the company. The directors also allotted to themselves 20,000 shares, and also another 10,000 shares for themselves and the other shareholders in the Sambre and Meuse Railway, of which they were also directors. These facts were suppressed in the prospectus they subsequently issued; which, however, did state that they had reserved to themselves a commission of 3*l.* per cent. upon the capital by way of reimbursement for the expenses, liabilities and payments already incurred. Upon a bill by an original shareholder to be relieved from his shares and to obtain payment of his deposit money and calls, with interest, on the ground that he had been induced to take them by the representations made by the prospectus:—Held, that the omission to state these facts in the prospectus was not such a misrepresentation or concealment as would induce the Court to set aside the contract, and the bill was dismissed, with costs. *Pulsford v. Richards*, 22 Law J. Rep. (N.S.) Chanc. 559; 17 Beav. 87.

Parliament having created a company, the power rests in parliament to vary its constitution, or to controul or to annihilate it, and it is not the function of a Court of equity to decide on the propriety of an application to parliament to vary the original object contemplated by the act. Such an application is not illegal if it be pursued by legal means. But it appearing in a suit by certain shareholders that a company had resolved to use its funds and to pledge its credit, and to make contracts for the purpose of such an application to parliament:—Held, that such application of funds and pledges and contracts were illegal; and at the instance of the shareholders an injunction was granted restraining the appropriation of funds, the pledging of the company's credit, and the entering into contracts in support of such an application to parliament, but the Court declined to restrain the company from introducing or soliciting such bill or using the name and seal of the company for these purposes. *The Great Western Railway Company v. Rushout*, 5 De Gex & S. 290.

Certain of the directors of a railway company acting on the nomination of another railway company which were interested in certain shares therein, and which nominated those directors by virtue of the act constituting the company, were excluded by a resolution of the board of directors from the meetings of the directors, and the majority delegated all the powers of the board to a managing committee:—Held, that, although in such a body the majority binds the minority, yet that it is essential to the validity of their acts that the view of the minority should have been heard, and such exclusion of directors was restrained. *Ibid.*

A railway company was beneficially entitled to certain shares in another railway company, which, under the authority of the act constituting the latter company, were vested in trustees for the former. The former company filed a bill against the directors and certain shareholders of the latter, and against the trustees of their own shares, complaining that certain dispositions of the trust funds and contracts which were in contemplation were illegal, and praying for an account and relief against the directors, and an injunction to restrain such disposition of funds and contracts:—Held, that as the equitable title of the plaintiffs was executed, they, making their

trustees defendants, could sustain their suit, and were not precluded from suing by the provisions of the Companies Clauses Consolidation Act, 1845, sect. 20, which exonerates companies from seeing to the execution of any trusts affecting shares. *Ibid.*

A party becoming a member of a public company or corporation upon false representations, made not to him alone but to him and other members, cannot be entitled on that ground to any decree for the repayment of his subscriptions, to which the other members would not be equally entitled; and if he be entitled to such repayment, he cannot obtain that relief in the absence of the other members. *Macbride v. Lindsay*, 22 Law J. Rep. (N.S.) Chanc. 165; 9 Hare, 574.

It is no ground for relief in equity, at the suit of a shareholder against the company, that the charter from the Crown or the grant to the company from a private person has been obtained by misrepresentation to the Crown or to such grantor. It is for the Crown or the grantor, if either should complain of the fraud and misrepresentation, to take proceedings to set aside the charter or the grant. *Ibid.*

The provision that the business of the company shall commence from the date of the certificate of the directors, that a stipulated number of shares had been subscribed for, and the stipulated capital paid up:—Held, not to mean that the company was not to exist antecedently to that date, when the deed also provided that the parties were to be associated in the business to be carried on, and the directors to have power to act for the company, notwithstanding the full number of shares were not subscribed for. *Ibid.*

(b) *As to other Persons generally.*

A railway company being indebted to a large amount upon bond and mortgage, and also upon simple contract, a bond creditor of the company filed a bill, on behalf of himself and other bond creditors, against the remaining bond creditors and mortgagees, and the company, charging that, under the Companies Clauses Consolidation Act, 1845, ss. 42. and 44, and the special act, the bond creditors and mortgagees had a statutable lien upon all the property and effects of the company, and praying a receiver and manager. On motion, by consent, a receiver was appointed. While the receiver was in possession, a simple contract creditor of the company sued out execution and levied upon the goods of the company, and refused to withdraw after notice of the order for a receiver. Upon motion to commit the sheriff for contempt, it was held, that it was no answer to the motion to shew that the order for a receiver ought not to have been granted; and the sheriff was ordered to withdraw and pay the costs, but without prejudice to any application by the execution creditor to be heard *pro interesse suo*, or otherwise. *Russell v. the East Anglian Railway Company*, 20 Law J. Rep. (N.S.) Chanc. 257; 3 Mac. & G. 104.

On petition by execution creditor, the Court, on the ground that the plaintiff had no equity for a receiver, ordered that the receiver should keep sufficient goods within the bailiwick for one month, and that the execution creditor should be at liberty to levy after that time, unless in the mean time security was given for the debt, &c., to await the order of the Court. *Ibid.*

DIGEST, 1850—1855.

The 42nd and 44th sections of the Companies Clauses Consolidation Act, 1845, do not give to the mortgagees and bond creditors of a railway company a specific lien upon the goods and chattels of the company. *Ibid.*

Quære—whether the Court of Chancery has jurisdiction to appoint a receiver and manager of a railway. *Ibid.*

A corporation of itself cannot be guilty of fraud; but where it can only accomplish the object for which it was formed through the agency of individuals, who act fraudulently, the corporation stands in the same situation with respect to the conduct of its agents as a private person would have stood had his agent so misconducted himself. *Ranger v. the Great Western Railway Company*, 5 H.L. Cas. 72.

Lessees of premises, occupied by them as a ropery, agreed to withdraw their opposition to a bill in parliament for a railway, which would intersect the ropery. The agreement, among other stipulations, provided that the railway should be so constructed as that when finished the level of the ropery should not be altered, nor the surface of the ropery be in the least respect diminished:—Held, that the railway company were bound to restore the surface so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only. *Hawtry v. the East and West India Docks, &c. Railway Company*, 1 De Gex, M. & G. 290.

A canal company was incorporated by a special act of parliament, which authorized them to purchase lands for the purposes of the act, and for no other purpose, and empowered them to levy rates, tolls and dues, and to borrow money on mortgage thereof; and contained a provision that all persons whatsoever might navigate upon the canal upon payment of the rates and dues thereby authorized to be taken. The company made several mortgages of the rates, tolls and dues under the act; one of the mortgages, on behalf of himself and all others, obtained the appointment of a receiver of the company's rates, tolls and dues, who was ordered to pay thereout the expenses of carrying on the company's business, and then the interest on the said mortgages, and to pay the balance into court in the cause. A judgment creditor of the company presented a petition in the cause before the hearing, praying that he might be at liberty to sue out and execute a *fi. fa.* and *elegit* against the goods and lands respectively of the company:—Held, that he might execute a *fi. fa.*, but that all he could take under the *elegit* would be such right in the lands as the company had, namely, subject to the mortgages and to the right of user of the canal by the public, and subject also to the powers of management of the company. *Potts v. the Warwick and Birmingham Canal Navigation Company*, Kay, 142.

(c) *Appropriation of Funds.*

The chairman of the South-Eastern Railway Company promised the managing committee of a proposed railway company that, in consideration of their not abandoning their project and intention of applying to parliament for an act to authorize the making of the proposed line, the South-Eastern Railway Company would, in case of rejection of the scheme, insure the company, of which the plaintiffs

were the managing committee, against loss which might be occasioned to such proposed railway company by such rejection and failure, and would defray and pay all expenses incurred by them in endeavouring to obtain the act. The South-Eastern Railway Company, by their acts, were authorized to apply their funds for certain purposes only, not including the payment of the costs of the proposed proceeding in parliament:—Held, that the agreement was void, as it was an agreement made by contracting parties (who must be presumed to have full knowledge of the powers conferred on the South-Eastern Railway Company by their acts of parliament, which were public acts,) that that company should do an act which was illegal, contrary to public policy and the provisions of the statutes. *Macgregor v. the Deal and Dover, &c., Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 69; 18 Q.B. Rep. 618.

A railway company, incorporated by act of parliament, is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever. *East Anglian Rail. Co. v. Eastern Counties Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 23; 11 Com. B. Rep. 775.

A railway company was incorporated by a public act of parliament, "for the purpose of making and maintaining" a particular railway and other works by the act authorized, "and for other purposes therein declared." They were empowered by the act to raise money for making and maintaining the railway and other works authorized by the act, and the money so raised was directed to be expended towards those purposes, and otherwise carrying the act into execution; and after paying these expenses the profits of the company were to be divided among the proprietors. The purposes mentioned in the act were confined to acts to be done upon and relating to the railway to be made by the company. The defendants, the company so incorporated, covenanted with the plaintiffs, another railway company, to take a lease of their railways, and to pay the costs of soliciting bills then pending in parliament, by which the plaintiffs were to be authorized to make extensions and branches of their railways. *Ibid.*

In an action for breach of covenant, in not paying the costs of the bills in parliament.—Held, that the act incorporating the defendants, being a public act, must be presumed to be known to the plaintiffs, and that they could not recover, inasmuch as the covenant entered into by the defendants was beyond the scope of their authority as a corporation, and was, therefore, illegal and void, however beneficial to the defendants' railways the objects of the covenant, if carried out, might be. *Ibid.*

(d) *Compliance with deposited Plans.*

Mandamus commanding the Caledonian Railway Company to construct a public carriage road, and a bridge for carrying the same over the railway, and the approaches thereto, under the obligations contained in the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, and the company's special act, and in conformity with a plan, section, and cross-section, deposited with the clerk of the peace, and as therein particularly marked. From the return by the company it appeared, that in making the railway within the deviation line authorized by the special

act, a part of the said carriage-road and the rates of inclination thereof, as delineated in the said cross-section, had been altered, and that it was impossible, consistently with such deviation line, to make and complete the alteration in the said road, in conformity with the rates of inclination delineated in the said plan and section and cross-section:—Held, upon demurrer, that the 14th section of the 8 & 9 Vict. c. 20. applied to the construction of the railway and not to cross-roads; and that the 9th section of the special act, 9 & 10 Vict. c. cxxlix., providing that it should be lawful for the company to construct the bridges for carrying the railways thereby authorized, over any roads, of the heights and spans and in the manner shewn on the sections deposited, applied only to the heights and spans and not to the rates of inclination delineated in the sections deposited; and therefore that the mandamus could not be supported. *Regina v. the Caledonian Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 147; 16 Q.B. Rep. 19.

(e) *Making and completing the Line.*

The time limited by a railway company's special act for the exercise of the company's powers for the compulsory purchase of lands, having actually expired before the granting of a writ of mandamus,—Held, upon a demurrer to a return to the writ, that the company could not be compelled by mandamus to purchase the lands necessary for making and completing a branch railway, as they had been required to do by a notice on the part of the landowners, a month before the expiration of their powers. The case of *Regina v. the Birmingham and Gloucester Rail. Co.* distinguished. *Regina v. the London and North-Western Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 399; 16 Q.B. Rep. 864.

Where a company have obtained an act of parliament enacting that "it shall be lawful" for them to make a railway, and giving compulsory powers of taking land for that purpose, upon a representation that it will be for the public benefit, and that they are willing to execute the proposed work, there is a contract and obligation with the public and the landowners to make the railway, attaching from the moment when the act receives the royal assent, and the performance of which will be enforced by mandamus, at the instance of a landowner along the line, although the company have never availed themselves of any of their powers, and although the existence of those powers may be limited to a specified period. *Regina v. the Lancashire and Yorkshire Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 57; 1 E. & B. 228.

An act of parliament, declaring a proposed railway to be for the public benefit, equally imposes an obligation on the promoters to construct the line, whether the words authorizing its construction are permissive or imperative. *Ibid.*

The writ of mandamus called upon the company to take all necessary steps, both as to the purchase of lands and otherwise, for making and completing and to make and complete the railway. The act of parliament authorizing the railway enabled the company to raise the necessary capital by the creation of shares and by mortgage. By the Lands Clauses Consolidation Act (s. 16.) the subscribing of the capital is made a condition precedent to exercising any of the compulsory powers for the purchase of land. There was no allegation in the writ that any

money had been raised by shares or mortgage:—Held, that assuming section 16. to apply to the case of an existing company obtaining powers to construct additional works, the writ required them to raise the requisite funds, in the mode pointed out by their act, and that it must be assumed that they had the power of doing so. *Ibid.*

A return to the writ, merely alleging that the company had taken no steps towards making the railway, is no answer. *Ibid.*

The above points were so held by *Lord Campbell, C.J., Coleridge, J. and Crompton, J.; dissentiente Erle, J. Ibid.*

Section 16. of the Lands Clauses Consolidation Act (8 Vict. c. 18), which enacts that the whole of the capital shall be subscribed under a contract binding the parties thereto for the payment of the sums subscribed, before it shall be lawful to put in force any of the powers of compulsory purchase, does not apply to a case where an extension line of railway is to be made by an existing company by means of funds to be raised by new shares in such company. *Regina v. the Great Western Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 65; 1 E. & B. 253.

Supposing section 16. to apply to such a case, where a mandamus ordered the company to make the extension line, a return alleging that the capital required for making it had not been subscribed under any contract as required by that section, and that the line could not be made without exercising the compulsory powers of purchase, is no answer to the writ, as it does not shew any inability to obtain such a subscription or any incapacity to obey the writ. *Ibid.*

Where the period for exercising the compulsory powers had expired since the return, a peremptory mandamus to make the line must nevertheless be awarded. *Ibid.*

Mandamus to complete a line of railway, authorized to be constructed by a special act incorporating the provisions of the Lands Clauses Consolidation Act (8 Vict. c. 18). Return, that the undertaking authorized by the special act was intended to be carried into effect by means of a capital to be subscribed by the promoters, and that the whole of such capital had not been subscribed under a contract as required by the 8 Vict. c. 18. s. 16, or otherwise, and that the defendants had not been able to procure the subscription of such capital, and that the lands required could not be obtained without the exercise of the compulsory powers. Plea, by way of estoppel, that the defendants had given notices to other landowners on other parts of the line, in exercise of the compulsory powers, and that proceedings to arbitration, under the 8 Vict. c. 18, had been taken upon those notices:—Held, that the return was a good answer to the writ; that the plea alleging what was *res inter alios acta* could not operate as an estoppel; and that a peremptory mandamus could not, therefore, be awarded. *Regina v. the Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 191; 1 E. & B. 372.

Where a railway company have obtained an act of parliament reciting that the making of a specified line of railway "will be of public advantage," and that they are willing to make the whole, and enacting that "it shall be lawful" for them to make such line, and giving them compulsory powers of taking land

for that purpose, and they have in partial exercise of such powers taken lands and made part of their line, there is an obligation upon them to complete the whole of the line specified in the act; in respect of which a mandamus will lie. *Regina v. the York and North Midland Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 41; 1 E. & B. 178.

The same principle applies where the portion not completed is a deviation line, substituted for a corresponding portion of the original line authorized to be abandoned by a subsequent act of parliament. *Ibid.*

Such a mandamus may issue on the application of a landowner whose land would be required for the specified line, or is prejudiced by the making of it. *Ibid.*

Semble, also, that a similar obligation to complete the line exists towards the public and the shareholders in the company. *Ibid.*

A line from A to D, passing through B and C, was authorized by act of parliament. The portion between A and B was made, and that between C and D had become impossible by reason of the expiration of the powers when the writ issued:—Held, that this was not a good return to a mandamus requiring the completion of the part between B and C, as to which the powers were still in force. *Ibid.*

A suggestion that the line, if made, would be unnecessary or inconvenient, from the nature of the locality, or unremunerative, is no answer to the writ; nor is it any answer that the funds, which will in reasonable probability come to the possession of or be disposable by the company, will fall short by 100,000*l.* of the sum necessary for making the railway in question. *Ibid.*

If a company carrying out the design with good faith and prudence, were, from unforeseen casualties, left without funds—*Semble*, that the Court, in its discretion, would not grant a mandamus. *Ibid.*

The above points were held by *Lord Campbell, C.J. and Crompton, J.*

Held, by *Erle, J.*, that such an act of parliament, using permissive, and not imperative words, imposes no obligation on the company of making the line thereby authorized, although they have exercised some of their powers by making part of the line. *Ibid.*

The obligation arising from taking land is fulfilled by making and opening an available railway, as far as the land is taken. *Ibid.*

A railway company obtained an act in 1846, which, after reciting that it would be attended with local and public advantage if a railway were made from Y through M and C to B, and that the company were willing to make the line, enacted that it should be lawful for the company to make the proposed railway. By a second act, in 1849, the company were authorized to abandon the line between M and C, and it was provided that it should be lawful for them instead thereof to make a new line between the same two towns. By the first act the compulsory powers to take lands were limited to three years, and the time for making the railway to five years, after which time the powers granted to the company were to cease (except as to the part of the line completed) and the land of the uncompleted part, if it had been taken by the company, was to revert to the landowners. By the second act the time was extended, but a longer period was

granted for the exercise of the compulsory powers in respect of the deviation line than in respect of the original line. The company completed the line from Y to M only, and did not make the rest, on the ground that it would not be remunerative. After the compulsory powers of the company to take land for completing the line from C to B had expired, but while the powers still continued with regard to the substituted line under the second act, a mandamus was applied for by persons whose land had been taken for making the completed portion of the line, and who also had land on the new proposed line, to compel the company to make the substituted line between M and C:—Held, that the substituted portion between M and C was to be treated as if it had been part of the original proposed line between Y and B. *The York and North Midland Rail. Co. v. Regina* (in error), 22 Law J. Rep. (N.S.) Q.B. 225; 1 E. & B. 858: reversing *Regina v. the York and North Midland Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 41; 1 E. & B. 178 [see the last case].

Held, further, that the statutes gave a power to the company, but did not oblige them, to make the railway: that they contained no implied contract between the company and the landowners along the proposed line that the railway should be made. *Ibid.*

Held, also, that the company by making part of the line had not thereby put themselves under an obligation to make the remainder. *Ibid.*

To a mandamus commanding a railway company to complete their line, it is not a sufficient return that the compulsory powers for the purchase of land expired before the issuing of the writ, and that the defendants never were in actual possession or entitled to acquire possession of all the lands required for the purpose of making the line; they must go on to shew that they cannot get all the necessary land without exercising their compulsory powers. *Regina v. the Great Western Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 263; 1 E. & B. 874.

Mandamus to make a line to R. It appeared, on the record, that, after the making of the return, but before the judgment of the Court below, the powers of the company had expired. The Court of Queen's Bench having held, that notwithstanding this a peremptory mandamus should be awarded, the propriety of the decision on this point was questioned by the Judges in the Exchequer Chamber; but the judgment was reversed on other grounds, *ideo quere*. In the special act it was enacted, that "it should be lawful for the company to make a line to R, the line in question," and if they shall think fit, "a branch. And that the line to R shall commence at," &c., "and shall terminate at R, and the branch, if the same shall be constructed, shall be made," &c. In the act was a power to lease the branch, with the power for making it:—Held, that it was not obligatory on the company to make the line to R, the peculiar words of the special act not taking the case out of the general rule. *Great Western Rail. Co. v. Regina*, 1 E. & B. 874.

(f) *Making and maintaining Fences.*

[See ACTION, (D) (d).]

A railway company is, under 5 & 6 Vict. c. 55. s. 9, bound to keep the gates at the ends of level crossings closed against all persons or cattle upon the

highway, whether lawfully there or not, and they are liable to an action for any injury arising from a breach of that duty. *Pawcett v. the York and North Midland Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 222; 16 Q.B. Rep. 610.

In an action on the case against a railway company for not keeping gates closed across the ends of a highway which crossed the railway upon a level, pursuant to 5 & 6 Vict. c. 55. s. 9, whereby two horses of the plaintiff, "then lawfully being on the said highway," strayed upon the railway and were killed, the defendants traversed that the horses were lawfully on the highway. It appeared that the horses, having been put into a field of the plaintiff's, the fences of which were sufficiently sound for ordinary purposes, had accidentally escaped and got into a public road, and thence along the highway through the gate upon the line of the railway:—Held, that as against the company the horses were lawfully upon the highway. *Ibid.*

Quere—whether the horses could under these circumstances have been distrained by the owner of the soil of the highway or impounded by the surveyor. *Ibid.*

Where the plaintiff's sheep, trespassing on A's close, strayed upon the defendants' railway, which adjoined, through a defect of fences which the defendants were bound as against A to make and maintain, and were killed,—Held, that the plaintiff could not recover either at common law or under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20.) section 68, or on the ground that the defendants exercised a dangerous trade; the obligation to make and maintain fences, both at common law and by the statute, applying only as against the owners or occupiers of the adjoining close. *Ricketts v. the East and West India Docks and Birmingham Junc. Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 211; 12 Com. B. Rep. 160.

The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20. s. 68, which requires a railway company to make sufficient fences "for separating the land taken for the use of the railway from the adjoining lands not taken," imposes on the company the obligation of making a fence between the railway land and a public highway which runs alongside of it. *The Manchester, Sheffield and Lincolnshire Railway Company v. Wallis*, 23 Law J. Rep. (N.S.) C.P. 85; 14 Com. B. Rep. 243.

The liability of the company under this section is the same as it would have been at common law if they had been bound by prescription to repair the fence; that is, that they are only bound to keep up the fence as against the cattle of owners or occupiers of adjoining lands. Therefore, though the owner of cattle lawfully passing or driven along a highway may be considered as an occupier of it, and entitled to recover a compensation from a railway company, whose land adjoins the highway, if through a defect in the fence between the latter and the railroad occasioned by the negligence of the company's servants his cattle get on the line and are injured; yet if from the same cause such an injury happen to horses when straying on the highway the company are not liable; for the owner of cattle so straying is not in law an occupier of the highway, and consequently as against him there is no obligation to maintain the fence. *Ibid.*

(g) *On Opening the Line.*

It being proposed to form a railway from A through N and G to B, and it being known that the line when open from A to N would compete with and injure the N canal, and when open from N to G would in like manner compete with and injure the G canal, a private act of parliament (9 & 10 Vict. c. clx.) was obtained, which authorized the formation of the whole railway from A to B, and which stated that it was intended that the canals and railway should be worked in connexion, and that the canal companies should be incorporated with the railway company. Section 73. provided that the railway company should be liable to pay to the canal companies a specified price per share for all their shares "from and immediately after the opening of the railway between A and G for public use." The railway was afterwards made and opened for a portion only of the space from A to G, namely, from N to G:—Held, (*Williams, J. dissentiente*) that the opening for public use of any portion of the line between A and G rendered the railway company liable to pay for the canal shares. *The Grantham Canal Company v. the Ambervale, Nottingham and Boston and Eastern Junction Rail. Co.*, (in error), 21 Law J. Rep. (n.s.) Q.B. 322.

(h) *Covenant to compensate for Lands.*

A railway company, who were promoting in parliament a bill for an extension of their line, which, if made, would pass through the lands of the plaintiff, covenanted with the plaintiff, "that in the event of the proposed bill passing in the then session of parliament, the company should, before they should enter upon any of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion not exceeding forty-three acres, which the company might, under the powers of their act, require and take for the purposes of their undertaking; and that, in addition to purchase-money as aforesaid, the company should pay to the plaintiff, before they should enter upon any part of his said land, 7,100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands not exceeding forty-three acres to be taken by them":—Held, that the company were not liable to pay either of these sums unless they entered upon some part of the plaintiff's lands. *Gage v. the Newmarket Rail. Co.*, 21 Law J. Rep. (n.s.) Q.B. 398; 18 Q.B. Rep. 457.

Held, also, that an absolute covenant to pay these sums to the plaintiff by the company would be *ultra vires* and void. *Ibid.*

The declaration stated that the defendants were provisional directors of a certain company and promoters of a bill in parliament for making a railway from E to P, and that by articles of agreement between them and the plaintiff, it was witnessed, that in consideration of the covenants thereafter contained, the plaintiff covenanted that he would accede to the bill, and the defendants covenanted that in the event of the bill passing into a law, the company should pay him for so much of his land as should be intersected by the railway at the rate of 120*l.* per acre, and secondly, that they should pay him 3,000*l.* in full compensation for the general damage which the railway might do to the mansion, park,

and estate, including the crossing of the road near the park entrance, the lowering the road, the obstruction of views, disturbance of privacy of the park, &c., the expense of temporary residence during the progress of the works, the depreciation as a residence, the additional expense in the cultivation of farms by the alteration of the road, and all other damage to be done to the mansion and park. Averment, that the plaintiff did assent to the bill, and the same passed into a law; that the company entered on the plaintiff's lands and cut down trees, &c., and although seven acres were intersected and severed by the railway, and the park and mansion deteriorated, yet neither the company nor the defendants had paid the plaintiff 120*l.* per acre, nor the 3,000*l.* Fourth plea, that the company did not enter on the plaintiff's land. Fifth, that the quantity of the plaintiff's land intersected by the railway was not required by the company for the purposes of the railway, nor was it severed from the remainder of the fields:—Held, *per Parke, B. and Platt, B.*, that the defendants were bound by their covenant to pay the plaintiff the sum of 3,000*l.* immediately after the passing of the act, although the railway had not been constructed nor any damage done to the plaintiff's land; *dissentiente Pollock, C.B.*, who held that the plaintiff was not entitled to the 3,000*l.* until his land should have been taken or some damage done. *Bland v. Crowley*, 20 Law J. Rep. (n.s.) Exch. 218; 6 Exch. Rep. 522.

(i) *Making and enforcing Bye-laws.*

F, being at Colchester and intending to travel by the Eastern Union Railway only as far as the Diss station, purposely applied for and obtained from the company's clerk at the Colchester station, within the borough of Colchester, a ticket for Norwich, and paid the fare demanded to Norwich. The proper fare to Diss was 7*s.*, and the fare to Norwich, though nineteen miles further from Colchester than Diss, was, owing to competition, 5*s.* only. On the arrival of the train at Diss, F got out of the train and delivered his ticket to the collector, and refused to pay the difference of fare to Diss, though demanded by the collector. By one of the company's bye-laws, it was provided that every passenger should pay his fare previously to entering a carriage of the company, upon payment of which he would be furnished with a ticket specifying the class of carriage and distance for which the fare was paid, which ticket such passenger was required to shew when requested by a servant of the company, and to deliver up the same before leaving the carriage; and that any passenger who should enter a carriage without having paid his fare, or who should refuse to shew or deliver up his ticket when required, was thereby subjected to a penalty not exceeding 40*s.* Under this bye-law F was convicted, by two Justices of the borough of Colchester, in a penalty of 10*s.*, for having, within the said borough, unlawfully and wilfully entered a carriage of the said company, for the purpose of travelling upon the said railway from Colchester to Diss, not having previously paid his fare for so travelling:—Held, that, supposing F to have committed the alleged offence against the bye-law, it was committed within the borough of Colchester; but that no such offence had been committed by him, and that the conviction, therefore,

was bad. *Regina v. Frere*, 24 Law J. Rep. (N.S.) M.C. 68; 4 E. & B. 598.

(j) *Distraining uncertificated Engines.*

Declaration for converting a locomotive engine. Pleas: secondly, that because the said engine was wrongfully on the defendants' railway, incumbering the same and doing damage thereto, the defendants seized and took the said engine as a distress for the damage done, and impounded the same, &c. Thirdly, as to the alleged conversion of the said engine, that the plaintiffs brought and continued the said engine upon the defendants' railway without having first obtained a certificate of the defendants' approval of the same, contrary to the statute in such case made and provided; wherefore the defendants removed the same from the railway a reasonable distance to a fit and convenient place, which was the conversion complained of. Replication to the second plea, that the plaintiffs had the said engine in and upon the railway for the purpose of using the same, &c., according to law and under and by virtue of the powers and authorities in them vested by the statutes in that behalf; that the said engine was properly constructed as directed by the acts of parliament in that behalf; that at and during all the times of their bringing and using the same upon the railway the plaintiffs were ready and willing to pay defendants all lawful tolls, charges and demands. New assignment to the third plea, that the plaintiffs sued, not for the removal or converting to the defendants' use or depriving the plaintiffs of the possession of the said engine, as alleged and justified in the said plea, but for that the defendants converted to their own use or wrongfully deprived the plaintiffs of the said engine otherwise than in the said plea mentioned. Rejoinder to the replication, that the plaintiffs had not, before the making of the distress, obtained or applied for a certificate of the defendants' approval of the engine, but brought the same upon the railway without such certificate, contrary, &c. Plea to the new assignment, that the place to which the engine was removed was land in the defendants' possession contiguous to the railway, and that the defendants continued possessed of the railway during, &c.; that while the engine was staying in the said place in consequence of the removal, the plaintiffs demanded the engine "for the purpose and in order that they, the plaintiffs, might, by the power of the steam of the said engine, move the said engine over and upon the said land of the defendants, towards, unto, to and upon the railway of the defendants, and there again on their said railway place and use the said engine, by the power of its own steam, without having first obtained a certificate of approval as aforesaid," contrary, &c.; and that, if the defendants had complied with the said demand, the plaintiffs would forthwith have, by the power aforesaid, moved the said engine over and upon the said land, towards, &c.; wherefore the said defendants, when the said demand was made, and to prevent, &c., refused to allow the plaintiffs to take possession of the said engine, &c.: —Held, upon demurrer, that the common law right of the defendants to seize the engine damage feasant was not taken away by the 116th section of the 8 & 9 Vict. c. 20, the remedy given by that section being cumulative, and therefore that the second plea was good. *The Ambergate, Nottingham and*

Boston and Eastern Junction Rail. Co. v. the Midland Rail. Co., 23 Law J. Rep. (N.S.) Q.B. 17; 2 E. & B. 793.

Held, also, that the plea to the new assignment by reasonable construction meant that the plaintiffs had made the illegal purpose alleged a part of their demand of the engine; and not merely that such purpose rested in intention, and therefore that the plea was good. *Ibid.*

(k) *Amalgamation.*

A company for making a railway from Dublin to Mullingar was incorporated by an Act of Parliament passed in July 1845 (8 & 9 Vict. c. cxix.), under the name of "The Midland Great Western Railway Company of Ireland." Some of its directors provisionally registered another company for making a railway from Mullingar to Galway, to be called "The Galway and Mullingar Junction Railway Company." Three months afterwards this name was altered at the Registration Office to "The Midland Great Western Railway Company of Ireland (extension from Mullingar to Galway)." Most of the directors of the two companies were the same. L applied for and received scrip certificates in the extension company, and paid deposits thereon, and received receipts headed with the altered name, and signed the shareholders' agreement and parliamentary contract. The Midland Great Western presented, in its own name and under its corporate seal, a petition to Parliament for an act to make a railway from Mullingar to Galway, undertaking, at its own expense, to make the railway. The act which was passed upon this petition, in July 1846 (9 & 10 Vict. c. ccxiv.), only gave authority to make the railway from Mullingar to Athlone, or but a part of the distance. The directors had power under the act to raise the necessary sums "by contributions among themselves or by the admission of other parties." The additional capital required for the extension was directed to form "part of the general and original capital of the company;" and the provisions of the recited act (that of 1845) were to extend to and be read with the new act. The expression "The Company," in the new act, was declared to mean the Midland Great Western Company. In September 1846, at a meeting of the directors of the Midland Great Western Company, a resolution was passed stating on what terms the holders of the extension scrip should be entitled to certificates in the joint company, and another resolution approving of and confirming those terms. At that meeting the seal of the Midland Great Western Company was affixed to the shareholders' book, which, however, did not then contain the names of the shareholders in the extension line. The latter were added in March 1847, when one of them, that of the defendant, was inserted. Three calls were made; the first was dated previous to the insertion of the extension subscribers in the shareholders' book, the two others after that insertion. An action was brought for these calls:—Held, that the act did not amalgamate the two companies; and that even if the directors possessed a power of amalgamation, the resolution of September 1846, was not an exercise of that power so as to render the defendant liable to an action for any one of the calls at the suit of the Midland Great Western Company. *Midland*

Great Western Railway of Ireland v. Leech, 3 H.L. Cas. 871.

A railway company associating, allying, and connecting itself with another, does not thereby become equitably "amalgamated" with it. *The Shrewsbury and Birmingham Rail. Co. v. the Stour Valley Rail. Co.*, 2 De Gex, M. & G. 866.

An agreement to amalgamate at from a time past may possibly in equity amount to amalgamation, but an agreement to do so at a future period will not until that period arrives. *Ibid.*

Pending the progress of a bill through Parliament, authorizing the S. V. Company to lease their line to the N. W. Company, the bill was opposed by the S. B. Company, and upon a compromise a clause was inserted securing to the S. B. Company the use of part of the line and the joint use of a station, subject to the cesser of those rights in the event of the S. B. Railway Company being leased to or amalgamated with a fourth company, viz. the G. W., who were rivals to the N. W. Company. At this time the S. B. Company was under no engagements to the G. W. Company. Subsequently, however, these two companies entered into agreements, giving facilities and preference to each other's traffic, and they agreed to amalgamate at a future time if the sanction of Parliament could be obtained:—Held, that this was not such a change of circumstances produced by the conduct of the S. B. Company as to exclude them from equitable relief by injunction for the enforcement of the rights of user conferred on them by the act. *Ibid.*

The Court may interfere between two railway companies entitled to the joint use of a station by prescribing regulations for its management, but such interference ought not to take place without grave occasion. The Court may also direct a partition of the station, and appoint a receiver, if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitration, the Court will withhold its intervention until the remedy thus provided has been resorted to. *Ibid.*

(l) *Acts of Servants.*

If a servant of a corporation aggregate commit an assault by the authority of the corporation, an action of trespass for assault and battery may be maintained against the corporation. It is not necessary that the servant should be authorized to do the act by instrument under the seal of the corporation. *The Eastern Counties Rail. Co. v. Broom* (in error), 20 Law J. Rep. (N.S.) Exch. 196; 6 Exch. Rep. 314.

If an assault be committed on behalf and for the benefit of a corporation aggregate, the corporation may ratify the act of the agent, and if they do so they render themselves liable to an action of trespass for the assault. *Ibid.*

If a servant of a railway company, acting on behalf of the company, assault and imprison a passenger to compel him to pay his fare for riding in the carriages of the company, the act of the servant is one which may be for the benefit of the company, and may be ratified by them. *Ibid.*

A railway company, by agreement under seal, engaged a contractor to execute the railway, reserving power to the company to watch the progress of the work, and to dismiss any incompetent workmen employed by the contractor. In constructing a via-

duct, part of the railway, over a public highway, a stone, through the negligence of the workmen, fell upon the plaintiff's husband, who was passing along the road underneath, and caused his death:—Held, that the company were not liable in an action against them for damages, under the 9 & 10 Vict. c. 93, by the widow and administratrix of the deceased. *Reedie v. the London and North-Western Rail. Co.*, 20 Law J. Rep. (N.S.) Exch. 65; 4 Exch. Rep. 244.

Trespass for false imprisonment. The plaintiff having seen an advertisement of an excursion train from Monk's Ferry to Bangor and back, inquired of the clerk at the Monk's Ferry station, which belonged to the defendants, as to the return of the train, and was informed that he could return that day by the half-past 7 train. The plaintiff then took a ticket, proceeded to Bangor, and returning thence by train at the time appointed arrived at Chester, where the train stopped. The Chester station was used by the defendants and by other railway companies. A railway servant, who had charge of the train, took the plaintiff's ticket, and informing him that he ought not to have gone by that train, demanded 2s. 6d. more. Payment being refused, the railway servant and the superintendent took the plaintiff into custody. The plaintiff's attorney having written to the secretary of the defendants' company, asking for compensation, received an answer from the secretary, requesting that he might be furnished with the date of the transaction and promising to make inquiries. The secretary also stated verbally that it was an awkward business, that the blame would fall upon the station clerk at the Monk's Ferry station, who gave the plaintiff the false information, and he also offered to return the 2s. 6d.:—*Quære*—whether there was evidence for the jury of the railway servant, who made the arrest, being a servant of the defendants. *Roe v. the Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, 21 Law J. Rep. (N.S.) Exch. 9; 7 Exch. Rep. 36.

But held, that, at all events, there being no proof of the defendants having the power of arresting the plaintiff, there was no evidence of their having expressly or impliedly authorized or ratified the arrest made by the railway servant, and therefore that they were not liable for his tortious act. *Ibid.*

The plaintiff had some quicks which were carried at his expense by the railway company to the N station on their line. By the leave of F, a servant of the company, styled the general superintendent of the railway, the plaintiff put them into a piece of ground of the company's, adjoining the station, to keep them alive. Afterwards, wishing to remove them, he applied to the station clerk, who would not permit him to take them, but referred him to F, who refused to let him have the quicks. He subsequently applied to B, the managing director of the company, and met with a like refusal. The plaintiff thereupon brought trover against the company, but offered no evidence to shew what were the respective duties of the general superintendent or managing director of the railway:—Held, that it was the duty of a railway company trading largely as carriers on their line to have some servants authorized to give directions and act for the company on all occasions as the exigency of the traffic might require; that the jury might therefore infer that the general superintendent and managing director had authority to act for the

company in all matters in the course of the ordinary business of the company as carriers. *The Taff Vale Rail. Co. v. Giles*, 23 Law J. Rep. (N.S.) Q.B. 43; 2 E. & B. 822.

Held, further (*Parke, B. dubitante*), that the jury might also infer that it was within F's power, as general superintendent, to grant permission to the plaintiff to put the quicks into the company's land, and that his refusal to deliver them was an act within his ordinary business and bound the company, and amounted to an act of conversion by them. *Ibid.*

(m) *Contracts generally.*

A public company incorporated under act of parliament cannot generally contract, except in the mode and upon the conditions specified either in the special act or the general act to which it is subject, such as the Companies Clauses Act, 8 & 9 Vict. c. 16. The plaintiff, an engineer, entered into a contract under seal with the Wolverhampton Waterworks Company for the supply of machinery and the execution of works for the purposes of the company, with certain provisions as to extra work. The company was incorporated subject to the general provisions of the 8 & 9 Vict. c. 16; but by the special act, three directors were made a quorum. Much extra work was done by the plaintiff, with the sanction of the engineer of the company, but not according to the provisions of the contract; and after the work was done, and a claim made by him for payment of the price stipulated in the contract, together with a further sum for the extra work, a sum of 1,000*l.* was paid to him on the general account; but no proof was given that this payment was made by the order of three directors:—Held, in an action brought to recover for the extra work, that there was no evidence to go to the jury of any contract with the company. *Homersham v. the Wolverhampton Waterworks Co.*, 20 Law J. Rep. (N.S.) Exch. 193; 6 Exch. Rep. 137.

Quere—whether upon proof that such payment had been made by order of three directors any contract binding on the company would have been implied. *Ibid.*

The plaintiff and defendants entered into an agreement with a railway company to execute a contract for making a tunnel upon a line of railway, called "the Morley contract." The plaintiff then assigned to the defendants all his right and interest in the contract, and the defendants agreed to pay a given sum to the plaintiff upon the completion of the contract. Subsequently, it became necessary to vary the levels, and the defendants agreed with the company to make the tunnel in a different direction from that specified in the Morley contract, and upon different terms as to payment:—Held, that the plaintiff had no right to sue the defendants for the sum stipulated to be paid to him by the agreement, as the Morley contract never was completed. *Humphreys v. Jones*, 20 Law J. Rep. (N.S.) Exch. 88; 5 Exch. Rep. 952.

Where a corporation have actually used and occupied land for the purpose of their incorporation, by the permission of the owner, *semble*, that they are liable to be sued in assumpsit for use and occupation, notwithstanding they have not entered into a contract under their common seal. But in the case of a railway company, sued under the above circumstances, where the 8 Vict. c. 16. s. 97. (the Companies Clauses

Consolidation Act), provides that any contract, which, if made between private persons, would be valid, although made by parol only, may be made by parol on behalf of the company by the directors, and shall be binding on the company:—Held, that such a contract might be presumed to have been entered into, and that the company was, therefore, liable to the action. *Low v. the London and North-Western Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 361; 18 Q.B. Rep. 632.

Although a corporation may be liable in an action for use and occupation of premises, it can only be so for the period of actual occupation, and a continuous occupation for several years will not render the corporation tenants from year to year. *Finlay v. the Bristol and Exeter Rail. Co.*, 21 Law J. Rep. (N.S.) Exch. 117; 7 Exch. Rep. 409.

A railway company, through their solicitor, hired rooms from the 16th of December 1846 for one year, but occupied them until the 16th of December 1848, previously to which time they removed their furniture and effects, left the keys in the doors, and paid the rent up to that day, but gave no notice to quit:—Held, that the defendants were not liable in use and occupation for rent subsequently to December 16, 1848. *Ibid.*

The declaration in covenant set out an indenture between the plaintiffs and the defendants, a railway company, which, after reciting that the defendants were desirous of being supplied with 350,000 sleepers of the description in the specification annexed, and that in the specification was stated the times within which, and the port at which they were to be delivered, contained a covenant by the plaintiffs, that they should and would, within the times and at the place mentioned in the specification, as, and when, and in such quantities as the company's engineer should from time to time, or at any time within the period limited in the specification, direct and require, furnish the company with 350,000 sleepers. The engineer had power to vary the form of the sleepers, and to settle the amount of difference in price to be paid to the plaintiffs in consequence of such alteration. It was also stipulated that, if the contractors did not regularly deliver the sleepers, the company might determine the contract by notice. The deed then proceeded, "that the said company will pay to the said contractors, for the said sleepers hereinbefore contracted to be supplied, the price of 4*s.* 3*d.* per sleeper, at the time and in the manner hereinafter mentioned:" in effect thus: nothing was to be paid until 2,000*l.* worth of sleepers had been delivered and certified, and then only the excess in value above 2,000*l.*; and the 2,000*l.* were to be paid within two months after the whole of the 350,000 sleepers hereinbefore agreed to be supplied should have been delivered, and a certificate given. The declaration then set out the specification, which stated, "the number of sleepers required under this specification is 350,000; one-half of the sleepers will have to be delivered in 1847, and the remainder by Midsummer 1848. The port at which the delivery will have to be made is G." It then stated that the year 1847 and Midsummer 1848 had elapsed; that the plaintiffs were always ready and willing to deliver the sleepers within the times and at the place specified, when and in such quantities as the engineer should require: yet that the engineer did not during 1847

give any order touching the delivery of half the sleepers, or by Midsummer 1848 for the other half. Among other pleas, the defendants pleaded that they had no notice or knowledge that the plaintiffs were ready or willing to supply the defendants with the said half of the sleepers. The issue on this plea was found for the defendants:—Held, that this indenture contained a covenant by the railway company that they would take the whole 850,000 sleepers at the stipulated price before Midsummer 1848, and also that their engineer should give the necessary orders for their delivery within the times limited by the specification. *The Great Northern Rail. Co. v. Harrison* (in error), 22 Law J. Rep. (n.s.) C.P. 49; 12 Com. B. Rep. 576: affirming *Harrison v. the Great Northern Rail. Co.*, 21 Law J. Rep. (n.s.) C.P. 89.

Held, further, that the plaintiffs were entitled to judgment *non obstante veredicto* on the issue on the plea that the defendants had no notice of the plaintiffs' readiness and willingness, as the plaintiffs were not bound to be ready and willing until they had orders from the engineer to deliver any sleepers, and need not have alleged that they were ready and willing, and that consequently notice to the defendants that they were ready and willing was not necessary. *Ibid.*

A clerk in the office of the engineer to a railway company made a contract with the plaintiffs for the purchase of a number of railway sleepers upon certain terms. The sleepers were taken by a carrier employed by the company to the railway, and used upon the railway. There was a subsequent correspondence between the plaintiffs and another clerk of the company as to the right of the company to a set-off, but their liability for the sleepers was not disputed:—Held, that there was evidence to go to the jury that the directors had contracted by parol to take the goods upon the terms of the clerk's contract, and that the company were, therefore, liable under the provisions of the 8 & 9 Vict. c. 16. s. 97. *Pauling v. the London and North-Western Rail. Co.*, 23 Law J. Rep. (n.s.) Exch. 105; 8 Exch. Rep. 867.

A railway company were empowered by act of parliament to make a railway, which was intended to cross the navigable river Wensum by a swivel bridge, according to deposited plans. Owing to engineering difficulties, it was found inconvenient to cross the river at the place pointed out in the deposited plans, and another site was selected; and the consent of the Admiralty and of the owners of the adjoining lands being obtained, the works were commenced and a centre pier to support the bridge was placed in the bed of the river. The corporation and inhabitants of Norwich preferred an indictment against the company for a nuisance in erecting the pier in the bed of the river, to which the defendants pleaded not guilty; and thereupon, in order to put an end to all disputes, the parties entered into an agreement, under seal, dated the 25th of March 1847, which provided that the parties prosecuting, so far as they were interested, should permit the pier to remain on the new site, and, in consideration thereof, the company covenanted to excavate to a certain depth the north bank of the river, and dredge and cleanse to the same depth another part of the river, so as to form a navigable channel of a certain

depth on the north side of the pier. The company also covenanted to use their best endeavours to obtain an act of parliament to sanction and confirm the agreement, the said corporation undertaking, on their part, to do all reasonable acts to aid the company in obtaining the act. The agreement further provided, that if the said pier and the works connected therewith were continued and completed without interruption or impediment by or at the instance of the parties prosecuting the indictment, then, whether the said act of parliament should be obtained or not, if the said works to be performed by or on the part of the company should not be completed, to the reasonable satisfaction of the engineer for the time being of the said corporation, within the space of twelve calendar months from the date of the said agreement, then and in such case the company would, on demand, forfeit and pay to the said corporation 1,000*l.*, to be recovered as liquidated damages. Upon this agreement, the corporation of Norwich brought an action against the company to recover the said sum of 1,000*l.*, alleging, as a breach, the non-completion of the works within twelve months to the reasonable satisfaction of the engineer of the corporation. The defendants, in their plea, set out the agreement, and then averred that the said agreement was entered into before the passing of the company's Railway Alteration Act, 1847; that the river Wensum had been from time immemorial a public navigable river; that the said pier was a public and common nuisance and an obstruction to the navigation; and that, at the time of making the said agreement, neither the said pier nor the proposed works in connection therewith were authorized by act of parliament. Replications: First, that the said pier and bridge were works necessary to be so erected and placed, and to be executed and completed, for the purpose of making and constructing the railway authorized to be made and constructed by the company's act, 1845. Secondly, that the said agreement was mentioned and described in the company's Railway Alteration Act, 1847, and that the said pier, bridge and works were mentioned and referred to in and by the said act, and that the said act was obtained within such time after the agreement as to leave to the defendants a sufficient time after the passing of the said act for completing, within the time mentioned in the said agreement, the said works so agreed to be performed, as in the said agreement was mentioned:—Held, upon demurrer, by *Lord Campbell, C.J.* and *Wightman, J.*, that as, at the time when the agreement was entered into, the works absolutely contracted to be executed were connected with the completion of the new pier, which then was a public nuisance, and as the obtaining an enabling act of parliament was not made by the agreement a condition of the execution and completion of such works, the agreement was illegal and void, and that upon the pleadings, the defendants were entitled to succeed. By *Lord Campbell, C.J.*, that the agreement being for the construction and completion of a public nuisance, and therefore illegal, could have no validity given to it by reason of the covenant in the deed to obtain an act of parliament to authorize the construction of the illegal works; that the works agreed to be done on the part of the directors of the company were *ultra vires* to

the knowledge of the covenantees; and on that ground, also, the defendants were entitled to judgment upon the plea. By *Coleridge, J. and Erle, J.*, that, by the agreement declared upon, the parties did not absolutely contract for the *unlawful* obstruction of a public highway without obtaining an act of parliament, so as to render the contract illegal and void; that the contract between the parties, as it appeared from the agreement itself, to which alone upon the pleadings the Court could look, was not necessarily unconnected with the purpose of the company's incorporation; but, on the contrary, it might, consistently with the pleadings, have been essential to, and it did tend to effect the main purpose of such incorporation; that the agreement, therefore, could not be considered *ultra vires* on the part of the directors of the company, though such purpose was agreed to be effected by means different from those at first authorized to be adopted, and upon both grounds the plea was no answer to the plaintiffs' claim. By *Lord Campbell, C.J., Coleridge, J. and Wightman, J.*, that the replications afforded no answer to the plea, and were bad in substance. *The Mayor, &c. of Norwich v. the Norfolk Rail. Co.*, 24 Law J. Rep. (N.S.) Q.B. 105; 4 E. & B. 397.

A provisionally registered railway company entered into an agreement with two canal companies, established by acts of parliament, for the purchase of their shares and property; and in the document it was provided that certain members of the provisional committee of the railway company should pay down, or procure to be paid down, the sum of 10,000*l.*, to be held upon trust, until the railway act should be obtained, in taking transfers of the bonds or mortgages of the canal companies, and the remaining amount of the purchase-money, within certain stated times, amounting altogether to 50,000*l.*; it was also further declared, that the purchase-money should be provided by the thereunder signed six members of the provisional committee out of their own monies, or they should procure the same to be paid as aforesaid, so that the canal companies should not be affected by any special trusts or liabilities which might attach to the paid-up capital of the railway company. This agreement was executed by the six, on behalf of the railway company, and by persons specially appointed by the canal companies. Three of the six provisional committee-men signed a cheque for the 10,000*l.*, and with the concurrence of the other three handed it to a trustee for the canal companies, and the money was paid by the trustees of the railway company, which company was ordered to be wound up, and the Master authorized one of the shareholders to file a bill against the canal companies for the recovery of the 10,000*l.*:—Held, affirming the decision of one of the Vice Chancellors, that the agreement was unauthorized, and one which could not be entered into without the sanction of parliament; that the 10,000*l.* was trust money of the railway company, and not the private monies of the six provisional committee-men; that the canal companies, receiving the cheque as they did, and receiving the money for the cheque from the bankers of the railway company, took the 10,000*l.* impressed with a trust, and with notice of its being trust money, and were therefore bound to refund it. *Bryson v. the Warwick and Birmingham Canal Navigation*

Co., 23 Law J. Rep. (N.S.) Chanc. 133; 4 De Gex, M. & G. 711: affirming 1 Sm. & G. 447.

Held, also, on the constitution of the suit, that the plaintiff was authorized to file the bill on behalf of himself and the other shareholders of the railway company, he having been duly authorized by the Master to institute the suit: the 60th section of the Winding-up Act, 1848, controuling the 29th and 50th sections of the same statute. *Ibid.*

The Shrewsbury and Birmingham Railway Company opposed a bill brought into parliament by the London and North-Western Railway Company, seeking to authorize a lease to that company of the Shropshire Union Railway then in progress, and an agreement in writing was made between the two companies, that in consideration of the withdrawal of opposition by the Shrewsbury Company, an account should be kept of the profits from traffic on the Shrewsbury and Shropshire lines, and the same should be divided in stated proportions. The opposition was withdrawn, and the bill passed, and when passed the agreement was re-executed under seal. The act recited three other acts, one only of which had relation to the agreement between the Shrewsbury and North-Western Companies. By the 5th section, on the completion of the works of the three lines of railways by the recited acts authorized to be made so as to be opened for public traffic, or at such other period as might be agreed upon, the Shropshire Company were empowered to grant to the North-Western Company a lease in perpetuity of the undertaking. By the 11th section it was enacted, that as each line of railway should be completed, the same should be worked and used by the North-Western Company, and for the purpose of such working, that company were to exercise the powers before given to the Shropshire Company in relation to every such completed railway. In other parts of the act, the authority to lease was referred to as "lease of the said railways" and "making of such lease." The Shrewsbury Company filed a bill for the specific performance of the agreement:—Held, upon an appeal of the Shrewsbury Company against a dismissal of their bill that the directors of the North-Western Railway Company were trustees for their shareholders, and that their entering into such a contract was a breach of trust as between them and the shareholders as creating a partnership between the North-Western and the Shrewsbury Companies, determinable only at the option of the latter, which varied the rights of the North-Western Company's shareholders in the gross receipts of their business, and that the Shrewsbury Company knowingly participated in such breach of trust. *The Shrewsbury and Birmingham Rail. Co. v. the London and North-Western and Shropshire Union Rails. and Canal Co.; and the London and North-Western Rail. Co. and the Shropshire Union Rails. and Canal Co. v. the Shrewsbury and Birmingham Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 682; 4 De Gex, M. & G. 115; 16 Beav. 441.

Held, further, that parliament having, with a view to the public good, authorized the construction of large bodies, acting by directors, with special and limited powers, and for certain specified purposes, and for the protection of the public, and the contract being to alienate the tolls of a given portion of the

line, such contract was contrary to the authority given by parliament, and was against public policy. *Ibid.*

Held, thirdly, therefore, that a Court of equity could not lend its assistance to enforce the specific performance of the contract, whether it were valid or invalid at law, and that the appeal against the dismissal of the bill must be dismissed, but without costs, and the cross-appeal must be dismissed, with costs. *Ibid.*

Semble—(one of the Lords Justices differing from the Master of the Rolls and agreeing with Lord Cottenham) that if the case had rested simply on the point, whether the contract had come into operation, the Shrewsbury Company would have been entitled to relief, although the three lines were not all completed. *Ibid.*

Heads of a proposed agreement were arranged between the directors of two railway companies, by which one company was to allow the other company for ninety-nine years to work the line, and use the property and plant of the granting company, except certain specified lands and buildings, upon certain terms of allowance for working expenses and charges, and the maintenance of works and ways, the property and plant to be restored on the termination of the agreement on terms of profitable return to the granting company, and provision was made for application to parliament for powers if needful. On a bill by a shareholder in the granting company on behalf of himself and all other the shareholders in that company, except the directors, against that company and the other company:—Held, first, that the proposed agreement was a delegation of some of the statutory powers of one of the companies to the other, which was contrary to the policy of their acts, and could neither be granted nor accepted without further powers from parliament; that it was a contract savouring of illegality, which at the suit of any shareholder this Court would restrain, and the Court, on motion, restrained the company from perfecting the agreement. Secondly, that such an agreement is not distinguishable on principle from a lease or grant, which is clearly not within the statutory powers of the granting company. Thirdly, that the 87th section of the Railways Clauses Consolidation Act merely gives to one company a limited power to run a portion of its traffic only when it is necessary for the purpose of its own traffic, over the line of another railway company. Fourthly, that an agreement for an application to parliament for powers necessary to enter into the above terms, and upon a stipulation that they should not be acted upon until the necessary powers should have been obtained, would be lawful and would not be restrained. Fifthly, that the suit being by one shareholder on behalf of himself and the other shareholders in the granting company against that company, and the other company proposing to enter into an illegal agreement, without making any directors or other persons parties seeking an injunction against the granting company to restrain them from perfecting the agreement, was properly framed. *Winch v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, 5 De Gex & Sm. 562.

(n) *Traffic and Toll Agreements.*

By an agreement between the Manchester and

Bolton Railway Company and the Bury and Rossendale Railway Company, it was agreed, first, that the M. and B. Company would concur, at the expense of the B. and R. Company, in obtaining an act of parliament in the ensuing session for a line of railway from the M. and B. Railway to Bury and Rawtenstall; secondly, that the B. and R. Company should have the use of the M. and B. Company's station at Salford, but not to impede the M. and B. Company's traffic, paying such charge for such requisite additional accommodation to the same arising from the traffic of the B. and R. Company, as three indifferent persons to whom it should be referred in the usual way should determine; thirdly, that the traffic of the Manchester, Bury and Rossendale Railway Company, whether of passengers, merchandise or coals (that is, traffic using both lines or any portion thereof), between Salford and Rawtenstall, or any points intermediate to these, should be carried on, as it respects engine power and carriages, clerks, porters and all other expenses (except the maintenance of the M. and B. Railway) at the costs and charge of the B. and R. Company, who should pay to the M. and B. Company, for the use of their railway and in respect of the traffic herein specified, a *pro rata* proportion, according to the distance passed over the two lines respectively, of all and singular the gross rates, tolls and proceeds arising from the said traffic. The agreement then set out the proportion. The B. and R. Company were incorporated first as the Manchester, Bury and Rossendale Railway Company, and afterwards, their line being greatly extended and other companies being amalgamated with them, they became the East Lancashire Railway Company, the defendants below. The M. and B. Company became the Lancashire and Yorkshire Railway Company, the plaintiffs below. After the defendants below had thus extended their lines and changed their name, the plaintiffs below confirmed the original agreement by a subsequent deed:—Held, that the East Lancashire Railway Company were not limited by the agreement in the use of the Lancashire and Yorkshire Railway Company's line and stations on the terms specified in the agreement to traffic beginning on some part of the B. and R. Company's original line on its way to Manchester and ending on some part of it on its way from Manchester; but that it extended to all traffic that passed over the original line from or to Manchester, whether its transit commenced or ended on any part of the original line, or whether it came from or went to any station upon any part of the new and extension lines. *The East Lancashire Rail. Co. v. the Lancashire and Yorkshire Rail. Co.* (in error), 23 Law J. Rep. (n.s.) Exch. 157; 9 Exch. Rep. 591: reversing *The Lancashire and Yorkshire Rail. Co. v. the East Lancashire Rail. Co.*, 21 Law J. Rep. (n.s.) Exch. 62; 7 Exch. Rep. 126.

The Great Northern Railway Company and the South Yorkshire Railway Company entered into a *bond fide* contract by deed, by which it was provided that the Great Northern Railway Company, the defendants below, might for twenty-one years pass over the railways of the South Yorkshire Railway, the plaintiffs below, and have free use of their works and conveniences for the purpose of carrying coal, upon payment of certain tolls and under certain

conditions, that is to say, when the quantity of coal carried over any part of the plaintiffs' railways to the defendants' railway, and then south of Doncaster, together with the quantity of coal carried over any part of the plaintiffs' railways by or for the defendants, or by any arrangement with them to any other railway for transit to the south of Sheffield or Rotherham, should not amount to 125,000 tons in the period of six calendar months, then the defendants should pay to the plaintiffs such tolls for such period of six calendar months as would, with any clear profit which might be made by the plaintiffs for the same period, after payment of all annual and half-yearly charges for interest and outgoings, and all expenses of management or otherwise, be sufficient to enable the plaintiffs to pay such dividends as might become payable in respect of any guaranteed or preference stock of the plaintiffs already issued, or hereafter to be issued, with the consent of the defendants, and also a clear net dividend at the rate of 3*l.* per centum per annum, for such period of six calendar months, upon the ordinary capital stock for the time being of the plaintiffs, then called up, or thereafter to be called up, with the consent of the defendants; and when the quantity of coal for any such period of six calendar months should exceed 125,000 tons and not 150,000 tons, such sum as would make up in manner before mentioned the dividend upon the preference stock and 3*l.* 5*s.* per cent. upon the ordinary stock; and when the quantity of coal during the like period of six calendar months should exceed 150,000 tons and not 175,000 tons, such sum as would make up in the like manner the dividend upon the preference stock, and 3*l.* 10*s.* per cent. on the ordinary stock; and so on progressively, up to the carriage of upwards of 400,000 tons during any such period of six calendar months, in which case the defendants are to pay the plaintiffs such sum as, together with the clear profits made by the plaintiffs during the same period, would pay the dividend upon the preference stock, and 6*l.* per cent. upon the ordinary stock. It was also provided that if the payment made by the defendants for any period of six months once made up 4*l.* 10*s.* per cent. on the ordinary stock of the plaintiffs, it should never afterwards cease:—Held, in an action to recover the sum payable under the contract, that this was a legal contract, and not beyond the powers of the respective companies, the payments to be made being tolls within the meaning of that word in the 87th section of the Railways Clauses Consolidation Act, 8 Vict. c. 20. *The Great Northern Rail. Co. v. the South Yorkshire Rail. and River Dun Co.* (in error), 23 Law J. Rep. (N.S.) Exch. 186; 9 Exch. Rep. 642: in the court below, 22 Law J. Rep. (N.S.) Exch. 305; 9 Exch. Rep. 55.

Two directors of a railway company (the plaintiffs) met two directors of another railway company (the defendants), and entered into an agreement in writing, signed by all four of the directors on behalf of their respective companies, whereby it was mutually agreed that each of the companies should interchangeably use the railway of the other company on certain specified terms. The agreement contained no words of succession or of restriction:—Held, that these contracts were not mere licences determinable at will, but conferred rights of a permanent nature on the companies. *The Great Northern Rail. Co. v. the*

Manchester, Sheffield and Lincolnshire Rail. Co., 5 De Gex & Sm. 138.

Held also, that the terms of the contract were not too vague, but that the user conceded was one consistent with the proper enjoyment of the railway, the subject-matter of the contract, and with the rights of the granting party. *Ibid.*

Held also, that this Court will grant an injunction restraining the defendants from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement. *Ibid.*

By certain articles of agreement made between the S. and B. Railway Company, the L. and N.-W. Railway Company and the S. U. Railway, reciting that the S. and B. Railway Company had agreed to withdraw their opposition to a bill before parliament for authorizing a lease of the S. U. Railway Company to the L. and N.-W. Railway Company, and that it had been mutually agreed by the three companies that the covenants thereafter contained should be mutually entered into by them, on an act being obtained for authorizing such lease, it was witnessed (*inter alia*) that during the continuance of such lease separate accounts should be kept of all passengers, &c. conveyed on the S. and B. and S. U. Railway lines; and that the money received in respect of such traffic should be divided between the three companies in certain proportions; and further, that during the continuance of such lease the L. and N.-W. and S. U. Railway Companies would not carry any passengers, goods, &c., or other matters and things between certain points, nor would use a certain portion of the S. U. Railway line to compete for any traffic which properly belonged to the S. and B. Railway:—Held, first, that this agreement was not void as a fraud upon the legislature. Secondly, that it was not illegal as giving a monopoly, and depriving the public of the benefit of competition. Thirdly, that the stipulation to divide the profits was not a fraud upon the shareholders of the respective companies. Fourthly, that the clause restraining the carriage of passengers, &c. on the S. U. Railway line was not contrary to the 1 & 2 Vict. c. 98. and the 7 & 8 Vict. c. 85. providing for the conveyance of mails and troops on railways; and, *semble*—that such traffic was impliedly excepted out of the restraining clause. *The Shrewsbury and Birmingham Rail. Co. v. the London and North-Western Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 89; 17 Q.B. Rep. 652.

A further clause of the articles provided "That the agreement thereby come to should not in any manner be evaded or eluded by either of the contracting parties, nor should any arrangement, scheme, device or contrivance be resorted to or attempted for that purpose":—Held, that this clause was independent of the existence of a lease, and that a breach was well assigned upon it, without averring the granting of any such lease. *Ibid.*

The defendants, a railway company, agreed with the plaintiffs to carry coals from U to K, and to find waggons, the Y. and B. Company undertaking to haul the waggons to and fro between U and Y, and the contract was founded on the basis that there should be no unreasonable detention of waggons, whether empty or full, between Y and U:—Held, that the neglect and refusal by the Y. and B. Company to haul between U and Y was an answer to an

action by the plaintiff against the defendants for neglecting and refusing to carry from U to K. *Jonassohn v. Great Northern Rail. Co.*, 24 Law J. Rep. (N.S.) Exch. 31; 10 Exch. Rep. 434.

(o) *Leasing and working Contracts.*

The plaintiffs having obtained an act authorizing them to make a railway from L to meet the L. and B. and G. W. Railways at H Green, it was afterwards, by an agreement between the plaintiffs and the G. W. Railway Company, agreed that the G. W. Railway Company should be allowed to carry their railway (which it was proposed to extend) across the course of the plaintiffs' intended railway on a level (the soil of the land at the crossing belonging to the plaintiffs); and by the agreement the G. W. Railway Company, among other things, covenanted to construct a railway station at the point of junction, and to stop their trains at that station to meet corresponding trains of the plaintiffs, for the purpose of transferring passengers and goods. This agreement was afterwards noticed and treated as binding by an act of parliament. Subsequently, and after both railways were made, an act was obtained, which, reciting that the plaintiffs' railway could not be worked as a separate and independent railway with advantage to the proprietors, but that it might be worked and used in connexion with the L. and B. Railway and G. W. Railway, or either of them, by their respective companies, empowered the plaintiffs to lease their railway, stations, and all their rights, powers, and privileges to the L. and B. Railway Company. Pursuant to this act the plaintiffs leased to the L. and B. Railway Company their railway, stations, and all their rights, powers, and privileges in relation thereto for 999 years, on the terms that the L. and B. Railway Company should pay them, besides a gross sum down, one-fourth of the gross receipts in respect of passengers, goods, and other things carried on the plaintiffs' line, and one-half of the net profits of the rates and tolls received for the use of the line; and the L. and B. Railway Company covenanted that they would, "at their own expense, during the continuance of the lease, *efficiently work and repair the railway and works demised*, and indemnify the plaintiffs against all liabilities, losses, charges and expenses, claims and demands, whether incurred or sustained in consequence of any want of repair or in consequence of not working, or in any manner connected with the working of the same railway and works; but that the plaintiffs should have no controul whatever over the working or management by the L. and B. Railway Company of the plaintiffs' railway or works." The rights and liabilities of the L. and B. Railway Company having been, by statute, transferred to the defendants, the plaintiffs sued the latter on this covenant. The material breach was, that the defendants did not efficiently work the said railway. It appeared on the trial that the plaintiffs had worked their line previously to the lease, both for passenger and goods traffic, but only in a slight degree and at a loss; that since the lease it had never been worked for passengers, but only for goods traffic; that it had never been worked in connexion with trains on the G. W. or the defendants' lines; but evidence was given to shew that if passenger trains were run on the demised line in connexion with trains on the G. W. and the

defendants' lines, passenger traffic would have presented itself. By a clause in the local act, if the plaintiffs' railway ceased for three years after completion to be worked and used as a railway, the land and soil of the railway was to vest in the adjoining landowners; and a second local act provided that, under such circumstances, the piece of land at the point of intersection of the G. W. Railway and the plaintiffs' land was, on tender of the purchase-money, by the G. W. Railway Company, to vest in that company:—Held, that the covenant sued upon was not a mere covenant to indemnify the plaintiffs against any loss or forfeiture in consequence of not working the railway, but that the object of the covenant was efficiently to work so as to secure the stipulated benefit to the plaintiffs in the gross receipts, and efficiently to repair so as to give them a chance of a share in the net profits; though the defendants were not bound to work the railway in such a manner as to produce the largest quantity of gross receipts, but only to use a fair and reasonable mode of working it to make it productive. *The West London Rail. Co. v. the London and North-Western Rail. Co.* (in error), 22 Law J. Rep. (N.S.) C.P. 117; 11 Com. B. Rep. 327.

Held, next (*dissentientibus Platt, B. and Martin, B.*), that the defendants were not, under all circumstances, bound to work the line for passenger traffic, even though passenger traffic presented itself, and that the covenant would be fulfilled if, by efficiently working the railway for goods traffic only, as large an amount of gross receipts could be obtained as by the carriage of passengers or of passengers and goods. *Ibid.*

Held, also, that the burden and benefit of the agreement with the G. W. Railway Company to stop their trains, ran with the plaintiffs' land and passed to the defendants as assignees of the plaintiffs' estate, probably at common law, and, at all events, by virtue of the leasing act and the terms of the lease; consequently, that the defendants had power to compel the G. W. Railway Company to stop their trains to meet trains on the plaintiffs' line; but that the defendants were not bound *necessarily* to exercise this power in order to the efficient working of the plaintiffs' line. *Ibid.*

Held, further, that the defendants were not *necessarily* bound to work the plaintiffs' line in connexion with their own or the G. W. line; though, practically, it could hardly be worked *efficiently* without connexion with one or the other. *Ibid.*

Held, lastly, that, in estimating the liability of the defendants, the jury ought not to treat them as if they were lessees of a separate and independent line, having no controul over any other line; but that the measure of efficient working ought to be greater in the case of the defendants, as they had entire controul over their own line, and had a power of adding to the traffic by a certain controul which they had over the G. W. line, and as their capabilities and powers in this respect were reasons which disposed parliament to permit the lease to be made to them. *Ibid.*

In 1846 the R. Railway Company proposed to make a railway from the plaintiffs' railway to the defendants' railway. For part of the distance, the proposed line ran in nearly the same course as part of a branch line at the same time proposed to be made by

the defendants. It was consequently arranged that the defendants should make their branch line, but that the R. Railway Company should have power to run over the specified portion of it, upon such terms as might be agreed upon between the defendants and the R. Railway Company. This arrangement was sanctioned by parliament in a clause in the defendants' act for making the branch line, which passed on the same day with the act authorizing the R. Railway Company to make the rest of their proposed line. The latter act empowered the R. Railway Company to lease their line to the plaintiffs. In 1847, an agreement was entered into between the R. Railway Company and the defendants, to the effect that the R. Railway Company should have the right in perpetuity of using for their traffic the above-mentioned portion of railway on certain specified terms. Subsequently, in 1850, the R. Railway Company leased their railway, and all their powers and privileges, and all the benefit and advantage to be derived from the agreement of 1847, to the plaintiffs for 1,000 years, subject to the obligations and liabilities of the R. Railway Company:—Held, that by virtue of the special acts and the Railways Clauses Consolidation Act, 1845, incorporated therewith, and the lease, the plaintiffs were entitled as against the defendants to the benefit of the agreement of 1847, and to stand in respect of it in the place of the R. Railway Company. *The London and South-Western Rail. Co. v. the South-Eastern Rail. Co.* (in error), 22 Law J. Rep. (N.S.) Exch. 193; 8 Exch. Rep. 584.

In consideration of the S. and B. Railway Company withdrawing their opposition to a bill brought into parliament by the L. and N. W. Railway Company, to enable the latter to take a lease of the undertaking of the S. U. Railways and Canal Company, the three companies entered into an agreement to keep a mutual account of the traffic of the S. and B. Railway and the S. U. Railway lines, and to divide the property between them in certain proportions; and that the L. and N. W. Railway Company should not use the lines to be leased to them so as to compete for any traffic which properly belonged to the S. and B. Railway Company; the opposition was withdrawn, and the bill passed:—Held, upon demurrer, that such an agreement was not a fraud upon parliament, nor inconsistent with the duties which the directors of the several companies owed either to the public or their constituents. *The Shrewsbury and Birmingham Rail. Co. v. the London and North-Western Rail. Co., the Shropshire Union Rails. and Canal Co. and G. C. Glyn and W. Cowan*, 20 Law J. Rep. (N.S.) Chanc. 90; 3 Mac. & G. 70.

By an act of parliament reciting three previous acts, the L. and N. W. Railway Company were empowered, on the completion of the works of the three railways by the said recited acts authorized to be made, so as to be opened for public traffic, or at such earlier period as might be agreed upon, to accept a lease in perpetuity of the undertaking; and it was provided that, upon the completion of the undertaking, the same should be worked by the L. and N. W. Railway Company consistently with the provisions of the act and the lease to be granted in pursuance thereof; and that the said L. and N. W. Railway Company should have all the powers in relation to every such completed railway as were

given to the S. U. Railway Company by the act authorizing the formation thereof. The act then provided for the computation of the rent to be paid on each of the said railways when completed in succession, until the lease should be executed:—Held, that upon the true construction of the act, the relation of landlord and tenant, with its respective benefits and liabilities, arose as and when each line was completed, notwithstanding the lease could not be executed until the whole of the undertaking was completed. *Ibid.*

An injunction, granted upon motion, by the Court below, restraining the defendants from using the lines leased to the L. and N. W. Railway Company, so as to compete with the traffic properly belonging to the plaintiffs' line, was dissolved, upon appeal, with liberty to the plaintiffs to bring an action at law for breach of the agreement, the plaintiffs and the defendants mutually undertaking at the same time to keep an account of the traffic on their respective lines. *Ibid.*

Upon motion, by way of appeal, to dissolve an injunction, granted upon affidavits before answer, the answer subsequently filed was used; the Court, on dissolving the injunction, refused to give the defendants the costs of the appeal motion. *Ibid.*

(H) POWERS, DUTIES AND LIABILITIES OF DIRECTORS.

A director of a railway company is a trustee; and, as such, is precluded from dealing, on behalf of the company, with himself, or with a firm of which he is a partner. *The Aberdeen Rail. Co. v. Blackie*, 1 Macq. H.L. Cas. 461.

A contract entered into with a railway company by a director is not void under the 8 & 9 Vict. c. 16. ss. 85. and 86, though it disqualifies the director. *Forster v. the Oxford, Worcester and Wolverhampton Rail. Co.*, 22 Law J. Rep. (N.S.) C.P. 99; 13 Com. B. Rep. 200.

The directors of the South Devon Railway Company introduced two bills into parliament on behalf of the company, which it was alleged would have the effect of altering the existing and established rights of the shareholders as between themselves. They consisted of two classes, the holders of original or whole shares, and the holders of half or preferential or guaranteed shares. Upon a bill filed by a holder of original shares, alleging that the bills introduced into parliament would vary the terms upon which the half shares were created, and that it would give a benefit to the holders of the half shares at the expense and to the loss of the holders of the whole shares:—Held, that the application to parliament by the directors to authorize the scheme was not a breach of trust or duty to the company; and, the defendants undertaking to be answerable for the costs, the Court refused to restrain the directors from using the name and seal of the company for introducing or prosecuting the bills in parliament; but it restrained the directors from applying the funds of the company in payment of the costs of the bills so far as they sought to alter the relative rights of the shareholders. *Stevens v. the South Devon Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 491; 13 Beav. 48.

A scrip-holder of an abortive railway scheme received a *pro ratâ* dividend on his shares, and received new certificates in lieu of the original. He after-

wards received a further and final dividend, surrendered up the new certificates, and signed a memorandum to release the provisional directors from all claims. Upon bill filed by the scrip-holder, on behalf of himself and all the other scrip and shareholders and subscribers (except the defendants), against the provisional directors, secretary and clerk, to refund certain sums paid by them in respect of dividends on certain alleged spurious scrip:—Held, that the bill was not sustainable; that the plaintiff could not undo the contracts entered into with the directors, and retain the dividends received under them; that he could not compel the other shareholders to refund the dividends received by them, and had no power to elect for them whether they would retain or refund such dividends. *The Official Manager of the Grand Trunk or Stafford and Peterborough Union Rail. Co. v. Brodie; Same v. Sturgis*, 22 Law J. Rep. (N.S.) Chanc. 514; 3 De Gex, M. & G. 146; 9 Hare, 823.

The shareholders of a railway company, at a general meeting, passed a resolution, by which they placed a large number of shares at the disposal of the directors, who, as a body, did not interfere with the management of the company, but allowed G H, their chairman, to exercise a supreme controul over the company and its affairs. The shares were then placed in the share register in the name of G H at the end of the names of shareholders, and he caused numbers of the shares to be transferred into the names of divers persons, and through different brokers sold them in the market at considerable premiums. Upon a bill filed by the company,—Held, that the office of director is a place of trust: that unambiguous expressions alone could confer upon them any special power; that a resolution to place shares at the disposal of the directors, without more, did not render them irresponsible: that they were bound to give explanations to the shareholders, and could not derive any personal or pecuniary advantage from the mode of dealing with the shares; that a suggestion of the application of money for secret purposes will not exonerate the directors from accounting, nor can any person in a fiduciary position retain any remuneration for his services; that an acquiescence in the acts of the directors cannot be raised by a production of the share register books at meetings of the company, and, consequently, that G H must account for the shares disposed of, and pay the costs, up to the hearing, of resisting the account. *The York and North Midland Rail. Co. v. Hudson*, 22 Law J. Rep. (N.S.) Chanc. 529; 16 Beav. 485.

A seller of land, like a purchaser of it, is entitled to file a bill for specific performance, where he seeks a more complete remedy than he could obtain by an action for damages for the non-performance of the contract. This rule applies equally to an incorporated company as to individuals. The directors of an existing railway company applied to parliament for an act to make a branch line and a diverging line, one of which would touch the property of a landowner, and the other pass through his house and garden. He opposed their bill. They entered into an agreement with him to buy his land at a certain price, and on this consideration he withdrew his opposition to the bill, which then passed, but which did not give the power to make the diverging line,

but only empowered them to make the branch line. The landowner executed his part of the agreement, the directors did not execute theirs, but after some time determined not to make the branch line, and gave the landowner notice that they should not want his land. He filed a bill for specific performance:—Held, that as the contract was one in furtherance of the general objects of the company (although the company was not at the time of making it empowered to execute the works for which the land was wanted) it was not a contract *ultra vires* of the directors, and that the person who had contracted to sell the land was entitled to specific performance. *The Directors of the Eastern Counties Rail. Co. v. Hawkes*, 24 Law J. Rep. (N.S.) Chanc. 601; 5 H.L. Cas. 331: affirming 22 Law J. Rep. (N.S.) Chanc. 77; 1 De Gex, M. & G. 737.

(I) LIABILITY OF PROVISIONAL COMMITTEEMEN.

(a) *For Deposits.*

The plaintiff, in answer to an application on his part, had shares allotted to him in a company provisionally registered for making a railway, the prospectus of which stated, that the capital of the company was to be 700,000*l.*, that there were to be 35,000 shares of 20*l.* each, and that all the shares had been allotted. He paid a deposit on his shares, and executed the subscription contract; which deed, after setting forth the intended railway, stated that the company was to have a capital *not exceeding* 700,000*l.*; and it authorized the directors to apply the deposits for the purposes of the undertaking, and to indemnify themselves. All the shares were not, in fact, allotted, nor was there any likelihood that they ever would be allotted. The company, after incurring great preliminary expenses, were unable to comply with the Standing Orders of the House of Commons, and leave to bring in a bill to carry out the scheme was refused. The plaintiff brought assumpsit for money had and received against a director, to recover back his deposit. On the trial, the Judge told the jury that the scheme having failed, the plaintiff was entitled to recover back his whole deposit, as he had subscribed to and executed the subscription contract in an association in which the capital was to be 700,000*l.*, and the number of shares 35,000, all of which it was said had been allotted; and it had turned out that the whole number of shares had never been subscribed for, and therefore that the committee were not authorized to go to parliament at the plaintiff's expense. He added that the plaintiff's execution of the deed had no material effect on his right to recover, as the deed was applicable only to a scheme in which 35,000 shares had been allotted:—Held, on a bill of exceptions to this ruling, that the direction of the Judge was wrong; that the deed, which merely stated that the capital was not to exceed 700,000*l.*, must be read by itself, and not with reference to the previous parol contract between the parties; and that by executing it the plaintiff had authorized the directors to apply his deposit for the purposes of the undertaking set forth in the deed. *Watts v. Salter*, 20 Law J. Rep. (N.S.) C.P. 43; 10 Com. B. Rep. 476.

The plaintiff applied for shares in a projected railway company. The provisional directors sent him a letter of allotment of the shares, which informed him that a deposit of 2*l.* 2*s.* per share must

be paid to certain bankers; that on presentation of the letter and payment of the deposit, the bankers would give him a receipt, which could be exchanged for scrip on his executing the parliamentary contract and subscribers' agreement. Accompanying the letter of allotment the directors sent the plaintiff a circular, stating that, in the event of the act not being obtained, the directors undertook to return the whole of the deposits, without deduction. The plaintiff paid the deposit, executed the parliamentary contract and subscribers' agreement, and received scrip certificates. He also applied for other shares, and paid the deposit on them; but, at his request, the directors, with knowledge of the facts, sent the letter of allotment and circular to E and F, who, in their own names, but as his nominees, executed the parliamentary contract and subscribers' agreement. The subscribers' agreement had been prepared before the plaintiff applied for any shares, and it, amongst other things, authorized the directors to expend the deposits in attempting to get their proposed act. A large portion of the deposits was so expended, but the bill was thrown out. The plaintiff thereupon demanded repayment of his deposits, with interest at 5l. per cent. from a period antecedent to the date of the letter.—Held, that, on the bill being thrown out, the plaintiff was entitled to a return of the whole deposit, pursuant to the terms of the circular, notwithstanding the power given to the directors in the subscribers' agreement to expend the deposits; that his right extended as well to the shares taken in the names of E and F as to those in his own name; that assumption against a director for money had and received to his use was the proper form of action; and that the demand for interest, though too large as applying to a time anterior to the demand, was yet sufficient to entitle the jury to give the plaintiff interest under the statute 3 & 4 Will. 4. c. 42. s. 28. *Londesborough v. Mowatt* (in error), 23 Law J. Rep. (n.s.) Q.B. 38; s. c. *Mowatt v. Londresborough*, 4 E. & B. 1: in the Court below, 23 Law J. Rep. (n.s.) Q.B. 177; 3 E. & B. 307.

(b) *Upon Insufficiency of Funds.*

The plaintiff became engineer to a projected railway company, on the terms contained in the following resolutions:—That the provisional committee disclaimed the intention of taking on themselves any personal responsibility as regarded the expenses incurred or to be incurred in or about the company; and that no such responsibility should attach to them; that it was clearly understood that the plaintiff should not have any personal claim against any member of the committee, and that the plaintiff would make no claim for his personal services until there should be sufficient funds of the company to meet any demand he might be entitled to make. The plaintiff also stated, in a letter, that he never understood that unless the project were successful the engineers were to abandon all claim, but he did understand that the individuals comprising the committee were not to be held personally liable. Deposits to the extent of 4,168l. were received by the company, which, on the project being abandoned, were returned to the depositors. The plaintiff having brought an action against a provisional committee-man to recover upwards of 500l.—Held, that the defendant was not personally liable, the

plaintiff having, in fact, consented to be paid out of such funds as should be properly applicable towards satisfaction of his claim, and there being no funds of that description. *Landmann v. Entwistle*, 21 Law J. Rep. (n.s.) Exch. 208; 7 Exch. Rep. 632.

(c) *For Contribution.*

Where two or more members of a provisional committee jointly enter into a contract with a third party, and one of them is compelled to pay more than his just share of the debt, he may maintain an action at law against his co-contractors to recover contribution in respect of the amount overpaid by him. *Batard v. Hawes*, and *Batard v. Douglas*, 22 Law J. Rep. (n.s.) Q.B. 443; 2 E. & B. 287.

In order to determine the aliquot part of the whole amount which each co-contractor is to contribute in such a case, the number of persons who originally entered into the contract must be looked to, and not the number of persons jointly liable to be sued as contractors at the time when the plaintiff in the action paid. Therefore, where twelve persons (including the plaintiff) jointly entered into a contract, and after the death of two of them the plaintiff paid the whole debt, it was held that he was entitled to recover from each of the surviving nine persons one-twelfth, and not one-tenth, of the sum paid by him. *Ibid.*

Semble—that an action at law might be maintained for contribution against the representatives of the deceased co-contractors. *Ibid.*

(J) *BORROWING POWERS.*

[See *BOND*.]

A railway company which, by their acts of parliament were empowered to borrow money on mortgage, borrowed money of H. By the mortgage deed, which was in the appointed form, the company, in consideration of the sum lent, assigned to H the undertaking, and all the estate, &c. of the company therein, to hold to H until the sum, with interest, was satisfied; and added the words, "the principal sum to be paid on the 1st of January 1851." The company did not pay it when due. By the local act applicable to the case, the stat. 7 & 8 Vict. c. lxxxv., it is provided in section 49, that the company may fix the period for the repayment of the principal sum and interest; and in such case they are to cause the period to be inserted on the mortgage deed, on the expiration of which period, it is enacted, that the principal and interest shall be paid to the party entitled to the mortgage. Section 52. states, "that if the principal and interest be not paid within six months after the same has become payable, and after demand thereof in writing, the mortgagee may sue for the same, or if his debt amount to 5,000l. he may alone, and if not of that amount, he may in conjunction with other creditors whose debts with his amount to 10,000l., require the appointment of a receiver":—Held, first, that the mortgage deed on its face imported a covenant by the company to pay the money. Secondly, that where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument, which on its face imports a covenant for repayment, if money be so borrowed and so secured, and not

duly repaid, an action may be maintained against the company on a breach of the covenant, although there are no specific statutory provisions enabling the company to bind themselves by such a covenant, and giving a right of action against them; consequently, that H might maintain an action against the company on the mortgage-deed, although he had not made any demand in writing. And further, that section 52. of the local act, in accordance with section 53. of the Companies Clauses Consolidation Act, the stat. 8 & 9 Vict. c. 16, did not give a right of action for the principal money, but only recognized it as already existing, and provided that when there had been a default in payment for six months and a demand in writing, the lender might either sue or have a receiver appointed. *The Eastern Union Rail. Co. v. Hart* (in error), 22 Law J. Rep. (n.s.) Exch. 20; 3 Exch. Rep. 116: in the Court below, *Hart v. the Eastern Union Rail. Co.*, 21 Law J. Rep. (n.s.) Exch. 97; 7 Exch. Rep. 246.

Trustees were empowered under a local act to purchase land, &c., for the purpose of making public docks, and to raise funds by borrowing money on the security of the rates and tolls to be levied under the act, and of any property vested in the trustees by virtue of the act, and the mortgages executed for this object were to be pursuant to a certain form, and to be registered. In the course of the execution of the works a large quantity of tools, machinery, and materials were purchased by the trustees for the purposes of the works, which they subsequently mortgaged to the contractor by two deeds which were not in the form given by the statute or registered. Subsequently these materials, tools, and machinery were seized under an execution against the company:—Held, that the mortgage was valid, and the materials, &c. were not liable to be seized. *M'Cormick v. Parry*, 21 Law J. Rep. (n.s.) Exch. 143; 7 Exch. Rep. 355.

2. JOINT-STOCK COMPANIES.

(A) REGISTRATION.

(a) When necessary.

A society, consisting of more than twenty-five members, raised money by subscription amongst its shareholders, and out of the money so raised made loans to its members at interest. Upon such loans, premiums also were payable by monthly instalments, and fines were incurred for default in payments. All the money arising from interest, premiums and fines went into the general fund of the society:—Held, that the society was not a company "established for any purpose of profit" within the meaning of the 7 & 8 Vict. c. 110. s. 2, and therefore that it did not require to be registered under that act. *Bear v. Bromley*, 21 Law J. Rep. (n.s.) Q.B. 354; 18 Q.B. Rep. 271.

The Union Bank of London held to be a public company not incorporated, within the meaning of the statute 7 & 8 Vict. c. 110. *Macintyre v. Connell*, 20 Law J. Rep. (n.s.) Chanc. 284; 1 Sim. N.S. 225.

Semble—the want of registration does not make a company illegal as between the shareholders and the promoters, whose duty it was to register it. *Butt v.*

Monteaux, 24 Law J. Rep. (n.s.) Chanc. 99; 1 Kay & J. 98.

(b) Provisional Registration.

An action for work and labour does not lie against a company completely registered for work done for the company provisionally registered. *Hutchinson v. the Surrey Consumers Gaslight and Coke Association*, 21 Law J. Rep. (n.s.) C.P. 1; 11 Com. B. Rep. 689.

A company completely registered is not liable on any contract made by the promoters before provisional registration. *Ibid.*

Quære—whether a company is liable, after complete registration, to be sued in its collective name upon contracts previously made by the provisionally registered company, when such contracts are within section 23. of the 7 & 8 Vict. c. 110. *Ibid.*

A declaration stated that the plaintiffs were the promoters of a railway company, and the defendants members of a managing committee of a provisionally registered railway company, and that the defendants were indebted to the plaintiffs in 3,000*l.* for certain plans, sections and books of reference, sold and delivered by the plaintiffs to the defendants, and by them used, and also for work and materials. Plea, that at, &c. each of the said companies was a joint-stock company within the meaning of the Joint-Stock Companies Registration Act (the 7 & 8 Vict. c. 110), and not being a banking company; that it consisted of more than twenty-five members; and that a contract was made between the plaintiffs, as such promoters of the first company, on behalf of the same company, and the promoters, of whom the defendants then were two, of the said secondly-mentioned company, whereby the plaintiffs agreed that they, the plaintiffs, and the said first-mentioned company should perform certain services for the said secondly-mentioned company, which said services and the said payment of which were not necessarily required for the establishing of the said company, or either of them; that the work was done by the plaintiffs in their character of promoters, and an account stated also in the same character; and that neither of the companies was completely registered as required by the said act of parliament, or incorporated by statute or charter, or authorized by statute or letters patent to sue and be sued in the name of any officer or person; and that the said plans, sections and books of reference at the time of the making of the said contract, and at the time of the said sale, &c., and using of the said plans, sections and books of reference were stores not necessarily required for the establishing of the said company; of all which premises the plaintiffs had notice at the time of the said making of the said contract and promise, and at the time of the said doing the said work and providing the said materials, and so selling and delivering, depositing, appropriating and using the said plans, sections and books of reference, and so paying the said money, &c.:—Held, that as the contract for services and work was forbidden by the act, and was therefore illegal, the plea was not bad on special demurrer as amounting to non assumpsit; and that it was good on general demurrer, as it was a good answer to the action. *Bull v. Chapman*, 22 Law J. Rep. (n.s.) Exch. 257; 8 Exch. Rep. 444.

A railway company requiring an act of parliament

must be provisionally registered under the 7 & 8 Vict. c. 110. s. 4; and, consequently, contracts entered into on behalf of such a company before provisional registration, are illegal, being prohibited by the 24th section of the act; and an action for work done in pursuance of them will not lie. *Abbott v. Rogers*, 24 Law J. Rep. (N.S.) C.P. 158; 16 Com. B. Rep. 158.

It is also illegal, under the 7th section of the 10 & 11 Vict. c. 78, for the promoters of such a company to issue, before obtaining a certificate of complete registration, a prospectus containing any of the particulars required, by that act or the 7 & 8 Vict. c. 110, to be returned to the Registrar of Joint-Stock Companies. *Ibid*.

(c) Complete Registration.

(1) Deed of Settlement.

Where a deed is altered in a material part it ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact. *The Agriculturist Cattle Insurance Co. v. Fitzgerald*, 20 Law J. Rep. (N.S.) Q.B. 244; 16 Q.B. Rep. 432.

Where in an action of debt for calls, under 7 & 8 Vict. c. 110. s. 55, it appeared that the deed of settlement of the company had been executed by the defendant as a shareholder, but there was an unexplained erasure of the name of another person who had signed it as a shareholder, it was held that the deed might be given in evidence to prove the fact of the defendant being a shareholder. *Ibid*.

Quære—Whether such an erasure could in any mode affect the defendant's liability under the deed. *Ibid*.

The deed of settlement of a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, was executed by one-fourth of the shareholders, and contained a clause providing that the shares of every subscriber who should not execute the deed within three months from its date should be forfeited, if the board of directors thought fit, and that the amount paid upon such shares should become the property of the company. Under this clause, the shares of a scrip-holder in the company, who had not applied to sign the deed within three months from its date, were declared forfeited, without any reasonable notice having been given, and a subsequent application to be allowed to sign was refused:—Held, in an action for such refusal, and for not causing a certificate of proprietorship of the shares to be delivered to the plaintiff, that the clause of forfeiture could not be objected to as being *ultra vires* or unreasonable, and that as the deed did not require notice to be given before forfeiture, no such notice was necessary, and therefore that after the forfeiture the plaintiff's title to the shares ceased. *Stewart v. the Anglo-Californian Gold Mining Co.*, 21 Law J. Rep. (N.S.) Q.B. 393; 18 Q.B. Rep. 736.

The deed of a joint-stock company, completely registered, provided that, on payment of 1*l.* per share, "no further call shall be made on any shareholder in respect of the share or shares subscribed for, or held by him, under the provisions of these presents." The deed gave power to the directors to borrow money

to a large amount, and to pledge the capital, credit and effects of the company for securing the same. G subscribed for twenty-five shares, and paid up the full amount of 1*l.* per share. An order was made for winding up the company. A great proportion of the shareholders had not paid up their shares. Considerable costs having been incurred by the official manager, who was unable to obtain payment from the defaulting shareholders, the Master made an order upon the whole of the contributories for a call of 1*l.* per share:—Held, upon appeal, reversing the order of the Vice Chancellor, that G and the other shareholders who had paid their shares in full, were liable to the call. *In re the Sea, Fire and Life Insurance Company*, and *in re the Joint-Stock Companies Winding-up Acts*, 1848 and 1849, *ex parte Greenwood*, 23 Law J. Rep. (N.S.) Chanc. 966; 3 De Gex, M. & G. 459; reversing 2 Sm. & G. 95.

The shareholders in a company ordered to be wound up, will be liable, as defendants in a suit, to pay the costs of winding up their affairs, any stipulation in their deed of settlement to the contrary notwithstanding. *Ibid*.

Even if the deed of settlement affects expressly to limit the liability of the shareholders to creditors, such limitation is inoperative, for the Joint-Stock Companies Registration Act has not altered the law of partnership in that respect. *Ibid*.

(2) Certificate of.

A joint-stock company, registered under 7 & 8 Vict. c. 110, cannot maintain an action for calls until they have obtained a certificate of complete registration, and a plea that they had not obtained such a certificate is an answer to the action. But this defence will not arise under a plea of never indebted, or a plea traversing that the plaintiffs were a completely registered company. *The Agriculturist Cattle Insurance Co. v. Fitzgerald*, 20 Law J. Rep. (N.S.) Q.B. 244; 16 Q.B. Rep. 432.

The Master, upon winding up this company, excluded certain shareholders from the list of contributories, on the ground that the requisitions of the statute 7 & 8 Vict. c. 110, in regard to the deed of incorporation, had not been complied with before the certificate of complete registration was obtained:—Held, that the certificate of the registrar was sufficient evidence of complete registration, although all the requisite provisions might not have been fully complied with. *In re the Independent Assurance Co., ex parte Bird*, 20 Law J. Rep. (N.S.) Chanc. 30; 1 Sim. N.S. 47.

(B) DIRECTORS.

(a) Power to contract.

A joint-stock company, registered under the 7 & 8 Vict. c. 110, and employed in manufactures, appointed a manager, under a clause in its deed of settlement, to superintend and transact its manufacturing business. The general business was to be transacted by a board of directors, who had power to appoint officers and delegate their authority. The manager, the chairman of the directors, the deputy-chairman and the secretary respectively ordered goods necessary for the manufacture, which were delivered on the company's premises and used for the company's purposes:—Held, that, without any delegation, the manager had authority to give such

orders in the absence of any express provisions to the contrary. That although the other officers had no authority to give such orders, and although there was no express recognition or adoption of their orders by the directors, the directors must be taken to have known that the goods had been furnished and used, and that therefore the company was liable to pay for them. *Smith v. the Hull Glass Co.*, 21 Law J. Rep. (N.S.) C.P. 106; 11 Com. B. Rep. 897.

By a deed made between L and his wife of the first part; the defendant of the second; the plaintiffs, a joint-stock company, of the third, and the trustees of the company of the fourth, in consideration of 200*l.* advanced to L by the company on the execution, L and the defendant covenanted to pay an annuity to the plaintiffs, and that L should keep on foot a policy on his own life, and one upon his wife's, L and his wife further granted to the trustees their interest in certain freehold property, upon trust to pay thereout, by sale or otherwise, the arrears of the annuity, and pay over the surplus monies received to the parties entitled thereto. In an action of covenant by the company against the defendant for the non-payment of the annuity, and for not keeping on foot the policies, the defendant, after setting out the deed on oyer, pleaded that it was a contract made on behalf of a completely registered joint-stock company under the 7 & 8 Vict. c. 110. s. 44, and that it was void because it was not executed with the formalities thereby required:—Held, that the plea was bad, the contract not being one made *on behalf of the company*, and being a unilateral one, on which the covenantee might sue without executing it. *The British Empire Mutual Life Assurance Co. v. Browne*, 22 Law J. Rep. (N.S.) C.P. 51; 12 Com. B. Rep. 723.

A director of a joint-stock company, duly registered, lent money to the company upon a promissory note, signed by two directors and the secretary, bearing interest at 5*l.* per cent. The reports of the auditors and secretary contained notices of the loan, and the same were read and adopted at the annual meeting of the shareholders, although the rate of interest was not mentioned. The company was ordered to be wound up, and the executors of the director claimed to be allowed to stand as creditors of the company for the money lent and interest; the Master, on the authority of *Teversham v. Cameron's Coalbrook Company*, disallowed the claim, but upon appeal it was held that the contract had been sufficiently confirmed by the shareholders under the 29th section of the Joint-Stock Companies Registration Act (7 & 8 Vict. c. 110), and that the claim must be allowed. *Ex parte Murray's Executors, in re the Universal Salvage Co.*, 24 Law J. Rep. (N.S.) Chanc. 25; 5 De Gex, M. & G. 746.

(b) Rights and Liabilities.

A company was provisionally registered and a managing committee appointed, who resolved that no payments should be made for sums over 10*l.* unless by cheques signed by three directors, countersigned by the secretary. The same committee subsequently resolved that all cheques should be signed by three of the five constituting the committee of management. E F M was a director, a member of the committee of management and a member of the allotment committee, and attended the meeting at which

the above resolutions were passed. On the 14th of August cheques were drawn, and E F M was present on that day for the last time, and on the 22nd he wrote saying "he withdrew;" on the 24th he desired the secretary to withhold his name from future prospectuses; on the 26th the chairman asked him to reconsider his determination; on the 28th the solicitor to the company wrote to a similar effect, and on the same day E F M declined compliance. The whole amount of deposits paid was above 40,000*l.*, 35,000*l.* of which only was paid up to the 22nd of August, out of which sums had been withdrawn leaving a balance of above 33,000*l.* in the bankers' hands on that day. The company was ordered to be wound up, and the Master charged E F M with the whole 40,000*l.* on the ground that he had not retired on the 22nd of August. T F M on the 6th of September was elected a member of the managing committee, and attended for the first time on the 11th, at which date the balance at the bankers was upwards of 24,000*l.* The Master charged him with this whole amount. On appeal by both the Messrs. M, the Court held that the managing committee had authority to pass the resolution that all cheques should be signed by three of the managing committee as being within their general power, and that the resolution was binding on the association. Held, also, that E F M had retired whether his resignation was accepted or not, and ought not to have been charged with any part of the 40,000*l.* unless for sums drawn out (if any) before the 22nd of August. Held, also, that T F M ought not to have been charged excepting for any money (if any) paid by cheques after he became a director. The whole decision on the appeal was declared to be without prejudice to any case against either of the Messrs. M on any additional evidence. *Ex parte Maitland, in re the Gloucester, Abergryth and Central Wales Rail. Co.*, 23 Law J. Rep. (N.S.) Chanc. 140; 4 De Gex, M. & G. 769.

Where directors of joint-stock companies are appointed they are trustees: after deposits are paid, and not before, there are trust funds, and those funds are held by the directors upon the trusts and terms of the subscribers' agreement, and if by that document the directors have power to bind by a majority all the members of the company, they have authority to resolve that a smaller number shall be a managing committee, and the latter may determine how many of their number may by cheque deal with the funds and so bind the whole body of subscribers. *Ibid.*

A suit was instituted against the directors of an abortive company, to make them liable for acts of mismanagement and for the misapplication of its funds. This was compromised by an order on the defendants to pay a fixed sum. One of them having paid more than his share,—Held, that he could sustain a suit simply for contribution in respect of the compromise, and that the co-directors were not entitled, without a cross-bill, to make the plaintiff at the same time account for his general liabilities to the company. *Prole v. Masterman*, 21 Beav. 61.

(C) SHARES.

(a) Certificate of Proprietorship.

The Joint-Stock Companies Registration Act (7 & 8 Vict. c. 110.) by section 51. enacts that, "on demand of the holder of any share the company

shall cause a certificate of the proprietorship of such share to be delivered to such shareholder," and by section 3. the word "shareholder" is to mean any person entitled to a share in a company, and who has executed the deed of settlement, so far as such meaning is not excluded by the context or the nature of the subject-matter.—Held, that a holder of shares in a joint-stock company who has not executed the deed of settlement, is not entitled to a certificate under section 51. *Wilkinson v. the Anglo-Californian Gold Mining Co.*, 21 Law J. Rep. (N.S.) Q.B. 326; 18 Q.B. Rep. 728.

The declaration alleged that the defendants were a completely registered company formed under a deed of settlement, and that the plaintiff became a subscriber for shares to be received by him as soon as the defendants were completely registered, and had paid the deposit upon such shares; and that after the complete registration of the defendants, the plaintiff duly executed the said deed of settlement except as to a certain provision therein numbered 179, and that by virtue of the premises and of the statute the plaintiff was entitled to have made out by the defendants a certificate of the proprietorship of the said shares so subscribed for by the plaintiff as aforesaid, and alleged as a breach that the defendants refused to deliver to him such certificate. The plea alleged that the plaintiff had not executed the deed of settlement:—Held (on demurrer to the plea), that the declaration shewed no cause of action, as it must be taken to omit any allegation that the plaintiff had executed the deed of settlement. *Ibid.*

There can be no such thing as a partial execution of a deed. *Ibid.*

(b) *Sale of.*

[See *MINE.*]

W E, being an allottee of shares in a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, directed his brokers to sell his shares, which they did. Before W E had executed the deed of settlement, he became bankrupt. Upon the petition of the brokers that the assignees might be directed to transfer:—Held, affirming the decision of the Commissioner, that W E not having been registered as a shareholder, the sale was absolutely void both at law and in equity, under the 26th section of the Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110. *Ex parte Neilson, in re Edmond*, 23 Law J. Rep. (N.S.) Bankr. 12; 3 De Gex, M. & G. 556.

(c) *Transfer of.*

The deed of settlement of a banking company allowed shareholders to dispose of their shares upon obtaining "the consent of the board of directors," which was to be testified by "a certificate in writing, signed by three of the directors." During the whole time that the bank carried on business a managing director received the applications for sales of shares, consented, and signed the certificate of "consent," which was afterwards signed by two other directors, but was never signed by the three assembled as a board. R S, a shareholder, had at various times, with such consents, sold his shares. The directors, under 7 Geo. 4. c. 46, made a return to that effect. The company failed, and the directors passed a resolution declaring that there had been no valid transfer

of the shares of R S:—Held, that as between him and the company the consents given by the directors, although informal and irregular, were valid, and that they could not afterwards treat R S as a member of the company. *Bargate v. Shorridge*, 24 Law J. Rep. (N.S.) Chanc. 457; 5 H.L. Cas. 297: affirming *Shorridge v. Bosanquet*, 22 Law J. Rep. (N.S.) Chanc. 48; 16 Beav. 84.

The deed of settlement of a joint-stock banking company provided that no person should become a shareholder without the consent of the directors, and in case the board should refuse to consent to any transfer of shares, they should, at the request of the holder, be obliged to purchase the same out of the funds, and on behalf of the company, at a price, in case the parties should not agree, to be fixed by arbitration. The plaintiff contracted to sell his shares, but the board refused to consent to the transfer, and he then required the board to purchase them. The plaintiff's shares not being purchased for the company, and an action being afterwards brought against him for calls made subsequently to his application to sell them, he filed a bill to compel the company to purchase the shares, and to restrain the action. On a motion for the injunction,—Held, that the fact, that at the time the application was made by the plaintiff to the board to purchase his shares out of the funds, and on behalf of the company, and thenceforward the company had no funds applicable to the purchase of shares was a defence to the equity of the plaintiff founded on the provisions of the deed to compel such purchase; that it did not follow from the absence of such funds of the company that the board of directors was therefore under all circumstances bound to adopt the alternative of permitting the plaintiff to transfer his shares to any other person; and held also, that the fact of the price at which the plaintiff had contracted to sell his shares, shewing that they were then nearly valueless, and the further fact, that in the following month the banking company suspended its payments offered sufficient *prima facie* evidence that the board were justified in not purchasing or permitting the transfer of the shares, to induce the Court to refuse to stay the action for calls until the hearing of the cause, except upon the terms of bringing the amount into court:—Held, also, that the question whether the board were justified by the facts of the case in refusing either to permit the transfer of the shares, or to purchase them for the company was a question to be tried in equity. *Taft v. Harrison*, 10 Hare, 489.

(D) *INVESTMENT OF MONEY PAID INTO COURT.*

Order made as to the investment of money paid into court by public companies in the funds, with reference to brokerage. *In the matter of Braithwaite's Trust*, 22 Law J. Rep. (N.S.) Chanc. 915; 1 Sm. & G. App. xv.

(E) *APPROPRIATION OF FUNDS.*

[See *ante*, 1, (G) (a) and (c).]

It is not lawful to apply the funds of a company in an application to parliament for powers to extend the business of the company beyond the objects for which it was constituted, and the Court will interfere by injunction at the suit of a shareholder to restrain any such application. The same principles

which regulate the rights of parties in ordinary partnerships are applicable in determining the duties of the managing bodies in joint-stock companies, as between them and members of such companies. *Simpson v. Denison*, 10 Hare, 51.

(F) DIVIDENDS.

In 1819 a person entitled to a share in a coal-mining company became bankrupt. Dividends were declared in 1831, 1838, and subsequently. The bankrupt's shares were carried over to a separate account in the company's books down to 1850, but no claim was made by the assignees until that year:—Held, that the right of the assignees to these dividends still subsisted, but that they were not entitled to any profits made by their retainer. *Penny v. Pickwick*, 16 Beav. 246.

3. DISSOLUTION AND WINDING UP OF COMPANIES.

(A) WHEN AND TO WHAT COMPANIES THE WINDING-UP ACTS WILL BE APPLIED.

(a) *In general.*

In 1845 a company was projected and was provisionally registered, but the allottees of shares not having paid any deposits the Standing Orders could not be complied with, and the undertaking was abandoned. The solicitor had given the members a guarantee against any expenses incurred in the formation of the company, but to avoid litigation each of the members paid a sum sufficient to liquidate all liabilities, except the solicitor's bill. The brother of the solicitor then presented a petition for winding up the company under the acts:—Held, that although it had been decided that unformed companies came within the meaning of the Winding-up Acts, the Court was bound to regard the inconvenience likely to arise in such cases, where each member was only liable for the debts which he had expressly authorized; and as there were no liabilities proved, which would not be covered by the guarantee, this was not a case for a winding-up order. *In re the Narborough and Watlington Rail. Co., ex parte James*, 20 Law J. Rep. (N.S.) Chanc. 275; 1 Sim. N.S. 140.

Held, also, that although the respondent had opposed the petition without being liable as a contributory, and without being served with the petition, he was entitled to his costs. Petition dismissed, with costs. *Ibid.*

A petition was presented by a member of a joint-stock company that the company might be wound up, on the ground that a judgment had been obtained against it under which any member of it might at any time be called upon to pay 15,000*l.* It appeared in opposition to the petition, that a great majority of shareholders was opposed to it; that the assets of the company, when realized, would be greater than their debts; that arrangements had been entered into with the judgment creditor relative to the debt; that the company had ceased to carry on business; and that they were trying to wind it up themselves. The Court, in the exercise of its discretion, under these circumstances declined to make the order. *In re the British Alkali Co.*, 22 Law J. Rep. (N.S.) Chanc. 241; 5 De Gex & Sm. 458.

The 12th section of the Winding-up Act gives the Court a discretion; and where it appeared that the majority of shareholders were attempting, with the creditors, to arrange the affairs of a banking company which had stopped payment, the Court refused, on the application of a single shareholder, to make an immediate order for winding up the company, but ordered the petition to stand over for two months to enable the company and creditors, if possible, to settle the affairs without the intervention of the Court. *Re the Monmouthshire and Glamorganshire Banking Co.*, 15 Beav. 74.

A provisionally registered railway company having abandoned their undertaking, the directors made two payments to the shareholders in part return of their deposits, and they offered to make a third and final payment, which the whole, or nearly the whole, of the shareholders except A accepted. All the debts and liabilities of the company were discharged, and all the assets of it were exhausted, and A applied for and received the second payment as being one of the shareholders who had concurred in the dissolution of the company. Nevertheless, he being dissatisfied, as he alleged, with the directors' accounts, petitioned for an order for the dissolution and winding up of the company, or for winding it up if it had been already dissolved. The Court refused to make the order at once, and directed the Master to inquire and state whether it was necessary or expedient that the company should be dissolved and wound up, or wound up. *In re the Boston, Newark and Sheffield Rail. Co., ex parte Williams*, 1 Sim. N.S. 57.

A winding-up order is not to be made because a company is within one of the eight classes described in the 5th section of the act, but it is for the Court to judge of the necessity or expediency; and when a company was insolvent, but there was an arrangement pending, by which the admitted debts would be cleared by a subscription among the shareholders, and there was no other question except equities between the shareholders, the Court refused a winding-up order on the petition of a few shareholders holding a few shares. *In re London Conveyance Co. ex parte Wise*, 1 Drew. 465.

(b) *Railway Companies.*

A projected railway company, provisionally registered, is within the meaning of the Winding-up Acts, which may, therefore, be applied to it if a Court of equity shall so think fit. *Bright v. Hutton*, 3 H.L. Cas. 341.

The 12 & 13 Vict. c. 108. (which came into operation on the 1st of August 1849), by section 1, enacts, that the Joint-Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45), shall not apply to railway companies incorporated by act of parliament. The 12 & 13 Vict. c. 83. (passed on the 14th of August 1850), by section 30, provides, that notwithstanding the provision in the 12 & 13 Vict. c. 108, that act, as well as the 11 & 12 Vict. c. 45, shall apply to any incorporated railway company, in respect of which an order for winding it up may have been made previous to the passing of the act of 1849, and that the proceedings for winding up the same shall proceed and be carried on under the Winding-up Acts of 1848 and 1849, or either of them:—Held, that this clause was retrospective in its operation, and rendered valid proceedings for the purpose of winding up an

incorporated railway company taken before the 14th of August 1850. *M'Kenzie v. the Sligo and Shannon Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 380.

(c) *Clubs.*

The affairs of a club were ordered to be wound up under the Joint-Stock Companies Winding-up Acts. *In the matter of the St. James's Club*, 20 Law J. Rep. (N.S.) Chanc. 630.

Clubs are not partnerships or associations within the meaning of the Joint-Stock Companies Winding-up Acts. *In re St. James's Club*, 2 De Gex, M. & G. 383.

(d) *Loan Societies.*

A petition was presented for the winding up of a loan society, in which certain persons united themselves together, to subscribe 8s. per month, for each share, for 100 months, amounting to 40l. per share, and whenever there should be 200l. in hand the members were to bid for the purpose of procuring a loan at 5l. per cent., the premiums to be divided among the members. After fifty-one meetings the society ceased its operations, and the petition was presented on the ground that the funds had been mismanaged and the society had come to an end. The petition was resisted, for three reasons: first, that the petitioner was not entitled to present the petition, as nothing was due to him from the society; secondly, that the society did not come within the meaning of the Winding-up Acts; and, thirdly, that this was not a case for the interference of the Court:—Held, that the petitioner being a member and claiming to be a contributory of the society was entitled to present the petition; that the object of the society being profit, it was within the meaning of the acts; and that, under the circumstances of the case, the Court was bound to make the order for winding up, although it might be detrimental to the interests of the society. *In re the Sherwood Loan Society, ex parte Smith*, 20 Law J. Rep. (N.S.) Chanc. 177; 1 Sim. N.S. 165.

(e) *Pending Suit for Winding up.*

Winding-up order refused, on the ground (amongst others) that a suit was pending for the same purpose. *In re Chester and Manchester Direct Rail. Co., ex parte Phillippo*, 1 Sim. N.S. 605.

(B) ORDER FOR WINDING UP.

(a) *On whose Petition made.*

A shareholder indebted for calls made two years previously to meet liabilities shewn by the accounts of that date:—Held, obiter, not to be entitled to an order for winding up the affairs of the company merely on the ground that he had been sued for a sum less than the amount due from him for calls as a debt claimed from the company, and had not been expressly indemnified or protected by the company pursuant to the Joint-Stock Companies Winding-up Act, 1848, sect. 5, case 5, the Court being of opinion that he had in his hands a sufficient indemnity for the action. *In re the Birch, Torr and Vitiifer Co., ex parte Lawton*, 1 Kay & J. 204.

But it appearing that the company was only existing for the purpose of winding up its affairs, and there being nothing to shew that the liabilities had since been paid, and subsequent accounts of the company shewing liabilities still outstanding and

calls being due from other shareholders, including one of the trustees of the company:—Held, that although the petitioner alone desired the investigation, he was entitled to an order for winding up the affairs of the company. *Ibid.*

(b) *Effect of.*

The 73rd section of the 11 & 12 Vict. c. 45. (the Winding-up Act) authorizes a plaintiff having a claim against a dissolved company, subject to the provisions of that act, to proceed with his action against such company, "after proof or exhibiting or making such proof as he may be able, of his debt or demand before the Master":—Held, that the plaintiff, who had exhibited such proof and had obtained the Master's allowance, was entitled to proceed with his action, and was not bound to take any further step, as, for instance, to endeavour to obtain payment of his demand. *Prescott v. Hadon*, 20 Law J. Rep. (N.S.) Q.B. 381; 5 Exch. Rep. 727; 1 L. M. & P. P.C. 640.

Quere—whether allowance of proof by the Master is essential in such a case. *Ibid.*

The dissolution of a company by an order absolute under the Joint-Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45.) is no bar to an action against the company by a creditor. Neither can the omission by such creditor to prove his debt before the Master in Chancery be pleaded in bar to such an action; the appropriate remedy being under section 73, by an application to a Judge to stay proceedings in the action until after proof made. *M'Kenzie v. the Sligo and Shannon Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 380.

(C) INTERIM MANAGER.

An interim manager appointed under the Winding-up Act (11 & 12 Vict. c. 45. s. 20.) is not an official manager within the 73rd section; and therefore the Court will not, under that section, stay proceedings in an action against the company ordered to be wound up, or other person representing the company, unless an official manager has been appointed. *Brettle v. Dawes*, 21 Law J. Rep. (N.S.) Exch. 94; 7 Exch. Rep. 307.

(D) OFFICIAL MANAGER.

An action brought against a contributory of a joint-stock company is not an action against the company, or a person authorized to be sued as nominal defendant, under the 50th section of the Winding-up Act (11 & 12 Vict. c. 45), and therefore need not be brought against the official manager appointed under the act. *Beardshaw v. Londesborough*, 21 Law J. Rep. (N.S.) C.P. 17; 11 Com. B. Rep. 498; 2 L. M. & P.P.C. 560.

An action against a contributory falls under the 62nd section, which enables the official manager, by leave of the Master, to defend such action in his official name, or in the name of the original defendant. *Ibid.*

The 7 & 8 Vict. c. 110. s. 66. provides that judgments obtained against a completely registered company may be enforced against shareholders. The 11 & 12 Vict. c. 45. s. 50. provides that, after the appointment of an official manager, actions which might be brought against a company or any person authorized to be sued on behalf of the company,

shall be brought against the official manager. The 57th section provides that judgments against the official manager shall have the like effect on shareholders as if the judgment had been against the company, or a person authorized to be sued on its behalf. The 12 & 13 Vict. c. 108, s. 1. extends the operation of the former act to all companies of more than seven members:—Held, that as the 57th section of the 11 & 12 Vict. c. 45. must be construed with reference to the 50th, a judgment obtained against the official manager of a company, only provisionally registered, cannot be enforced against a shareholder, as the action could not have been brought against the company. *Prichard v. the Official Manager of the London and Birmingham Extension, Northampton, Daventry, Leamington and Warwick Rail. Co.* (In re Weiss.) 24 Law J. Rep. (N.S.) C.P. 30; 15 Com. B. Rep. 331.

An action cannot be maintained against the official manager of a company within the provisions of the Joint-Stock Companies Winding-up Act, 7 & 8 Vict. c. 110, and being wound up under the 11 & 12 Vict. c. 45, unless such company has been completely registered; for section 50. of the last-mentioned act only provides for the official manager being sued where such action could otherwise have been maintained against such company or any person duly authorized to be sued as the nominal defendant on behalf of the same. *Russell v. Croysdill*, 24 Law J. Rep. (N.S.) Exch. 287; 11 Exch. Rep. 123.

Under the order for winding up a joint-stock company, calls were made upon the contributories to the amount in the whole of 324,000*l.* and upwards, of which 142,205*l.* only was received by the official managers and paid to the creditors of the company, not being shareholders; and 181,711*l.* 14*s.* 4*d.* was set off against the calls of certain of the contributories, thereby extinguishing such contributories' demands against the company to that extent:—Held, that under the 35th section of the Winding-up Act, 1849, the per-centage was payable only in respect of the 142,205*l.*, the amount actually received and divided among the creditors of the company. In the matter of the Joint Stock Companies Winding-up Act 1848 and of the North of England Joint-Stock Banking Co., 20 Law J. Rep. (N.S.) Chanc. 462.

Proceedings were taken in the Master's office by the official manager, upon which he obtained the order of the Master for the production of an account of certain payments. The parties ordered to produce this account appealed, and the Court discharged the order:—Held, that the proceedings being, in the opinion of the Court of Appeal, improper, the official manager must pay the costs before the Master, but that the costs of supporting the order of the Master in the court of appeal must be paid out of the estate; the former being without prejudice to any order the Master might make as to indemnity out of the estate. *Ex parte Woolmer, in re the Direct Exeter, Plymouth and Devonport Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 513.

In proceedings by the official manager of a joint-stock company, his name and address, as well as style, should be given. *Ex parte Heritage*, 23 Law J. Rep. (N.S.) Chanc. 200; Kay, App. xxix.

An official manager who continues an existing suit, under an order of the Court, pursuant to the provi-

sions of the Winding-up Acts, adopts the suit with all the imperfections and infirmities attaching upon it at the time of obtaining the order substituting the official manager for the original plaintiff. *The Official Manager of the Grand Trunk or Stafford, &c. Rail. Co. v. Brodie*; and *The Same v. Sturgis*, 22 Law J. Rep. (N.S.) Chanc. 514; 3 De Gex, M. & G. 146; 9 Hare, 823.

A trustee cannot be charged for fraud upon the mere ground that the document, by which the alleged fraud was perpetrated, had been in his possession, but had been subsequently lost and was not accounted for. *Ibid.*

The Court being of opinion that a bill adopted by an official manager contained charges of fraud and misconduct, not supported by the evidence, that the suit was improperly framed in its inception, and that, both with reference to the frame of the suit and the merits of the principal question, it ought not to have been adopted, dismissed the bill, with costs, to be paid personally by the official manager. *Ibid.*

An order directing an official manager by name, and by his description of official manager, to pay costs, is an order for him to pay them personally, and not in his official character. *Ibid.*

(E) FUNDS.

(a) Misapplication of.

A railway company was formed, and a large number of shares in it was allotted, and a considerable sum paid in respect of deposits on the shares. A managing committee of the company was appointed, and five of its members were appointed a finance committee, with power to draw cheques. By the direction of the managing committee, large sums, part of the company's funds, were employed in purchasing shares in the market. The Master to whom the winding up of the company was referred, charged the members of the finance committee with these sums, on the ground that the managing committee was implicated in the breach of trust. The Master's order was overruled. *In re the London and Birmingham Extension, and the Northampton, Daventry, Leamington, and Warwick Rail. Co., ex parte Carpenter's Executors*, 21 Law J. Rep. (N.S.) Chanc. 825; 5 De Gex & Sm. 402.

(b) Distribution of.

In the proceedings before the Master for winding up an abortive joint-stock company, in which 53,015 shares had been subscribed for, a sum of 23,000*l.* was realized. After two advertisements in the daily papers for scrip-holders, certificates representing 25,675 were produced, 24,870 scrip shares were cancelled by arrangement with the holders, leaving 2,470 scrip shares unaccounted for. It appeared that 22,000*l.* assets of the company remained outstanding. On the application of the official manager the Court authorized him to pay a dividend of 1*s.* per share among the holders of the 25,675 scrip shares, and to pay and distribute future dividends among the holders for the time being of scrip shares, with the sanction of the Master. *In re the Madrid and Valencia Rail. Co., ex parte Quilter*, 5 De Gex & Sm. 276.

(F) COMPROMISE.

Upon the authority of *Uppill's case*, decided by

the House of Lords, W L was placed upon the list of contributories of a railway company. Subsequently, W L, with the sanction of the Master, agreed to pay a certain sum as a compromise of all liability. Between the decision of *Upfill's case* and the date of the agreement, *Bright's case* was decided by the House of Lords, which overruled *Upfill's case*. One of the Vice Chancellors held, that the compromise was binding, although W L alleged surprise and misrepresentation; and the Lords Justices, confirming that decision,—Held, first, that the approval of the Master had relation back to the time of the agreement, and was not affected, therefore, by *Bright's case*; secondly, that as when the Master approved of the compromise there was a doubt, of which W L was aware, whether he was not entitled to be relieved from liability on the authority of *Bright's case*, the compromise was for a good consideration, and therefore valid; and, thirdly, that the compromise, having been entered into *bona fide*, the parties thinking the question between them was doubtful, although in fact it turned out that there was no real question between them, and there being no evidence of surprise or misrepresentation, was valid and binding. *Ex parte Lucy, in re the Midland Union, Burton-upon-Trent, Ashby-de-la-Zouch and Leicester Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 732; 4 De Gex, M. & G. 356.

(G) ACTIONS AND SUITS AGAINST THE COMPANY OR CONTRIBUTORIES.

[See OFFICIAL MANAGER, *ante*, (D).]

The plaintiffs filed a bill to wind up the affairs of a banking company, charging the directors with personal misconduct. The defendants afterwards obtained an order to wind up the company under the Winding-up Act, although such order was opposed by the plaintiffs. The plaintiffs now moved to stay proceedings in the suit until the company should be wound up under the order for that purpose:—Held, that the winding-up order could not give all the relief sought by the bill, and that the plaintiffs ought to have come to the Court promptly, instead of delaying two years and a half. Motion refused. *Deeks v. Stanhope*, 20 Law J. Rep. (N.S.) Chanc. 485; 1 Sim. N.S. 439.

A joint-stock company overdrew its account with its bankers, and was subsequently ordered to be wound up. The amount of debt was disputed, and the public officer of the bank (also a company) carried in a claim before the Master, who refused to admit it as a claim until the debt was proved at law. The Master of the Rolls on appeal admitted the claim, and directed an action to be brought; but, upon appeal, it was held, that although the order at the Rolls was correct in admitting the claim, it must be altered by giving the public officer of the bank liberty to bring such action against such person or persons as he should be advised. *Ex parte the East of England Banking Co., in re the Norwich Yarn Co.*, 21 Law J. Rep. (N.S.) Chanc. 822; 5 De Gex, M. & G. 505; 13 Beav. 426.

A person having a claim as creditor against a company ordered to be wound up was, after various proceedings, allowed to bring an action against the official manager, and recovered judgment for the amount and costs. The order permitting the action directed that the judgment, if any, should be dealt

with as the Court should direct. The creditor applied for leave to issue proceedings at law or in equity against the property of the company, or against the contributories, or that the official manager might make a call for payment of the demand:—Held (overruling a decision of one of the Vice Chancellors, who had refused to make any order), that he was entitled to proceed at law; but that the Court would not make a call, as such an application must be made in the Master's office. *Ex parte Prichard, in re the London and Birmingham Extension, Northampton, Daventry, Leamington and Warwick Rail. Co.*, 23 Law J. Rep. (N.S.) Chanc. 914; 5 De Gex, M. & G. 484.

An execution against a company having proved ineffectual, the Court allowed the creditor to issue execution against some of its members to the extent, of their shares not paid up, notwithstanding the company was about to be wound up. *Ex parte the Warkworth Dock Co., re Phillips*, 18 Beav. 629.

Upon the formation of a joint-stock company, two of the members advanced part of the purchase-money for the land required for the concern, upon a mortgage made to a trustee for them, when the land was conveyed in trust for the company. The mortgage was afterwards transferred to strangers. The company being wound up under the Winding-up Acts, the transferees, by arrangement with the official manager, sold the land, which did not realize sufficient to pay the mortgage debt, and proved for the deficiency as creditors. Being unable to obtain payment from the official manager, they filed a bill against him:—Held, upon demurrer, that payment of the debt was properly enforceable by suit in equity against the official manager, and that the plaintiffs were not precluded from instituting such a suit by the proceedings under the Winding-up Acts. *Thompson v. Norris*, 5 De Gex & Sm. 686.

(H) CLAIMS.

(a) *In general.*

Directors of one railway company passed a resolution to lend money to the directors of another company on their personal responsibility, and the money was so lent, and some of the directors signed a guarantee for repayment. Under an order for winding up the company, the directors of which borrowed the money, a claim was carried in on behalf of the lending company, but it was disallowed; and on appeal, it was held,—affirming the decision of the Master,—that where a company or association is ordered to be wound up, the Master has no jurisdiction under the order to take cognizance of a claim not alleged to be due from the company, but only from individual members of it, and that it made no difference that the money was applied for the purposes of the company. *Ex parte Wryghte, in re the Great Western Extension Atmospheric Rail. Co.*, 21 Law J. Rep. (N.S.) Chanc. 807; 2 De Gex, M. & G. 636.

The two trustees of a joint-stock trading company, at the request of the directors, gave a bond for 1,000*l.* borrowed for and applied to the use of the company. In an action against one of these two trustees the bond creditor recovered the 1,000*l.* and interest and costs against him personally, and the trustees paid the debt, interest and costs. The trustee ineffectually gave notice of the proceeding to the directors of the company twice (the second time under the Winding-

up Act, 1848, sect. 5, case 5). On a claim by the trustee to be admitted as a creditor of the company under the Winding-up Acts, the Court directed an action, which established the borrowing to have been an authorized act:—Held, that the trustee was entitled to stand as a creditor for 1,000*l.* and interest and his costs, charges and expenses properly incurred as a trustee in defence of the action and of the motion, but he was allowed no damages for costs incurred in raising the amount. *In re the Oundle Brewery Co., Croxson's case*, 5 De Gex & Sm. 432.

An engineer claimed to be admitted, under an order for winding up an abortive railway company, as a creditor for the amount of his bill for work done and money laid out. The Master, having divided the contributories into three classes, and not determining that the engineer's claim was good against all the classes, admitted it as a claim only, leaving the engineer to establish his case at law against such contributories as he might elect to sue:—Held, on appeal, that the debt, if any, due to the engineer formed a debt due from the company, proveable under the winding-up order. *In re the London and Birmingham Extension, &c. Rail. Co., Pritchard's case*, 4 De Gex & Sm. 328.

(b) *Advances by Directors.*

Where directors had advanced money (which they had borrowed and for which they were personally liable) beyond the amount authorized by the deed of settlement of an unincorporated company, and upon the evidence it was clear that they had acted *bona fide*, and that the money had been expended for the purposes of the company, and so as to enable them to discharge their duty as trustees towards their *cestuis que trust*, the shareholders.—Held, upon appeal, affirming the certificate of the Master charged with winding up the affairs of the company, and the decision of one of the Vice Chancellors refusing to disturb that certificate, that the directors ought to be allowed their payments as an indemnity in the same manner as other trustees. *In re the German Mining Co.*, 24 Law J. Rep. (N.S.) Chanc. 41.

(c) *Solicitor's Bills.*

Upon the winding up of a company, which had been completely registered, the solicitor carried in before the Master his bill for the whole expenses incurred, both those preliminary to the complete registration of the company and those incurred subsequently to that period. The Master allowed the whole bill as a claim and not as a debt, with liberty to the solicitor to bring an action:—Held, upon motion to discharge the Master's order, that the members of a completely registered company were not liable for preliminary expenses, unless they had expressly or impliedly rendered themselves liable; that the bill in this case was so framed that it was impossible to distinguish the preliminary from the subsequent expenses, and the Master had, therefore, come to a right conclusion in allowing the whole bill as a claim only. *In re the Independent Assurance Co., ex parte Terrell*, 21 Law J. Rep. (N.S.) Chanc. 222; 2 Sim. N.S. 126.

A company was completely registered. On a proceeding under the Winding-up Acts, the solicitor who had been employed in its formation carried in before the Master his bill for the whole expenses in-

curred, both those preliminary to the registration of the company and those incurred subsequently to that period. The Master only allowed the bill as a claim, and gave the solicitor liberty to proceed by action as he might be advised:—Held, that this course was erroneous; that the Winding-up Acts embraced both equitable and legal claims; and that as there was no doubt of the retainer and employment of the solicitor, the bill ought to have been allowed as a debt, but subject to taxation. *In re the Independent Assur. Co., R. H. Terrell v. James Hutton, official manager*, 23 Law J. Rep. (N.S.) Chanc. 345; 4 H.L. Cas. 1091.

(d) *Salaries.*

When a company was formed it was resolved that no director of the company should be personally responsible for the salaries of the officers, and that no officer should obtain payment for his services until a sufficient sum should have been obtained by the funds of the company for that purpose. It was also agreed that the officers should receive half their salaries until such time as it might be convenient to the company to pay the whole. Upon the company being wound up, the Master disallowed the claim of the secretary for salary, during the two years he had acted as such, and one year afterwards for default of notice:—Held, that the claim for the full amount of salary for two years only must be allowed. *In re the Independent Insurance Co., ex parte Cope*, 20 Law J. Rep. (N.S.) Chanc. 28; 1 Sim. N.S. 54.

(e) *Costs of obtaining Act of Parliament.*

A committee was appointed under the provisions of the deed of settlement for winding up the affairs of a joint-stock company. The existing law being inadequate for the purpose, the committee incurred large expenses in procuring the insertion into a bill then before parliament of certain clauses applicable to the affairs of the company:—Held, affirming the decision below, that these expenses were not a charge against the company, not being authorized by the deed of settlement or by the individual shareholders. *In re the St. George Steam Packet Co., ex parte Cropper*, 21 Law J. Rep. (N.S.) Chanc. 593; 1 De Gex, M. & G. 147.

(f) *Policies.*

A joint-stock company assigned its goodwill, business, trade, property and effects to another joint-stock company, and the latter covenanted to indemnify the former against all claims in respect of policies previously granted. Both companies were ordered to be wound up. Claims were made against the assigning company in respect of policies, and the official manager thereof claimed indemnity, in virtue of the covenant, out of the assets of the other company. Part of the evidence of the claimants shewed that the assigning company was insolvent at the date of the assignment. The Master disallowed the claim, and his decision was affirmed by one of the Vice Chancellors; but upon appeal,—Held, that the claim must be allowed; that the insolvency of the company was no proof of fraud, and that the costs of the appeal, both to the Vice Chancellor and to the Court of Appeal, must be borne by the respondent company. *Ex parte the Official Manager of*

the Port of London Shipowners' Loan and Assur. Co., in re the Sea, Fire, and Life Assur. Society, 24 Law J. Rep. (N.S.) Chanc. 705; 5 De Gex, M. & G. 465.

(g) *Advertisements.*

The registered secretary to a provisionally registered company, in pursuance of instructions given to him at a meeting of the members or committee of the company, gave orders to an advertising agent to cause the scheme, &c. to be advertised. The agent executed the orders and paid for the advertisements, and afterwards claimed, before the Master charged with the winding up of the company, to be admitted a creditor of the company for the amount paid by him; but he did not know the names of the persons present at the meeting. The Master declined to admit the claim as a proof, because the affidavits in support of it did not establish a debt against any particular persons or against the whole class of contributories; and the Court, on appeal, confirmed the Master's decision. *In re the Direct West-End and Croydon Rail. Co., ex parte Lloyd, 1 Sim. N.S. 248.*

(h) *When barred by Statute of Limitations.*

A railway company was ordered to be wound up, in 1849. In February 1850, A filed an affidavit of debt on the allegation that he had lent the company 2,000*l.* in October 1845. The claim was brought before the Master in December 1851, and January and February 1852, on which occasions he disallowed it, on the ground that it was barred by the Statute of Limitations:—Held, that the claim was not barred by the statute; and it was ordered that the Master should review his decision. *In re the Great Western Extension Atmospheric Rail. Co., ex parte Wryghte, 22 Law J. Rep. (N.S.) Chanc. 183; 5 De Gex & S. 244.*

(I) *CONTRIBUTORIES.*

(a) *Who may be.*

(1) *Directors.*

A, a director in a joint-stock company, gave an undertaking to take 100 shares in the company and a promissory note for 1,000*l.* in respect of calls made on the shares. A, wishing to retire from the directorship and to give up his shares, communicated these wishes to the other directors. In June 1842 he was discharged from the directorship, and in July it was agreed that his shares should be taken; which was carried out by the directors returning to A his undertaking and note. No other formalities were gone through. The deed of settlement of the company contained ample powers for the directors to make contracts and to purchase shares. The company was ordered to be wound up:—Held, that A was not a contributory. *In re the Royal Bank of Australia, ex parte Cockburn, 20 Law J. Rep. (N.S.) Chanc. 137; 4 De Gex & Sm. 177.*

(2) *Provisional Committee-men.*

B allowed his name to be used as one of the provisional committee of a projected railway company, which was provisionally registered. A managing committee was afterwards appointed, and 100 shares were allotted to B, who thereupon wrote to the secretary, declining to accept any shares, and re-

quiring his name to be withdrawn from the list of the provisional committee. After certain expenses had been incurred by the managing committee, the scheme proved abortive. B, never having previously interfered in the affairs of the company, and being ignorant that his name had been withdrawn from the list, attended certain meetings of the provisional committee for winding up the affairs of the company, and joined in signing an agreement, whereby the parties signing agreed to pay a rateable proportion towards the expenses incurred. Under resolutions passed at such meetings, B paid several sums of money. The company being ordered to be wound up,—Held, that under the circumstances B was not a contributory. *In re the Direct Exeter, Plymouth and Devonport Rail. Co., ex parte Besley, 20 Law J. Rep. (N.S.) Chanc. 385; 3 Mac. & G. 287.*

The Master placed Mr. Carmichael on the list of contributories to a company, as a provisional committee-man and as an allottee of 100 shares:—Held, that the evidence was not sufficient to shew that Mr. Carmichael had bound himself to take any shares, and that he being only in the position of a provisional committee-man, who had not authorized any expenditure on his behalf, his name must be expunged from the list of contributories. *In re the Irish West Coast Rail. Co., ex parte Carmichael, 20 Law J. Rep. (N.S.) Chanc. 12.*

The Master had placed the name of Mr. Clarke on the list of contributories, on the ground that he had allowed his name to be advertised as one of the provisional committee. Mr. Clarke had taken no shares in the company:—Held, that a person being one of the provisional committee did not of itself subject him to any liabilities, unless he had authorized expenses being incurred on his behalf. The Master's decision was reversed. *In re the Falmouth, Helston and Penzance Rail. Co., ex parte Clarke 20 Law J. Rep. (N.S.) Chanc. 14.*

A's name was placed in the list of the provisional committee of a railway company. Soon after he received a letter from the secretary of the company, containing an offer of 250 shares, or any less number he might choose. A accepted the offer of the whole 250 shares. A month after, A received a letter from the secretary to the effect that 100 shares had been allotted to him, and that the committee might find themselves in a position to allot the other 150. No notice was taken by A of the last letter. The company was ordered to be wound up:—Held, that A was not a contributory. *In re the Oxford and Worcester Extension and Chester Junction Rail. Co., ex parte Barber, 20 Law J. Rep. (N.S.) Chanc. 146.*

A provisional committee-man who has accepted shares in a company is liable as a contributory, following the decision in *Upfill's case*. *In re the Direct Birmingham, Oxford, Reading and Brighton Rail. Co., ex parte Sichel, 20 Law J. Rep. (N.S.) Chanc. 129; 1 Sim. N.S. 187.*

A was one of the provisional committee and also one of the managing committee of a railway company, directed to be wound up under the Joint-Stock Companies Winding-up Act. By a resolution of the committee, it was resolved that the committee of allotment should make an allotment, according to a scheme, under which each of the managing committee should have 500 shares. By a minute made

at a meeting of the managing committee, signed by A as chairman, it was reported that the committee had completed the allotment of shares according to the above-mentioned scheme. Nothing further, however, was done as to this allotment:—Held, that A was properly put on the list of contributories in respect of 500 shares. *In re the Oxford and Worcester Extension and Chester Junction Rail. Co., ex parte Morrison*, 20 Law J. Rep. (N.S.) Chanc. 296.

A party consented to have his name placed on the list of provisional committee-men, and agreed to take shares. Shares were allotted to him, but he did not pay the deposits thereon until after the undertaking had been abandoned, and he never executed the subscribers' agreement or parliamentary contract, without which it was expressly stated he could take no interest in the company. The Master struck his name off the list of contributories:—Held, upon appeal from this decision, that he had brought himself within the rule in *Upfill's case*, and his name must be replaced on the list of contributories. *In re the Direct Shrewsbury and Leicester Rail. Co., ex parte Brittain*, 20 Law J. Rep. (N.S.) Chanc. 479; 1 Sim. N.S. 281.

A railway company having been only provisionally registered, Mr. Carrick became a member of the provisional and executive committees, and took an active part in attending meetings and ordering work to be done for which expenses were incurred. He was also present at a meeting when it was resolved that 150 shares should be offered to each member of the executive committee. Mr. Carrick did not apply for shares, but 150 were allotted to him. When the undertaking failed, he paid 6s. per share on 100 shares towards the expenses incurred. The Master having placed his name on the list of contributories, the Court held, upon motion to reverse the Master's decision, that there was no distinct evidence of Mr. Carrick having accepted shares, or having sanctioned any of the expenses incurred,—his name must therefore be withdrawn from the list. *In re the Great North of England Rail. Co., ex parte Carrick*, 20 Law J. Rep. (N.S.) Chanc. 670; 1 Sim. N.S. 505.

Held, also, that the legal rights or liabilities of promoters and persons agreeing to take shares in a company provisionally registered, are not altered by the Winding-up Acts. *Ibid.*

A was a member of the provisional committee of a projected railway company, and, as such, attended a meeting of the provisional committee, and concurred in the appointment of a number of gentlemen as a committee of management. This committee of management, immediately on their appointment, undertook the exclusive conduct of the affairs of the company, and gave orders to engineers to make surveys, &c. in the name of the company, and incurred considerable expenses in respect of the undertaking, but, after some time, abandoned the concern. The provisional committee, after such abandonment, held a meeting, at which, under the impression that they were personally liable, they came to certain resolutions as to contributions among themselves in respect to the expenses incurred. A attended this meeting, and took an active part in carrying out the resolutions:—Held, that A was not liable as a contributory. *In the matter of the Direct Exeter, Plymouth and Devonport Rail.*

Co., ex parte Tanner, 21 Law J. Rep. (N.S.) Chanc. 212; 5 De Gex & Sm. 182.

The secretary of a provisionally registered railway company informed A B, by letter, dated the 6th of October, that he was entitled, as a provisional committee-man, to 100 shares, provided he signified on or before the 9th instant what number he desired to take. A B's wife, on the 7th, asked that the shares might be reserved a few days longer. A B, on the 9th, wrote saying, "I should wish to have 100 shares reserved for me." On the 21st of November, the secretary required payment of the deposit on the 100 shares "accepted" by A B. On the 27th, A B wrote, saying, "Inform me whether a sufficient amount of deposits has been paid up to enable the company to go to parliament this session, and if all the provisional committee have paid their deposits; should that be the case, I shall not hesitate to pay also, that is, upon being clearly satisfied on these points." The Master placed the name of A B on the list of contributories, as having accepted shares, and that decision was affirmed by the Vice Chancellor; but upon appeal to the Lords Justices, it was held, that there had been no absolute and unqualified, but only a conditional, acceptance, and as the condition had not been, and could not be, performed, A B's name must be removed from the list. *Ex parte Mainwaring, in re the Eastern Counties Junction and Southend Rail. Co.*, 21 Law J. Rep. (N.S.) Chanc. 416; 2 De Gex, M. & G. 66.

The provisional committee of a projected railway company passed a resolution that fifty shares should be offered to each provisional committee-man. A, a provisional committee-man, applied for fifty shares. A stated in an affidavit that no reply was given to his application, and that he never received any communication respecting it, and that he never attended any meetings, and did not pay anything by way of deposit or call. No evidence of any allotment of shares was given in opposition to A's statement:—Held, that A's case differed from *Upfill's case*, and that he was properly excluded from the list of contributories. *In the matter of the Brighton, Lewes and Tunbridge Wells Rail. Co., ex parte Conway*, 21 Law J. Rep. (N.S.) Chanc. 461; 5 De Gex & Sm. 150.

At a meeting of the managing committee of a provisionally registered railway company, at which A and B were present as members, it was resolved that the shares of the company should be allotted according to a certain scheme, by which 500 shares were to be allotted to each member of the managing committee under the head of "reserves." In fact, 100 shares only were allotted to and accepted by A and B respectively, and for that number only they signed the parliamentary contract. On the winding up of the company the Master placed A and B on the list as contributories in respect of 500 shares each:—Held, upon appeal, that A and B were liable in respect of the 100 shares only; and that the reservation of the 500 shares in their favour did not amount to a contract binding upon them to accept that number of shares. *In re the Oxford and Worcester Extension and Chester Junction Rail. Co., ex parte Sharp and James*, 21 Law J. Rep. (N.S.) Chanc. 767; 1 De Gex, M. & G. 565.

Mr. Hight was a member of the provisional committee of a railway company, and attended one

meeting, at which he moved a resolution for the appointment of the officers of the company. He had taken no shares and had not signed the subscribers' agreement. There being no evidence that any expenses remained unpaid which had been incurred with his sanction, it was held, that his name had been improperly placed upon the list of contributories. *In re the Dover and Deal Rail. Co., ex parte Hight*, 22 Law J. Rep. (N.S.) Chanc. 902; 1 Drew. 464.

A B consented to act as a provisional committee-man, and signed an agreement to take one or more shares. He was then requested to take up 25 shares out of the 100 to which he was entitled, and to pay the deposit of two guineas per share. Before paying the required amount or taking up the shares the undertaking was abandoned, and the provisional committee-men were requested to pay a sum equal to the deposit upon 25 shares, to cover the expenses incurred. This sum was then paid by A B, and subsequently two further sums to the same amount were paid, upon a threat of being otherwise exposed to legal proceedings. The Master placed A B's name on the list of contributories:—Held, upon appeal from this decision, that A B had never consented to take up any shares, but had paid the calls upon him *causâ pacis*; and his name was therefore struck off the list of contributories. *In re the Wolverhampton, Chester and Birkenhead Junction Rail. Co., ex parte Stocks*, 22 Law J. Rep. (N.S.) Chanc. 218: see also *Ex parte Roberts*, 22 Law J. Rep. (N.S.) Chanc. 223; 1 Drew. 204.

At some of the meetings of the managing committee of a provisionally registered railway company at which A, one of the committee, was present, it was resolved that certain proceedings should be advertised. At another meeting attended by four of the body, but not by A, it was resolved that a circular should be sent to the members of the provisional committee, which included the members of the managing committee, stating that on payment of 160*l.* each they should be released from all liability. A and the others paid this amount, and A never attended any subsequent meeting. Meetings of the managing committee were afterwards held, at which some of these payments were referred to, and the terms of the circular were recognized and acted upon. The company was wound up under the Winding-up Acts, and it appeared that one of the provisional committee had been compelled by proceedings at law to pay the bill of the advertising agent:—Held, that A was *primâ facie* liable for some part of the demand, and was not exonerated by his payment of 160*l.* and the subsequent conduct of his co-committee-men, but had been properly placed on the list of contributories. *In re the Midland Union, &c. Rail. Co., Pearson's Executors' case*, 3 De Gex & Sm. & G. 241.

A member of the committee of management of an abortive railway company attended many of the meetings, but he did not attend the only meeting at which the only unsatisfied debt of the company (being a debt to its engineer) was contracted; he, however, attended a subsequent meeting, at which the report of the engineer was received and adopted:—Held, that *primâ facie* the claim of the engineer was a liability of the company within the meaning of the Winding-up Acts; and that although the

member was not directly liable to the engineer, he was liable to the persons liable to the engineer to contribute rateably with them; and the member's name was retained on the list of contributories. *In re the Midland Union, Burton-upon-Trent, &c. Rail. Co., Norbury's case*, 5 De Gex & Sm. 423.

The local agent of a provisionally registered railway company applied to a landowner on the proposed line to become connected with the company, assuring him from the managing committee that he would incur no liability thereby, and the landowner thereupon became a provisional committee-man. On his subsequent application for 200 shares "subject to the subscribers' agreement," no allotment of any shares to him were proved, but when a claim for calls was made on shares he asked time to pay them. No subscribers' agreement was ever prepared. On the winding up of the company under the Winding-up Act,—Held, that the landowner was a provisional committee-man who had taken shares in the company within the decision of *Upfill's case*, and that he was a contributory. *Ex parte Metropolitan Rail. Junction Co., Markwell's case*, 5 De Gex & Sm. 529.

(3) *Devises.*

A was the holder of shares in a joint-stock company, the members of which had by covenant, not binding their heirs, engaged that the partnership should continue for ninety-nine years; that there should be no right of survivorship, and that the shares should be deemed personal estate. A died in 1833, having, by his will, devised his real estate to B, and appointed C his executrix. At the time of his death the company were solvent, and all the then existing liabilities were afterwards discharged. C, after A's death, was treated as the proprietor of the shares; and for five years received dividends upon them as executrix. The company became insolvent; and, it appearing that the testator's personal estate was exhausted, B's name was put on the list of contributories, in his character of devisee of the real estate:—Held, reversing the decision of the Court below, that B was rightly placed on the list of contributories. *In re the St. George Steam-Packet Co., ex parte Hammer's Devises*, 21 Law J. Rep. (N.S.) Chanc. 832; 4 De Gex, M. & G. 866: overruling 20 Law J. Rep. (N.S.) Chanc. 207; 3 De Gex & Sm. 279.

The statute 3 & 4 Will. 4. c. 104. charges debts of every description on the real estate of the testator; and a further debt, arising out of a previous obligation of the testator, is within the act. *Ibid.*

(4) *Trustees.*

An insurance company allotted the managing director a certain number of shares in consideration of his services, but he, being unable to take the shares in his own name by reason of being covenantee in the shareholders' deed, induced his brother to hold the shares for him and to sign the deed. The directors, considering afterwards that they had done wrong, cancelled the allotment and recalled the shares:—Held, that the brother having signed the deed, contracted liabilities with the other shareholders, from which he could not escape, and his name must be placed in the list of contributories. *In re the Independent Assurance Co., ex parte Holt*, 20 Law J. Rep. (N.S.) Chanc. 413; 1 Sim. N.S. 389.

(5) *Executors.*

A, the original holder of shares in a joint-stock banking company, died in 1842, possessed of shares, and B, his executrix, upon production of the probate of his will, received the dividends upon the shares from 1842 to 1846, and signed receipts for the same, as executrix of A, the shares remaining in the name of A. An order being made for winding up the company, the Master excluded B's name altogether from the list of contributories. The company's deed provided, that each shareholder should be liable to losses in proportion to his shares, and each shareholder covenanted for himself, his heirs, executors, &c., in respect of shares remaining part of his assets, to observe all the stipulations of the deed. Upon appeal, an order of the Vice Chancellor declaring that B ought, either personally or as executrix, to be on the list of contributories, was affirmed. *In re the North of England Joint-Stock Banking Co., ex parte Gouthwaite*, 20 Law J. Rep. (N.S.) Chanc. 188; 3 Mac. & G. 187.

The limitation of three years, imposed by the 7 Geo. 4. c. 46. s. 13, is confined to a claim by a creditor against a retired shareholder, and does not apply to a claim by partners for contribution *inter se*. *Ibid.*

A, by a letter written in 1840, addressed to the directors of a joint-stock banking company, agreed to take 100 shares in the company, in addition to twenty which he already held, and at the same time gave a promissory note for the amount of the calls. Entries were made in the books of the company of the dividends on the shares and the interest on the note on A's account. A went abroad in 1842, and remained there until 1848, when he died. The company was ordered to be wound up:—Held, that A's executors were properly put on the list of contributories in respect of the 100 shares which A had agreed to take. *In re the Royal Bank of Australia, ex parte Robinson's Executors*, 2 De Gex, M. & G. 517; affirming 20 Law J. Rep. (N.S.) Chanc. 297.

A, by a letter in 1840, addressed to the directors of a joint-stock banking company, agreed to take 500 shares in the company, in addition to twenty which he already held, and gave a promissory note for the amount of the calls. A died in 1841. In February 1842 A's executors inquired of the directors what was the number of the shares held by A, and received for answer that A held twenty shares. No information was ever given by the directors to the executors as to the agreement to take 500 shares or the promissory note. In 1843 the directors cancelled the note. In 1849 the company was ordered to be wound up:—Held, that A's executors were not liable as contributories in respect of the 500 shares agreed to be taken by A. *In re the Royal Bank of Australia, ex parte Meux's Executors*, 2 De Gex, M. & G. 522; affirming 20 Law J. Rep. (N.S.) Chanc. 298; 4 De Gex & Sm. 331.

A, the holder of shares in a joint-stock company, died in 1838, having made B and C his executors. The company was ordered to be wound up. In March 1849 the Master placed B on the list of contributories, as personally liable in respect of those shares, but in February 1851 he struck out the name of B, and placed instead the names of B and

C as executors of A:—Held, that it was competent to the Master, under the Joint-Stock Companies Amendment Act 1849, to review his decision in this respect. *In re the North of England Joint-Stock Banking Co., ex parte Crossfield*, 20 Law J. Rep. (N.S.) Chanc. 301; 4 De Gex & S. 338; affirmed 22 Law J. Rep. (N.S.) Chanc. 208; 2 De Gex, M. & G. 128.

B had taken the probate to the office of the company, and, between 1838 and 1848, received the dividends on the shares, and had various communications with the manager of the company in respect of them. In the greater part of these communications B called himself, and was called, executor of A, but in some of them no allusion was made to his representative character. C had nothing to do with the shares. The company was ordered to be wound up in 1848:—Held, that B and C were properly placed on the list of contributories as executors of A. *Ibid.*

A proprietor of shares bequeathed them to an unmarried lady, who subsequently married. Neither on the death of the testatrix, nor on the marriage of the legatee, were the regulations of the deed of settlement complied with. The Court was of opinion that there was no sufficient evidence of the assent of the executor of the testatrix to the legacy, or that the directors of the company had approved of the legatee and her husband or either of them, as proprietors or proprietor of the shares; and, therefore, Held, overruling an order of one of the Vice Chancellors, (by which he had reversed a decision of the Master), that the legatee and her husband were not liable as contributories, and that the liability of the executor not having ceased, his name was properly placed on the list of contributories, without qualification. *Ex parte Wood, in re the Vale of Neath and South Wales Brewery Joint-Stock Co.*, 22 Law J. Rep. (N.S.) Chanc. 365; 3 De Gex, M. & G. 272; nom. *Keene's Executors' case*.

By the deed of settlement of a joint-stock company, the directors were specifically authorized to purchase shares of members under certain circumstances; but the deed contained no express prohibition restricting the directors from buying up shares generally. The company, becoming embarrassed, summoned an extraordinary general meeting, at which a resolution was passed, authorizing the directors to purchase and take a transfer of the shares of any member who would lend the company a sum of money equal to the purchase-money of his shares. The notice calling the meeting did not state, as required by the deed, the specific object for which the meeting was called. At a subsequent general meeting, at which the resolution was read, the directors were authorized to give further time to the members who had not yet complied with the terms of the resolution. W L then sold his shares to a trustee for the company upon the terms stated in the resolution, and died before the transfer was effected; and the directors, at the instance of his executor, completed the requisite formalities of the transfer:—Held, that the resolution of the extraordinary meeting was invalid for want of due notice; and that the subsequent ratification of the same was inoperative, as in excess of the powers of a general meeting; and that the executor of W L was properly retained on the list of contributories without qualification. *In*

re the Vale of Neath and South Wales Brewery Joint-Stock Co., ex parte Lawes, 21 Law J. Rep. (N.S.) Chanc. 688; 1 De Gex, M. & G. 421: 20 Law J. Rep. (N.S.) Chanc. 295.

Observations on the difficulty of applying the doctrine of acquiescence to joint-stock companies. *Ibid.*

Where partnerships, as in the case of joint-stock companies, consist of a great number of individuals, the Court will hold them in their transactions strictly to the terms of the partnership contract. *Ibid.*

By the provisions of a joint-stock company's deed of settlement, the company was to continue for forty years, and it was thereby in effect provided that no proprietor of shares should ever be discharged from his liability to the company until some other proprietor should have been substituted under the same liability as attached to the original proprietor. The deed also provided that the executor of a deceased proprietor should not be deemed a proprietor until he should be duly admitted as such. The company being wound up under the Joint-Stock Companies Winding-up Acts,—Held, that the executors of a deceased proprietor were liable in that capacity to be placed on the list of contributories in respect of partnership debts incurred subsequently to the death of their testator, although they had not complied with the formalities of the deed so as to be entitled to the profits of the company. *In re the Northern Coal Mining Co., ex parte Blakeley's Executors*, 3 Mac. & G. 726; 13 Beav. 133.

Executors who, after the death of their testator, had purchased further shares,—Held, as to the latter to be contributories without qualification, though they had been treated as executors in regard to such further shares. *Spence's case, re Newcastle, &c. Banking Co.*, 17 Beav. 203.

(6) Bankrupts.

A, a shareholder in a joint-stock company, was made a bankrupt in October 1848. In November 1850 the company ceased to carry on business, and was shortly afterwards ordered to be wound up. The assignees disclaimed the shares. The Master put on the list of contributories the assignees of A, in respect of losses incurred before the bankruptcy, and A, in respect of losses incurred after the bankruptcy. The Court ordered the name of A to be erased from the list of contributories. *In re the Liverpool Marine Assurance Co., ex parte Green-shields*, 21 Law J. Rep. (N.S.) Chanc. 773; 5 De Gex & S. 599.

A joint-stock company completely registered became bankrupt. One of the members of the company had previously been declared bankrupt, and had obtained his certificate. The Master placed the bankrupt's name on the list of contributories, and calls were made by the Master on him for contributions to discharge the liabilities of the company incurred before his bankruptcy:—Held, on his appeal, that his certificate was a bar to the liabilities to satisfy which the calls were made; and that the bankrupt's name ought to be removed from the list of contributories. *In re the Merchant Traders' Ship Loan and Insurance Co., Chapple's case*, 5 De Gex & Sm. 400.

(7) Allottee of Shares.

An unaccepting allottee of shares in a company

provisionally registered, held not to be liable even to the extent of the deposit required by the Standing Orders to be paid for the certificates of shares, for the preliminary expenses incurred in the formation of the company. *In re the Direct Birmingham, Oxford, Reading and Brighton Rail. Co., ex parte Capper*, 20 Law J. Rep. (N.S.) Chanc. 148; 1 Sim. N.S. 178.

In July 1849 A gave B, the secretary of a joint-stock company in the course of formation, a power of attorney authorizing him to execute the deed of settlement in the name of A for five shares. In August a correspondence passed between A and B to this effect: A desired to terminate all connexion with the society; B requested A to pay the calls; A hoped the directors would excuse him, and B stated that the directors would not release him. Nothing further took place between A and B. In October the company was completely registered, and B executed the deed of settlement in the name of A. The company was wound up:—Held, that A had not revoked the power of attorney, and was properly placed on the list of contributories of the company, in respect of five shares. *In re the Sea, Fire and Life Assurance Society, ex parte Burton*, 21 Law J. Rep. (N.S.) Chanc. 781.

Whether A could revoke the power of attorney—*quære. Ibid.*

A person who had been allotted fifty shares in a projected railway company, and had signed the subscribers' agreement and parliamentary contract, but had not received his shares or paid his deposit, was held to have been properly placed on the list of contributories. *In re the Staffordshire and Shropshire Rail. Co., ex parte Bowen and Martin*, 22 Law J. Rep. (N.S.) Chanc. 856.

A wrote a letter of application for shares in a railway company which was provisionally registered, and received an answer in the usual form declaring that certain shares had been allotted to him, on which he was required to pay a deposit. A paid the required deposit, but neither signed the subscribers' agreement nor the parliamentary contract. The scheme was abandoned:—Held, that A did not by his letter of application for shares, and by paying the deposits thereon, become a "member" of the company, or a "contributory," within the meaning of the Joint-Stock Companies Winding-up Acts. He merely bound himself to take such shares as he had applied for, should the company ever, in fact, be established. *Hutton v. Thompson. Norris v. Cooper*, 3 H.L. Cas. 161.

Held, therefore, that his name had been improperly put by the Master among the list of contributories, and that the Court below had rightly ordered it to be expunged from the list. *Ibid.*

The 7 & 8 Vict. c. 110. does not create any new liability in an allottee of shares beyond what his own contract imports. *Ibid.*

The secretary to a company wrote to A, a member of the provisional committee, informing him that the managing committee had apportioned one hundred shares to each member of the provisional committee, and requesting to be informed, on or before a certain day, whether A would take that or any less number of shares, otherwise the committee would consider that he declined taking any. A, in answer, requested that the one hundred shares might be reserved for

him. The Court directed an issue to try whether A had accepted the shares. *In re the Direct Birmingham, Oxford, Reading and Brighton Rail. Co., Onion's case*, 1 Sim. N.S. 394.

(8) *Persons accepting Shares.*

The Master placed on the list of contributories a person who had accepted shares and paid the deposit upon them, but had not belonged to the provisional committee. The company never came actually into existence, owing to the requisite amount of capital not having been paid up. The Master's decision was reversed, upon the ground that persons, by taking shares in such a company, did not render themselves liable for any expenses incurred without their sanction. *In re the India and Australia Mail Steam-Packet Co., ex parte Maudslay*, 20 Law J. Rep. (N.S.) Chanc. 9.

E. Walstab had taken shares in a company, and had paid the deposit, but had since recovered back the deposit in an action at law against one of the directors:—Held, that she was not liable as a contributory under the Winding-up Act. *In re the Direct Birmingham, Oxford, Reading and Brighton Rail. Co., ex parte Walstab*, 20 Law J. Rep. (N.S.) Chanc. 58.

A joint-stock company was completely registered, and a person applied for and accepted shares and paid a deposit on the shares allotted to him. The company's deed required that on its execution the names of the parties executing should be entered on the list of shareholders, and be returned to the Stamp Office, &c., and thenceforth they should have the privileges and be subject to the liabilities of shareholders. In this instance the deed was not executed, but the directors entered and returned, &c. the name:—Held, nevertheless, that the name of this person had been properly placed by the Master, under a winding-up order, on the list of contributories to the debts and liabilities of the company. *Ex parte Yelland, in re the Port of London Shipowners' Loan and Assurance Co.*, 21 Law J. Rep. (N.S.) Chanc. 852; affirming 5 De Gex & Sm. 395.

The liability of a person as a contributory under the Winding-up Acts is not a question of law, but of fact. The test of his liability in equity is his liability at law. *Bright v. Hutton*, 3 H.L. Cas. 341.

Contributories are those only who have contracted by themselves or agents with a creditor, or who have agreed to indemnify or repay in part or in all, those who have contracted with the creditor on their own account. *Ibid.*

A was a member of the provisional committee of a projected railway company, which had been provisionally registered, and the affairs of which were put under the authority of a managing committee. He accepted shares and paid a deposit on them, but did no further act. The scheme was abandoned:—Held, that, on these facts, he was not liable to a creditor for business done under the orders of the managing committee towards completing the projected undertaking and converting the association into a regular company, and consequently he was not liable as a contributory under the Winding-up Acts. *Ibid.*

(9) *Former Holder of Shares.*

B, an original promoter of a company, executed the deed of partnership for 100 shares; he subse-

quently obtained other shares, making in all 1,000 shares. The provisions of the deed of partnership were not duly observed by the directors. B paid three calls and received the only dividend ever made while he continued a shareholder; upon a fourth call B, without reference to the forms of the deed respecting sales of shares, gave up 260 shares to the directors, which they agreed to purchase for the company, in consideration of a sum of money, and the amount of the fourth call. B afterwards sold the rest of his shares and ceased to be a partner. The company was carried on for eight years after the sale of the 260 shares to the company, but it subsequently fell into difficulties, and in winding up the affairs of the company, under the 11 & 12 Vict. c. 45. and the 12 & 13 Vict. c. 108, it was desired to place B upon the list of contributories in respect of the 260 shares, on the ground that the transaction with the directors was not valid:—Held, that the company, after having dealt with a shareholder, could not treat the transaction as void for want of form, though not immaterial, which their own irregularities had rendered it impossible to observe; and the motion that the Master might review his decision was refused, with costs to be paid out of the estate. *In re the Northern Coal Mining Co., ex parte Bagge*, 20 Law J. Rep. (N.S.) Chanc. 229; 13 Beav. 162.

A shareholder in a joint-stock company, who had sold his shares, held, under the terms of the deed of settlement of the company not to be a contributory in respect of liabilities of the company incurred previously to the sale of the shares. *In re the Oundle Union Brewery Co., Croxton's case*, 1 De Gex, M. & G. 600.

(10) *Adventurer who had relinquished his Shares.*

A company was formed in Wales for working, on the cost-book principle, a lead-mine, a lease of which the adventurers held. The 24th rule gave power to shareholders to determine their liabilities on giving notice to the purser of a desire to retire, and depositing with the purser a transfer of their shares, and signing a relinquishment of claims on the company in respect of the shares. One of the adventurers having shares signed a document furnished him at the office, relinquishing his claims in respect of his shares. The company was ordered to be wound up. The Master held, that the adventurer was still liable as a contributory in respect of the debts and liabilities of the company existing at the date of his letter of relinquishment; but, on appeal, the Lords Justices removed his name, and gave him all his costs. *Ex parte Fenn, in re the Pennant and Craigroven Consolidated Lead Mining Co.*, 22 Law J. Rep. (N.S.) Chanc. 692; 4 De Gex, M. & G. 285; 1 Sm. & G. 26.

(11) *Where Shares have been forfeited.*

A took shares in a joint-stock company, and paid a deposit and a call, but did not execute the deed of settlement. A further call was made, which A did not notice. The deed of settlement contained clauses authorizing the directors to declare shares forfeited for non-payment of calls, and for not executing the deed of settlement. The directors declared A's shares to be forfeited for non-payment of calls. The company was ordered to be wound up:—Held, that A was not a contributory. *In re Kollmann's*

Railway Locomotive and Carriage Improvement Co., ex parte Baily, 20 Law J. Rep. (N.S.) Chanc. 145.

(12) *Transferor under invalid Transfer of Shares.*

By the deed of settlement of a joint-stock company no shares could be transferred without the consent of the directors. The company being unprosperous, and serious disputes existing, some of the shareholders agreed to pay a sum to the directors in full discharge of all their liabilities, which money was accepted, and transfers were made to two persons, and the shareholders retired. The directors applied the money partly in payment of claims of the lessors (who were also directors) of the property held by the company, and partly in payment of other claims, which were the subjects of the disputes. The company having been ordered to be wound up, the Master placed the name of one of the retiring shareholders on the list of contributories, and the Master of the Rolls refused to remove him; and, on appeal, the decision of the Master and of the Master of the Rolls was supported, the agreement being *ultra vires*, the directors having no authority thus to sanction the retirement of a body of the shareholders. *Ex parte Bennett, in re Cameron's Coalbrook Steam Coal and Swansea and Lougher Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 130; 5 De Gex, M. & G. 248; 18 Beav. 339.

A director of a company is in a very different position from an ordinary shareholder, for, having the means of seeing that all the formalities of transfer required by the constitution of the company are complied with, he is bound, in transferring his own shares, to see to the regularity of the transfer; if he neglect to do so, and there be a want of formality therein, he remains a contributory. *In re the Newcastle-upon-Tyne Marine Insurance Co., ex parte Brown*, 19 Beav. 97.

A company, being in an unprosperous condition, its operations, accounts, audits, dividends, &c., being suspended, and its shares worthless, the auditor sold his shares to the managing director, and gave notice, and the transfer was entered in the minute-book as approved by the directors. The transfer was, in fact, informal. The Court, doubting the *bona fides* of the transaction, and seeing that proper steps had not been taken to ascertain that all the necessary formalities had been complied with,—Held, that the auditor was still a contributory. *In re the Newcastle-upon-Tyne Marine Insurance Co., ex parte Henderson*, 19 Beav. 107.

(13) *Transferee of Shares.*

A purchased fifty shares in a banking company from the directors of the company. No deed of transfer of these shares to him was executed, as required by the deed of settlement of the company, but the directors gave him certificates of the shares, and he received the dividends declared on them from time to time. The company was ordered to be wound up:—Held, that A was properly put on the list of contributories in respect of these shares. *In the matter of the North of England Joint-Stock Banking Co., ex parte Bernard*, 21 Law J. Rep. (N.S.) Chanc. 468; 5 De Gex & Sm. 283.

A purchased of B, a shareholder of the company,

thirty shares in the company. No deed of transfer was executed, as required by the deed of settlement, but the directors gave A certificates, and he received the dividends declared on them:—Held, that the formality had been waived, and that the transfer had been complete; and that A had properly been put on the list of contributories in respect of the shares. *Ibid.*

Equitable considerations will be regarded in determining whether a party is a member of or contributory to the liabilities of a company under the Winding-up Acts. *In re the North of England Joint Stock Banking Co., ex parte Straffon's Executors*, 22 Law J. Rep. (N.S.) Chanc. 194; 1 De Gex, M. & G. 576; 4 De Gex & Sm. 256.

Distinction between the cases where directors are acting in substantial contravention of the objects and scope of their deed of settlement, as in *Ex parte Morgan*, and *Ex parte Lawes*, and where their course of dealing in the transfer of shares has not been in compliance with the strict formalities of the deed. *Ibid.*

J S purchased 120 shares in the company, and the requisite notices of and consent of directors to such transfer were given. J S did not execute the deed of settlement, but he executed a deed of transfer of ten of these shares, by which he covenanted with the public officer of the company to observe all the stipulations, &c. of the settlement deed. The settlement deed provided that one execution of the deed by a shareholder was sufficient for all his shares. J S afterwards purchased other shares, making altogether 700. No formal deed of transfer was executed in respect of any of these shares (except as above), but the consent of the directors to such transfer was testified by writing across the notice of sale "Transferred," which was signed by one of the directors. The deed of settlement provided that such consent should be testified by the directors signing their name in the margin of the deed of transfer, and that all transfers not made in accordance with the deed of settlement should be void. J S had received dividends upon the 700 shares:—Held, that the requisitions of the deed had been complied with in substance, and that by the course of dealing between the parties, the directors could not dispute J S's title, nor J S his liability as a member; and, consequently, that J S was liable as a contributory in respect of his 700 shares. *Ibid.*

J S sent to the office of the company a deed of covenant in respect of a transfer of shares, apparently executed by himself, though in fact his name was signed by a third party; and he acted under the deed, and received benefits under it:—Held, that his executors were estopped from saying that it was not his deed. *Ibid.*

In case of a contract for purchase of shares, and an incomplete or informal transfer, the vendor has an equity to call upon the purchaser to clothe himself with the legal title; and this equity will impress upon the latter the character of a purchaser upon a completed contract. *Ibid.*

A mining company was professed to be carried on upon the cost-book principle. The 23rd rule of the company provided that a written notice of any intended transfer should be sent to the purser, and that no share should be sold unless in a particular form, and that no transfer in any other form should

be valid. The 24th rule provided that any shareholder might determine his liability upon giving notice to the pursuer of his intention, and depositing the transfer, and signing a relinquishment of all claims upon the company. The company was ordered to be wound up. S, a shareholder, had entered into a contract with M to sell to him his shares, and he was to take them subject to the conditions on which they were then held. The shareholder S went with the shareholder M to the office of the company, and deposited with the pursuer a transfer of the shares in the required form, but no previous notice was given of the intended transfer. The Master placed the name of M upon the list of contributories; and the Vice Chancellor affirmed that decision. Upon appeal to the Lords Justices,—Held, that M was properly placed upon the list; and, before the full Court of Appeal, held, that the liability of M, as such contributory, was not limited to the time from which he took a transfer of the shares. *Ex parte Mayhew, in re the Pennant and Craigwen Consolidated Lead Mining Co.*, 24 Law J. Rep. (N.S.) Chanc. 353; 5 De Gex, M. & G. 837.

(14) *Where Object of Company altered.*

A prospectus was issued for the establishment of a company. A B took shares and paid his deposit. Afterwards, at a meeting of shareholders, the scheme was greatly varied. A B was present, but took no part in the matter, and never after in any way interfered. The company was formed on the new scheme, and failed:—Held, that A B was not a contributory. *Goldsmid's case, in re the British and American Steam Navigation Co.*, 16 Beav. 262.

A B took ten shares in a company intended to be formed for specified objects, and on stated principles. The projectors afterwards materially varied its character. A B did no act by which he assented to the variation, or adopted the new company. Some time after the directors agreed that nine of A B's shares should be cancelled, and that A B should remain a shareholder for one:—Held, that A B was not a contributory in respect of the nine shares. *Meyer's case, in re the British and American Steam Navigation Co.*, 16 Beav. 383.

(b) *Extent of Liability of.*

(1) *In general.*

It having been decided that Mr. Upfill was a contributory, the Master made a call upon all contributories, rateably, according to their number of shares:—Held, upon appeal, that the Master could not make a call upon any contributory until he had decided that the contributory was liable to the payment of the debts in respect of which the call was made. *In re the Direct Birmingham, Oxford, Reading and Brighton Rail. Co., ex parte Upfill*, 20 Law J. Rep. (N.S.) Chanc. 480; 1 Sim. N.S. 395.

A contributory, under the Winding-up Act, in respect of 173 shares purchased by him, had covenanted in a deed, transferring a portion of the shares to him, to pay all instalments and sums of money in respect of the shares transferred, and to execute the company's deed of settlement. The contributory having died without executing the settlement,—Held, on petition (*Wightman, J.* assisting and concurring), that the company were not entitled to rank as *spécialité* creditors against the estate of the contribu-

tory for any of the shares except those vested in him by the deed of transfer. *Hay v. Willoughby; Hay v. Flintoff; In re the North of England Joint-Stock Banking Co., ex parte Harrison*, 22 Law J. Rep. (N.S.) Chanc. 249; 10 Hare, 242.

The provisional directors of a projected railway company, pursuant to a resolution, transmitted a circular letter to M, amongst others, by which they undertook to return to the subscribers the whole deposit in case they should not be able to obtain their act of parliament. On the faith of this letter, M subscribed for shares and paid the deposit and executed the subscribers' agreement, a deed under seal, which contained a covenant by the subscribers to pay the expenses of the provisional directors, whether the act passed or not. The company failed to obtain their act, and it was ultimately ordered to be wound up. M was placed upon the list of contributories; and the Master made a general call upon all the contributories, for the purpose of defraying the expenses of the company. The Vice Chancellor refused to discharge that call as against M:—Held, upon appeal, discharging the order against M, that the provisional directors, by sending that letter to M, had as between themselves and M, rendered themselves primarily liable to the expenses; and that the call ought to be made in the first instance exclusively against those primarily liable, except in the case where they were confessedly insolvent, or there was difficulty in recovering the money from them. *In re the Dover and Deal Rail. Co., ex parte Mowatt*, 22 Law J. Rep. (N.S.) Chanc. 578; 3 De Gex, M. & G. 254; reversing 1 Drew. 247.

A railway company was projected, but proved abortive. The subscribers' agreement was of three parts: the subscribers of the first part; proposed trustees of the second part; and the managing directors (who were some of the parties of the first part) of the third part. The deed recited that the managing directors had accepted that office and subscribed the requisite number of shares. The deed contained a covenant by the subscribers to indemnify the managing directors against all liability. In the proceedings under the Winding-up Acts, it was proved that, before the execution of the deed by any person, Mr. F, one of the persons named as a managing director, had refused to accept that office or to execute the deed; and it was not proved that Mr. M or Mr. C (two other of such persons) had ever accepted office. Only nineteen subscribers executed the agreement, and none of the managing directors executed it or took shares, but, except as before stated, they accepted office and acted. The parties settled on the list of contributories were the acting directors and the subscribers; and it becoming necessary to make a call for debts and costs, the Master made a call on all the contributories rateably, treating each director as the holder of the number of shares requisite to a qualification for office; and as to the costs made a call upon all the contributories equally:—Held, upon appeal, that the directors having knowingly made misrepresentations of fact, they could not have the benefit of the covenant; that as the subscribers acted on the faith of such representations, they had an equity to restrain the directors from enforcing the covenant; that the directors were primarily liable for the debts; that, under the

Winding-up Acts, the subscribers could assert the invalidity of the deed without taking proceedings to impeach it; and that the directors were primarily liable to the costs as well as the debts; and the call for both was discharged, as against the subscribers. *Ex parte Carew, in re the Dover, Hastings and Brighton Junction Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 769.

The subscribers' agreement of an intended railway company provided that the committee of management might dissolve and wind up the affairs of the company at any time before the act of incorporation was obtained. Under these powers the committee of management dissolved the company, and proposed to return to each scripholder a certain amount of the deposit. Before such amount was received by any scripholder he had to sign an assent to the cancellation of his scrip, and he became entitled to receive such further sum as the committee of management might declare payable after a final settlement of all claims upon the company. The company being subsequently wound up under the Winding-up Acts, a list of contributories divided into several classes was settled, and a call was made for the costs incurred in the winding up:—Held, that the Master was not justified in making the call exclusively on that class of the contributories which included those scripholders who had received back part of the deposit; but that such class being entitled to participate in any further sum which might be declared payable, was liable *pari passu* with all the other contributories to the call made to discharge the expenses incidental to the winding up. *In re Rugby, Warwick and Worcester Rail. Co., Preece and Evans's case*, 2 De Gex, M. & G. 374.

A was in his absence chosen by the provisional committee of a provisionally registered railway to be one of the managing committee, to whom, by resolutions of the provisional committee, power was given to allot shares and to apply the funds of the company in payment of expenses. The scheme having proved abortive, the allottees recovered their deposits in actions against A, and other persons who had been appointed to be members of the managing committee. The members of the managing committee thereupon appointed a sub-committee, of which A was one, to take measures to protect the members of the committee. A was a constant attendant at the meetings of the sub-committee, and took an active share in providing for some of the demands on the committee of management, and resisting others:—Held, that he thereby sanctioned and adopted the former proceedings of the managing committee in which he had not taken part, and was liable to contribute in respect of them. *Spottiswoode's case*, and *Amsinck's case*, 6 De Gex, M. & G. 345.

B, who was appointed and acted as a member of the managing committee of a provisionally registered railway company, with power to contract with engineers for the requisite surveys, &c., was one of the members liable in respect of an order given to the engineers, who afterwards, being unable to complete the contract by the required time, offered to forego it, and to substitute a contract for a part of the line only, on the terms that the completion of the latter within the time should not be required. At a meeting at which B was not present, the majority of

the managing committee present resolved to accede to the proposal. B at a subsequent meeting opposed the confirmation of the resolution. Afterwards he concurred in resolutions for providing means of satisfying the engineers' demand among others:—Held, that the substituted contract was only a modification of the contract in respect of which B was liable, and that, under the circumstances, B was liable to contribute to the payment of the engineers' demand. *Ibid.*

Contributions may be enforceable on general principles of justice, independently of contract. *Ibid.*

(2) *Debts and Losses before Transfer.*

In January 1847, A transferred some shares held by him in a joint-stock banking company to B. By the deed of settlement it was declared, that the holder of shares, after a transfer, should be free from all subsequent obligations in respect of them, but that this should not extend to release him from his proportion of losses sustained by the company up to the period of his ceasing to be a member; and it was further declared, that half-yearly balance sheets should be exhibited to the shareholders, shewing the profits and losses of the company, and that such balance sheets should be binding and conclusive on all the shareholders, unless error was shewn within a given time. The half-yearly balance sheets, before and immediately after A's transfer, shewed profits to a large amount, and dividends were declared accordingly. In 1849 the bank failed for a very large amount:—Held, that the losses to which a transferor of shares was liable, were losses appearing upon the balance sheet; and none such appearing, and A having ceased to be a member for three years, he was properly excluded from the list of contributories. *In re the North of England Joint-Stock Banking Co., ex parte Holme*, 22 Law J. Rep. (N.S.) Chanc. 226; 2 De Gex, M. & G. 113: affirming 20 Law J. Rep. (N.S.) Chanc. 300; 4 De Gex & Sm. 312.

Quere—whether there could be any losses within the meaning of the clause so long as any part of the capital of the company remained uncalled up? *Ibid.*

The deed of settlement of a company provided that when any shares in the capital should be transferred to a new proprietor, the responsibilities of a previous owner should cease, and such previous owner should be exonerated and discharged from all "subsequent claims," demands and obligations in respect of the same shares, and from all future observance of the covenants of the deed in respect of the same shares:—Held, affirming the decision of the Court below, that the transferee of shares was subject to the debts and liabilities of the company, as well those incurred before, as those subsequent to the date of his transfer. *In re the Monmouthshire and Glamorganshire Joint-Stock Banking Co., ex parte Cape's executor*, 22 Law J. Rep. (N.S.) Chanc. 601; 2 De Gex, M. & G. 562.

Semble—In the absence of express provisions in the deed of settlement to the contrary, the transferee would be held to stand in the place of the original owner for all purposes. *Ibid.*

A had been a member of the provisional committee, and had accepted shares in a company which was ordered to be wound up. The Master placed A's name on the list as a contributory to the expenses of the committee incurred between the

14th October, 1845, the day on which he accepted his shares, and the 30th November, 1845, on or before which day the company ought, according to the Standing Orders, to have deposited their plans, &c. in order to obtain an act of incorporation in the then next session. But they did not do so, nor did they after that day take any steps towards the establishment of the company:—Held, that A was liable to contribute to the expenses incurred between the 14th October and 30th November, 1845, both inclusive, but was not liable to contribute to the expenses incurred before the former day or after the latter. *In re the Direct Birmingham, Oxford, Reading and Brighton Rail. Co., Bright's case*, 1 Sim. N.S. 602.

(3) *Borrowed Money and Advances.*

Directors and shareholders in an unincorporated company made *bond fide* advances of money for the purpose of carrying on a mine established abroad, and without which advances the property would have been wholly ruined. The money was applied to purposes for which these parties and the other shareholders were jointly personally liable. The company was ordered to be wound up, and the Master made a call on these directors and shareholders and the other shareholders, as contributories, and he allowed these parties their several advances as set-off against their calls as contributories:—Held, on appeal, that the Master was correct. *In re the German Mining Co.*, 22 Law J. Rep. (N.S.) Chanc. 926; 4 De Gex, M. & G. 19.

The deed of settlement of a joint-stock company established for erecting and maintaining a corn exchange, provided, that the capital of the company should consist of a sum of 4,000*l.* divided into shares of 5*l.* each; and the directors were empowered from time to time to make calls upon the shareholders not exceeding the amount of their shares unpaid, and also to borrow money to the extent of 2,000*l.* for the purchase of the site and for erecting the building, instead of calling for instalments upon the shares. In the purchase of the site and the erection of the building the directors expended more than double the amount of the capital, having borrowed the money of the shareholders and of their bankers, one of whom was a director of the company. An order was made for winding up the company, and a general call was made upon all the shareholders:—Held, upon appeal, discharging the order for a call, first, that, upon the construction of the deed, the directors had power to borrow only to the extent of the unpaid capital. Secondly, that the liability of the shareholders was limited to the amount of their respective shares unpaid, and the directors were primarily answerable for the excess of expenditure. Thirdly, that a creditor, having notice of the limited liability under the deed, was bound by such notice. Fourthly, that the company was not a trading partnership, and therefore the directors could not, in excess of their authority under the deed, pledge the credit of the shareholders even to a creditor who had no notice of the deed. *In re the Worcester Corn Exchange Co.*, 22 Law J. Rep. (N.S.) Chanc. 593; 3 De Gex, M. & G. 180.

A joint-stock company was formed in England for working mines in Germany, subject to the terms of a deed of settlement, which provided that the capi-

tal should be 50,000*l.*, and gave no powers to the directors to raise money except by the creation of new shares. The capital was paid up and proved insufficient for working the mines. The wages of the miners being in arrear, and other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those debts and preventing the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guarantee from the bankers of the company, not for payment of debts, but for carrying on the business of the company in its ordinary course, and they afterwards repaid the bankers these advances. The company was wound up under the Winding-up Act:—Held, first, that the advances made by the shareholders to pay debts of the company might be set off by them, with interest, against a call. Secondly, that although the advances made by the bankers did not constitute a debt due to them from the company, the directors having no power to borrow, the directors were entitled to be allowed the amount repaid by them to the bankers, the directors being trustees, and in that character entitled to indemnity from their *cestuis que trust* against expenses *bond fide* incurred. Thirdly, that the distinction between advances by shareholders to pay necessary expenses and a loan contracted by them is a sound one. *Ex parte Chippendale, in re the German Mining Co.*, 4 De Gex, M. & G. 19; 22 Law J. Rep. (N.S.) Chanc. 926.

(4) *Guarantee to return Deposit.*

Three of the directors of a projected railway company, with their letters of allotment, sent a letter to each allottee, containing the following passage:—"In the event of the act not being obtained, the directors undertake to return the whole of the deposits without deduction." The act was not obtained, and the company was ordered to be wound up. The Court having decided that as between these three directors, and allottees who had signed the subscribers' agreement (by which it was stipulated that the expenses of the provisional directors in raising the company should be borne by the parties thereto, whether the act was obtained or not), on the faith of the guarantee, the three directors were primarily liable for all the expenses, the Master made a call upon them. One of the Vice Chancellors refused an appeal motion from an order for the call, and the Lords Justices affirmed the decision of His Honour, by dismissing the appeal, but without prejudice to any question between the three directors who signed the guarantee on the one hand, and the other directors on the other; and also without prejudice to any question between those three directors and the other directors on the one hand, and such of the allottees as might have signed the deed not on the faith of the guarantee on the other hand. *Ex parte Londesborough, in re the Dover, Deal and Cinque Ports Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 736; 4 De Gex, M. & G. 411.

Three directors of a projected railway company, with their letters of allotment sent to each allottee a letter saying, "In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction." The Master decided, that the three directors who signed the

letters were alone liable, and made a call on them accordingly for the expenses incurred. One of the three paid the whole, and then sought for contribution from the other five directors, who had not signed the letter:—Held, that the decision of the Master was correct, and that the three alone were liable. *Ex parte Londesborough, in re the Dover, Deal and Cinque Ports Rail. Co.*, 23 Law J. Rep. (n.s.) Chanc. 738; 4 De Gex, M. & G. 411.

(5) *Costs of Winding up.*

The Master having made a call for payment of costs, incurred under a winding-up order, upon all the contributories rateably, according to the number of shares taken by each of them, it was held, that no call for payment of costs could be made before the Master had ascertained that such costs had been incurred in respect of some liabilities which attached to each particular person. Master's order discharged. *In re the Direct Birmingham, Oxford, Reading and Brighton Rail. Co., ex parte Hunter*, 20 Law J. Rep. (n.s.) Chanc. 483; 1 Sim. N.S. 435.

An association was provisionally registered, but no deed of settlement was executed, and it was ordered to be wound up. The Master, by his report, found that the only contributories were provisional and managing committee-men, who had agreed to take shares, and thereby became liable equally among them to the expenses of forming the concern and to the expenses of its being wound up; that the greater part of the expenses had been paid by means of calls and other payments; but for paying all the remaining expenses, costs of winding up, &c., which he estimated at a certain sum, money must be raised by a call of 60l. on each of the contributories. He accordingly made an order for a call, dated the same day as his report:—Held, that each contributory was liable to pay the call; that the principle on which the Master had proceeded was correct; that it was no objection to the call that if all the contributories paid, more than sufficient would be raised; and that it was unimportant whether the liabilities were liquidated or unliquidated. *Ex parte Dale, in re the Wolverhampton, Chester and Birkhead Rail. Co.*, 21 Law J. Rep. (n.s.) Chanc. 341; 1 De Gex, M. & G. 513.

Held, also, that the call, being founded on a report, which the contributories had an opportunity of questioning, but which they did not question, could not be impeached on the ground of any invalidity of the report. *Ibid.*

(c) *Rights of.*

An order was made for the winding up the affairs of a joint-stock company; the property of the company being about to be sold by auction, a meeting was held for the purpose of fixing a reserved bidding; at the meeting, the contributories claimed a right to be present, but the Master excluded them. From this decision they appealed, and the Vice Chancellor reversed the Master's determination; and, on an appeal from the order of the Vice Chancellor, it was held, that the 38th section of the statute 11 & 12 Vict. c. 45. did not give the Master authority to exclude the contributories. *In re the Imperial Salt and Alkali Co.*, 21 Law J. Rep. (n.s.) Chanc. 224; 1 De Gex, M. & G. 64; 5 De Gex & Sm. 34.

(J) *CALLS.*

A signed a deed by which he and other parties agreed to pay all the expenses incurred and to be incurred, with the view to the formation of a projected railway company, such expenses to be assessed rateably on the sums subscribed. Some expenses were incurred, but the undertaking was abandoned, and the company was ordered to be wound up under the Joint-Stock Companies Winding-up Act. The Master made a list of contributories, in which all the parties to the subscription contract were included. It appeared that a suit and an action were in prosecution by and against the official manager, and that the official manager had no assets in hand, and that it was necessary that some funds should be supplied. The Master made a call on all the subscribers to the subscription contract. This was resisted by some of the subscribers on the ground that the managing committee, who were included in the list of contributories, had received large sums which they had not accounted for, and that these sums ought in the first instance to be obtained and applied. In answer to this, evidence was given that the persons forming this committee were not in solvent circumstances:—Held, that, under all these circumstances, the Master had authority to make the call, and that he had properly exercised his discretion in making it. *In the matter of the London and Birmingham Extension and Northampton, Daventry, Leamington and Warwick Rail. Co., ex parte Gay*, 21 Law J. Rep. (n.s.) Chanc. 284; 1 De Gex, M. & G. 347; 5 De Gex & Sm. 122.

A subscribed the deed of settlement of a joint-stock company, instituted for the purpose of granting assurances on ships, for 1,000 shares of 25l. each. By the deed of settlement it was declared that a deposit of 2l. 2s. should be paid on each share, and that a further call of 2l. 2s. might be made by the directors, but that no further call should be made without a previous resolution of the shareholders assembled at a general meeting. The company granted several policies. The company was afterwards made bankrupt, under the 7 & 8 Vict. c. 111, and debts were proved against it to the amount of 70,000l., and upwards. It was afterwards ordered to be wound up under the Joint-Stock Companies Winding-up Act. The Master placed A on the list of contributories, and made an order that he should pay 25,000l. Motion, that the order as to the call should be discharged was refused. *In re the Merchant Traders' Ship Loan and Assurance Association, ex parte Lord Talbot*, 21 Law J. Rep. (n.s.) Chanc. 846; 5 De Gex & Sm. 336.

A decree was made declaring that an incorporated company was bound to indemnify its retired directors, and a reference was made to the Master. An order being afterwards made to wind up the company, the official manager was substituted in the suit. On further directions an order for payment and indemnity was made on the official manager, and the Master was directed to make proper calls on the contributories for that purpose. Form of order in such a case where the plaintiffs were themselves contributories. *Gleadow v. the Hull Glass Co.*, 15 Beav. 200.

(K) *ACTIONS.*

The 73rd section of the 11 & 12 Vict. c. 45. (the

Winding-up Act) authorizes a plaintiff having a claim against a dissolved company, subject to the provisions of that act, to proceed with his action against such company, "after proof or exhibiting or making such proof as he may be able, of his debt or demand before the Master":—Held, that the plaintiff, who had exhibited such proof and had obtained the Master's allowance, was entitled to proceed with his action, and was not bound to take any further step, as, for instance, to endeavour to obtain payment of his demand. *Quere*—whether allowance of proof by the Master is essential in such a case. *Prescott v. Hadow*, 20 Law J. Rep. (N.S.) Exch. 18; 5 Exch. Rep. 726.

Two members of a joint-stock company, but which was not completely registered, in their own names, entered into a contract by their agent, but which was, in fact, for the benefit of the company:—Held, that they might sue and be sued upon the contract. *Clay v. Southen*, 21 Law J. Rep. (N.S.) Exch. 202; 7 Exch. Rep. 717.

The 3 & 4 Vict. c. 95, after reciting that several persons had formed themselves into a company or partnership for effecting assurances on lives, and that difficulties might arise in recovering debts due to the company, since by law all members of the company must be named in every action or suit for such purpose, enacted that all actions and suits against any person indebted to the company, or upon any bonds, covenants, bills of exchange, promissory notes, or agreements, and, generally, all other proceedings whatsoever at law or in equity, by or on behalf of the company, against any person or persons, whether such person or persons be a proprietor or proprietors of the company, or not, shall be commenced in the name of the chairman, or of a director, or the secretary of the company, as the nominal plaintiff:—Held, that the company might sue, in the name of the nominal plaintiff, one of its own members for a debt due to the company. *Reddish v. Pinnoch*, 10 Exch. Rep. 213.

(L) PRACTICE.

(a) *Winding up in Chambers.*

A company may be wound up in chambers under the acts 1848 and 1849, instead of by the Master. *In re the Newcastle, Shields, and Sunderland Union Bank*, 17 Beav. 470.

(b) *Advertisement of Petition.*

An advertisement under the Joint-Stock Companies Winding-up Act stated that the petition would be heard on "Saturday, the 20th of December." The 20th being on a Thursday, the Court would not hear the petition, but required fresh notices to be given. *In re the Joint-Stock Companies Winding-up Act*, 13 Beav. 434.

(c) *Re-hearing.*

The 33rd section of the Joint-Stock Companies Amendment Act, 1849, does not apply to the case of a motion to re-hear an order of the Lord Chancellor. *In re the Direct Exeter, Plymouth and Devonport Rail. Co., ex parte Besley*, 20 Law J. Rep. (N.S.) Chanc. 385; 3 Mac. & G. 287.

A special application for leave to move for a second re-hearing does not necessarily require notice. *Ibid.*

(d) *Appeal.*

The 33rd section of the statute 12 & 13 Vict. c. 108. (the Joint-Stock Companies Winding-up Act Amendment Act) is imperative; and therefore the Court has no authority to enlarge the time for giving notice of appeal, after the three weeks from the making of the order complained of has elapsed. *Ex parte Green, in re Cameron's Coalbrook Steam Coal and Swansea and Lougher Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 331.

Seven persons were elected the managing committee of a company, and performed acts in that character. The scheme proved abortive. Actions were brought against one of the seven, and he obtained an order for winding up the company. Others of the seven had made a similar attempt, but were not in time to do so before the order was actually obtained. An official manager was appointed, and the order was prosecuted with the concurrence of all seven. Four of the seven appealed from the order for winding up, and also from an order for a call to pay the costs and expenses and the debts; but it was held, first, that whether the order for winding up were rightly or wrongly made, the four could not move to discharge it; and, secondly, that the order for the call was properly made on the seven members of the managing committee. *Ex parte Woolmer and others, in re the Direct Exeter, Plymouth and Devonport Rail. Co.*, 21 Law J. Rep. (N.S.) Chanc. 883; 2 De Gex, M. & G. 665; 5 De Gex & Sm. 117.

The general rule of practice of the Court of Chancery, by which a successful appellant is not allowed the costs of his appeal, does not apply to proceedings under the Winding-up Acts, but the costs of all the proceedings are in the discretion of the Court. *In re the North of England Joint-Stock Banking Co., ex parte Hall*, 1 De Gex, M. & G. 1.

In a case where the official manager succeeded before the Master, and on appeal before the Vice Chancellor, in obtaining the name of a party to be included in the list of contributories, but these decisions were ultimately reversed by the Lord Chancellor, the costs of all the proceedings, including the costs of the appeals and in the Master's office, were ordered to be paid by the official manager to the party sought to be charged. *Ibid.*

(e) *Order to stay Proceedings.*

An order was made for winding up an abortive railway scheme. A list of contributories was prepared, but it contained the word "adjourned" written in pencil against some names. Six persons were comprised in the names on this document. The Master made a call upon the six, and, against the consent of the official manager, compromised the liabilities of five of these persons by payment of a stated sum each. The sixth person was a managing committee-man, and although he at one time denied his liability before the Master, he ultimately consented to remain. He then gave two notices of motion, one to remove his name from the list, and the other to discharge the order for a call, or that the compromise might be set aside. One of the Vice Chancellors considered that the order to wind up could not be sustained, as there was, in fact, no company to wind up, and, therefore, he discharged the order for

the call, and ordered all further proceedings under the winding-up order to be stayed. The official manager appealed. On the hearing of the appeal, this contributory offered to pay back the money which the other five had paid on the compromise:—Held, that the Court below had no jurisdiction to make the order to stay proceedings, it being a rule of the Court that where necessary parties, being served, do not appear, the terms of the notice of motion cannot, so far as they are interested, be materially departed from; that, notwithstanding the dissent of the official manager to the compromise, and the offer of the party moving to repay the money the compromising contributories had paid, the compromise could be supported; and that the list of contributories was not such as the act of parliament required. *Ex parte Underwood, in re the Eastern Counties and South-end Junction Rail. Co.*, 23 Law J. Rep. (N.S.) Chanc. 943; 5 De Gex, M. & G. 677.

The Master charged with the winding up of an abortive scheme settled on the list of contributories the members of the managing committee and parties who had signed the subscribers' agreement; but as the latter had, in that instrument, covenanted to indemnify the managing committee from all costs, the Master made a call upon them exclusively, as being primarily liable. From this order three of the parties appealed, seeking its discharge, or for leave to appeal from the settlement of the list of contributories; and, on the hearing, one of the Vice Chancellors directed all the contributories to be served, and, although all did not appear when served, his Honour made an order discharging the call and directing a stay of all proceedings under the winding-up order, and directing the official manager to repay all monies he had received. From this order the official manager appealed:—Held, that the order of the Vice Chancellor must be discharged altogether, and an order be substituted discharging the order for the call, the materials before the Court not being sufficient to support it; and all parties to be paid their costs of the proceedings before the Vice Chancellor and upon the appeal out of the estate. *Ex parte Carew, in re the Dover, Hastings and Brighton Junction Rail. Co.*, 23 Law J. Rep. (N.S.) Chanc. 761; 5 De Gex, M. & G. 94; 2 Sm. & G. 1.

The circumstance that an order goes beyond the notice of motion on which it is made, however immaterial as between those who have appeared and taken part in the discussion upon the motion, is not so as to those parties interested in the subject-matter of the motion, who, being served with notice thereof, did not appear thereon, for these are entitled to rest on their right to assume that nothing beyond what is contained in the notice will be asked upon the motion. *Ibid.*

Quære—whether supposing all who had been served had appeared, such an order would be sustainable, being made in the absence of the creditors of the company who had proved their debts before the Master under the winding-up order. *Ibid.*

A railway company was ordered to be wound up. A claim was made before the Master, but not prosecuted. One contributory agreed to pay all debts proved before the Master, and thereupon an order was made to stay all proceedings under the winding-up order. In the same matter two solicitors obtained an order for the taxation and payment of their bills of

costs. The taxation was commenced, and had not concluded when the order to stay proceedings was made:—Held, that the claimant was entitled to proceed before the Master to exhibit such proof as he might be able. *Ex parte Clifton, Ex parte Hook, and Ex parte Thompson, in re Dover, Deal and Cinque Ports Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 83; 5 De Gex, M. & G. 743.

Held, also, that the solicitors were entitled to proceed with the taxation of their bills of costs. *Ibid.*

(f) *Discharging the Order.*

A petition to discharge a winding-up order dismissed, with costs, on account of delay in presenting it. *In re the Chepstow, Gloucester and Forest of Dean Rail. Co.*, 2 Sim. N.S. 11.

An application may be made by motion, with notice, to discharge a winding-up order which has been made upon petition. *In re Metropolitan Carriage Co., Clarke's case*, 1 Kay & J. 22.

Where such an application was made fifteen months after notice of the order, and when considerable costs had been incurred in the winding up, although made by a person directly after he was placed upon the list of contributories, and although supported by evidence of facts which, if disclosed, on the hearing of the petition would have prevented the order:—Held, that the Court could not discharge the order unless the applicant would consent to pay the costs which had been incurred by the official manager, and as he declined to do so the motion was refused, with costs. *Ibid.*

(g) *Form of Master's Certificate.*

The Master certified that he had included A's name in the list of contributories not as a shareholder, but as a contributory in respect of any expenditure which he might be proved to have incurred. The Court held the certificate to be informal, and directed the Master to review his certificate, with liberty to either party to adduce further evidence. *In re the Shrewsbury and Leicester Direct Rail Co., Riddle's case*, 1 Sim. N.S. 402.

(h) *Reviewing Master's Report.*

The Master having placed Mr. Best upon the list of contributories, his decision was reversed by Knight Bruce, V.C. and the name expunged. After the decision in *Upfill's case*, the Master reviewed his report, and again placed Mr. Best's name upon the list:—Held, that a party can, under no circumstances, be summoned a second time before the Master, as to his liability for any shares in respect of which he has once been excluded from or included in the list of contributories. The Master's decision reversed. *In re the Direct Birmingham, Oxford, Reading and Brighton Rail. Co., ex parte Best*, 20 Law J. Rep. (N.S.) Chanc. 125; 1 Sim. N.S. 193.

The 17th section of the Winding-up Amendment Act, 1849, is retrospective as well as prospective, and gives the Master power to review a decision made by him prior to the passing of that act. *In re the North of England Joint-Stock Banking Co., ex parte Crossfield*, 22 Law J. Rep. (N.S.) Chanc. 208; 2 De Gex, M. & G. 128; 20 Law J. Rep. (N.S.) Chanc. 301; 4 De Gex & Sm. 338.

The question whether the Master has properly exercised his discretion in reviewing his decision, par-

ticularly with reference to the circumstances that may have happened between his first and second decisions, may properly be brought before the Court by way of appeal. *In re the North of England Joint-Stock Banking Co., ex parte Crossfield*, 20 Law J. Rep. (N.S.) Chanc. 301; 4 De Gex & Sm. 338: affirmed, 22 Law J. Rep. (N.S.) Chanc. 208; 2 De Gex, M. & G. 128.

(i) *Proof of Debt.*

A party claiming to be a creditor of a company ordered to be wound up, is entitled to produce all his evidence before the Master to establish it. *Ex parte Prichard, in re the Warwick and Worcester Rail. Co.*, 23 Law J. Rep. (N.S.) Chanc. 958; 5 De Gex, M. & G. 495.

(j) *Service of Notice.*

A notice of call was sent to a contributory out of the jurisdiction, by a letter posted and directed to his last known place of residence in England, and at the same time by a letter posted and directed to him at the place out of the jurisdiction where he was last quartered on military duty. It did not appear upon the evidence that the notice had not come to his hands.—Held, that the notice was well served within the 108th section of the 11 & 12 Vict. c. 45. *Ex parte D'Urban, in re the Direct Exeter, Plymouth and Devonport Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 701.

Held, also, that he was liable for costs incurred by the official manager in unsuccessfully endeavouring to place various persons on the list of contributories, he (this contributory) having had an opportunity of examining the documents in the Master's office, and of disputing the validity of the call, and having failed in so doing. *Ibid.*

(k) *Costs of Witnesses.*

Where an alleged contributory, whose name is finally settled on the list of contributories of a joint-stock company ordered to be wound up, is summoned to attend before the Master, under the 64th section of the act of 1848 (11 & 12 Vict. c. 45.), *semble* (per *Lord Justice Turner*) that he is entitled to have his travelling expenses tendered to him at the time of the service of the summons. *Ex parte Mercer, in re the Northern and Southern Connecting Rail. Co.*, 23 Law J. Rep. (N.S.) Chanc. 246; 5 De Gex, M. & G. 26; 2 Sm. & G. 87.

4. EXECUTION AGAINST SHAREHOLDERS.

(A) RAILWAY AND OTHER INCORPORATED COMPANIES.

Under section 36. of 8 & 9 Vict. c. 16. the Court will not order execution to issue against a shareholder of a company without a *scire facias*, but will only, upon sufficient ground being shewn, allow a *scire facias* to issue, in order that execution may be obtained against such shareholder to the extent pointed out by that section. A suggestion is not the proper course. *Hitchings v. the Kilkenny, &c. Rail. Co., in re Emery*, 20 Law J. Rep. (N.S.) C.P. 31; 10 Com. B. Rep. 160; 1 L. M. & P. C. 712.

It is not sufficient, in order to obtain leave for issuing such *scire facias*, to shew that *fi. fa.*'s have

been issued against the effects of the company into two counties, and *nulla bona* returned to him. *Ibid.*

A *scire facias* may issue at the suit of a judgment creditor of a company, subject to the provisions of the 8 Vict. c. 16. s. 36. (the Companies Clauses Consolidation Act), against a shareholder; but, *quære*, whether that is the sole remedy. *Devereux v. the Kilkenny and Great Southern and Western Rail. Co., in re Emery*, 20 Law J. Rep. (N.S.) Exch. 37; 5 Exch. Rep. 834.

When it is proved to the satisfaction of the Court, upon the motion for such *scire facias*, that an execution has been issued against the company, and that it has been unproductive, the issuing of the *scire facias* is still a matter of discretion with the Court. *Ibid.*

Where a company was established for making a railway in Ireland, although no proceedings had been taken to procure satisfaction in Ireland, and the affidavits did not expressly negative the existence of property there, the Court granted a rule for a *scire facias* against a director who had stated at a meeting of the company in London, that in consequence of the shareholders not paying the calls, the directors had no funds to meet the claims against them, one of the claims being the judgment obtained by the plaintiff. *Ibid.*

The averments in the *scire facias* that the party is a shareholder, and as to the amount of his shares unpaid, are traversable. *Ibid.*

A judgment creditor of a railway company within the operation of the Companies Clauses Consolidation Act, 1845, is entitled to issue execution against a shareholder, under section 36, although he has before issued an *elegit* against the lands of the company, but such lands are insufficient to satisfy the judgment debt; and the Court granted a mandamus to compel the production of the register of shareholders for his inspection. *Regina v. the Derbyshire, Staffordshire and Worcestershire Junction Rail. Co.*, 23 Law J. Rep. (N.S.) Q.B. 333; 3 E. & B. 784.

An affidavit in support of an application under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, for a *scire facias* for execution against a shareholder on a judgment against a railway company, stated that the deponent "having been foiled in his attempts to obtain a sight of the register, and so obtain authentic and official information on the subject, deponent instituted inquiries *aliunde* as to who really were the shareholders of the company, and hath been credibly informed by parties officially connected with the said railway, and which information deponent verily believes to be true, that the said J F F, who has been a director of the said company from the commencement, was a duly registered shareholder of seventy shares in the said company, and that 1,085l. was due thereon in respect of subscriptions not called up, the shares in the said company being 20l. shares, and only 4l. 10s. per share having been paid up or called:—Held, that this affidavit unanswered was good *prima facie* evidence of the party being a shareholder of the company. *Rastrick v. the Derbyshire, Staffordshire and Worcestershire Junction Rail. Co.*, 23 Law J. Rep. (N.S.) Exch. 2; 9 Exch. Rep. 149.

Where a creditor had obtained a judgment against a company which had been ordered to be wound up

under the 11 & 12 Vict. c. 45, having first proved his debt before the Master, and execution had been ineffectually issued against the company, and there was no prospect of a payment being made to the creditors out of the funds in court under the Winding-up Act within a reasonable period, the Court granted a *scire facias* for execution upon the judgment against a shareholder. *Mackenzie v. the Sligo and Shannon Rail. Co.*, 24 Law J. Rep. (N.S.) Q.B. 17; 4 E. & B. 119.

Where execution by *fi. fa.* and *elegit* issued against the property of a railway company for 800*l.*, and the sheriff returned to the *elegit* that lands of the company, amounting in annual value to 10*s.*, had been taken under the *elegit*, and the plaintiff had not taken possession of the land, nor had he levied the sum of money due to him, and the land was not sufficient whereon to levy the principal money and interest mentioned in the writ,—Held, that the extent in question of the land was no answer to the *scire facias* for the whole amount issued under the 8 Vict. c. 16. s. 36. against a shareholder of a company who had not fully paid up his shares. *Addison v. Tate*, 24 Law J. Rep. (N.S.) Exch. 249; 11 Exch. Rep. 250.

The solicitors of a public company, being also shareholders in the company, sued the company for their bill of costs, and obtained judgment by default. They then issued a writ of *scire facias* against two of the shareholders only for the purpose of putting a stop to a suit against the directors, in which those shareholders were plaintiffs:—Held, that the Court would restrain proceedings upon the *scire facias*. *Horn v. the Kilkenny and Great Southern and Western Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 241; 1 Kay & J. 399.

The original bill having been filed for the purpose of charging the directors with certain shares, and the proceedings complained of having been taken by the solicitors for the purpose of assisting the directors and putting a stop to the suit:—Held, that this was proper matter to be introduced by amendment, and not inconsistent with the original purpose of the suit. *Ibid.*

(B) JOINT-STOCK COMPANIES.

Scire facias against a member of a company completely registered under the Joint-Stock Companies Act, 7 & 8 Vict. c. 110, to obtain satisfaction of a judgment and execution against the company, the plaintiff having failed to obtain satisfaction of the said judgment, by execution against the property and effects of the company. Plea, first, that due diligence had not been used to obtain satisfaction by execution against the effects of the company, concluding with a verification. Secondly, that no rule or order of the Court or a Judge had been obtained for leave to issue the *scire facias*. Replication to the first plea, that due diligence was used to obtain satisfaction by execution against the property of the company, concluding to the country:—Held, upon demurrer, that the 68th section of the 7 & 8 Vict. c. 110. was cumulative only, and did not preclude the plaintiff from proceeding by *scire facias*, to obtain satisfaction of his judgment from the defendant, under the 66th section. *Marson v. Lund*, 20 Law J. Rep. (N.S.) Q.B. 190; 16 Q.B. Rep. 344.

Held, also, as to the pleadings, first, that the

second plea was bad; secondly, that the replication was sufficient, and properly concluded to the country. *Ibid.*

(C) LIMITED LIABILITY COMPANIES.

[See Stat. 18 & 19 Vict. c. 133. s. 8.]

COMPANIES CLAUSES ACT.

The 12th section of the Common Law Procedure Act, 1854, authorizes the Court to appoint an umpire in all cases of arbitration where the parties or two arbitrators are at liberty to appoint an umpire, and do not do so, although the submission to arbitration may have taken place before the act came into operation. *In re Lord*, and *In re the Governor and Company of Copper Miners in England*, 24 Law J. Rep. (N.S.) Chanc. 145; 1 Kay & J. 90.

Where, by a special act, certain matters not connected with railways were referred to arbitration in the manner provided by the Companies Clauses Consolidation Act, 1845, it was held, that as the arbitration clauses of that act only applied to cases where a railway company was one party to the arbitration, an umpire might be appointed under the Common Law Procedure Act, 1854. *Ibid.*

COMPENSATION.

[See LANDS CLAUSES CONSOLIDATION ACT—MASTER AND SERVANT—NEGLIGENCE.]

CONCEALING THE BIRTH OF DEAD CHILDREN.

Placing the dead body of a child under the bolster of a bed with a view to its temporary concealment, although with the intention of removing it elsewhere when opportunity offers, is a disposing of the body within the meaning of the statute 9 Geo. 4. c. 31. s. 14. *Regina v. Perry*, 24 Law J. Rep. (N.S.) M.C. 137; 1 Dears. C.C.R. 47.

If a woman be delivered of a child, which is dead, and a man take the body and secretly bury it, she is indictable for the concealment by secret burying, under the stat. 9 Geo. 4. c. 31. s. 14, and he for aiding and abetting her, under s. 31, if there was a common purpose in both in thus endeavouring to conceal the birth of the child; but the jury must be satisfied not only that she wished to conceal the birth, but was a party to the carrying that wish into effect by the secret burial by the hand of the man in pursuance of a common design between them. *Regina v. Skelton*, 3 Car. & K. 119.

CONFLICT OF LAWS.

A mortgagor resident in this country mortgaged, by deed executed in England, to mortgagees also resident here, real estate in Demerara, and before the mortgagees completed their title to the mortgaged property according to the laws of Demerara, the mortgagor became bankrupt, and his assignees

in this country sold the property and received the proceeds. Whether the rights of the contracting parties have ceased to be governed by the law of Demerara, the *lex loci rei sitæ*, and must be governed by the law of this country, the *lex loci contractûs*—*quære*. *Waterhouse v. Stansfield*, 21 Law J. Rep. (n.s.) Chanc. 881; 9 Hare, 234.

A contract of marriage made in London, in the Scotch form, will be construed in England according to the law of Scotland. The domicile of the parties must determine the remedies by which the contract must be carried into effect. *Duncan v. Cannon*, 23 Law J. Rep. (n.s.) Chanc. 265; 18 Beav. 128.

A domiciled Scotchman intermarried with an Englishwoman in London; a contract of marriage was entered into in the Scotch form; they went to reside in Scotland, but subsequently came to reside permanently in England, where he engaged in trade, and became a bankrupt, having received a great portion of the property of his wife from the trustee of her father's will. Upon a bill by his wife, asking that the trustee might make good the sums paid,—Held, that he was not liable to make good any money paid upon the joint receipt of the husband and wife; but that the assignees of the husband could give no valid discharge for the property of the wife, and that he must make good such sums of money as he had paid to them, and also a sum lost. That all unpaid property of the wife, including the sums to be made good, belonged to her, subject to the life estate of the husband. That the life interest of the husband could not be impounded to secure the provision he had, by the marriage contract, agreed to make for his wife and children. That the property, so far as it was not affected by the marriage contract, was the property of the wife, and must be settled for the benefit of herself and her children. *Ibid*.

British subjects may contract that the law of any foreign state shall regulate their rights; and such contract, if not contrary to the policy of the law of England, will be carried into execution by the Courts of law here in accordance with the law of the state contracted for. A marriage valid by the law of England will be held valid in France to support a contract of marriage entered into in France, although it was alleged that the contract was invalid there as having been entered into in contemplation of the marriage being solemnized in France, which was never done. By the law of France, property not included in the marriage contract remains the separate property of the party to whom it belonged, and although such contract of marriage might be invalid in France as to property there, it will, as to property in England, be carried into effect by the Courts here, in accordance with the law of France. If a wife might, by the law of France, make a valid will there, and dispose of her separate property not included in her marriage contract, she may, in England, make a will valid by the law of England and dispose of her property in England, and that, although the marriage contract might not be valid in France. The law of England will imply a power of disposition over property in England if such a power would have been given by the law of France. Two domiciled English subjects entered into a French contract of marriage, and stipulated that their property should be regulated by the law of France,

which recognized the wife's right of separate estate over property not brought into community, and gave her a power of making a will and disposing of it. The marriage was solemnized in the chapel of the British ambassador at Paris, but it was not celebrated in accordance with the law of France. The husband and wife immediately separated, and she died in 1850 a domiciled English subject, leaving her husband surviving, having, by her will duly executed by the law of England, made a legal appointment of her property in England, and appointed the plaintiff her executor, to whom limited administration was granted:—Held, that the marriage was valid by the law of England; that the contract of marriage, though in the French form, was valid, and that this Court would carry it out in accordance with the law of France; that as the law of France recognized the right of the wife to dispose of her separate property by will, this Court would imply not only an authority to make a will, but also a power of disposition over her property in England, and that the *jus mariti* of the husband was wholly taken away by the marriage contract. *Este v. Smyth*, 23 Law J. Rep. (n.s.) Chanc. 705; 18 Beav. 112.

CONSIGNEE.

A consignee of West India estates appointed by the Court was discharged at his own request, there being a large balance due to him:—Held, that he was entitled to be indemnified out of the slaves compensation money (which had been paid into court and accumulated) for his expenditure and costs in priority to a mortgagee, whose security was prior to the suit, but who was not made a party till after the discharge of such consignee. *Morrison v. Morrison*, 2 Sm. & G. 564.

A consignee appointed by the Court, and expending his money under its sanction, may reasonably look for reimbursement out of every fund arising from the estate under its controul. *Ibid*.

A consignee of the same West India estates appointed after the mortgagee had become a party to the suit, and the compensation money for the slaves had been paid into court, a large balance being found due to him,—Held, that while consignee he could not be paid out of the fund in court; but on his amended petition to be discharged and to have the corpus paid to him, the order was made. *Ibid*.

A consignee of West India estates, appointed by the Court, has a right to be reimbursed his expenditure out of the rents of the English estates of the same owners, although the consignee is not the receiver of these estates. *In re Tharp*, 2 Sm. & G. 578.

CONSPIRACY.

- (A) THE OFFENCE.
- (B) INDICTMENT.

- (A) THE OFFENCE.

A conspiracy to procure by false pretences, false representations, and other fraudulent means, a young girl to have illicit carnal connexion with a man, is a

misdeameanour at common law. *Regina v. Mears*, 20 Law J. Rep. (N.S.) M.C. 59; 2 Den. C.C.R. 79.

An indictment alleged that S sold B a mare for 39*l.*; that while the price was unpaid B and C conspired by false and fraudulent representations made to S, that the mare was unsound, and that B had sold her for 27*l.*, to induce S to accept 27*l.* instead of the agreed-on price of 39*l.*, and thereby to defraud S of 12*l.*:—Held, that the indictment was good, and that, being supported by proof of the facts alleged, it warranted a conviction. *The Queen v. Carlisle*, 23 Law J. Rep. (N.S.) M.C. 109; 1 Dears. C.C.R. 337.

(B) INDICTMENT.

The 3 & 4 Will. 4. c. 53. s. 120. enacts, that all suits, indictments or informations exhibited for any offence against that or any other act relating to the Customs in any of his Majesty's Courts of Record at Westminster, shall be brought within three years after the date of the commission of the offence:—Held, that this was confined to indictments to be brought under sections 75. and 112. in the name of the Attorney General, in one of the courts of record at Westminster, and did not apply to an indictment preferred at the assizes for a conspiracy to defraud the Queen of certain duties, which was an offence at common law. *Regina v. Thompson*, 20 Law J. Rep. (N.S.) M.C. 183; 16 Q.B. Rep. 832.

An indictment charged A, B and C with conspiring together and "with divers other persons, to the jurors unknown." The evidence at the trial applied only to A, B and C. The jury found that A had conspired with either B or C, but that they could not say with which. The Judge directed a verdict of guilty to be entered against A, and of not guilty in favour of B and C:—Held, (*Erle, J. dissentiente*) that on this finding A was entitled to be acquitted, as the words "persons unknown" meant persons other than A, B and C, and that there was no evidence adduced as to any other persons being concerned. *Ibid.*

In an indictment for a conspiracy to violate an act of parliament charging the acts prohibited by the statute as the means by which the conspiracy is to be effected, it is not necessary to allege those acts as specifically as in a conviction under the statute. *Regina v. Rowlands*, 21 Law J. Rep. (N.S.) M.C. 81; 2 Den. C.C.R. 364.

In an indictment for conspiracy to injure a tradesman in his trade, under the 6 Geo. 4. c. 129, it is sufficient to allege that the defendants conspired, &c. by "molesting," "using threats," "intimidating" and "intoxicating" workmen hired by the tradesman in order to force them to depart from their work; and, also, that they conspired, &c. to "molest" and "obstruct" the tradesman and his workmen, with the same object, and in order to force him to make an alteration in the mode of carrying on his trade, the words used being those employed in the statute, and it not being necessary to set out the means of molestation, intimidation, &c. more specifically. *Ibid.*

Counts framed upon the 4 Geo. 4. c. 34. charged that the defendants conspired, &c., by "molesting" and "obstructing" and by "using threats and intimidation," to obstruct such workmen as might be willing to be hired by the tradesman to prevent them from hiring themselves to him:—Held, sufficient. *Ibid.*

Other counts charged the defendants with conspiring to intimidate, prejudice, and oppress A B in his trade, and to prevent his workmen from continuing to work for him; and with conspiring by divers subtle means and devices and wicked acts and practices to injure and oppress A B in his trade, and to induce his workmen to leave their hiring before the period of their agreement was completed; and with conspiring to intimidate, prejudice, and oppress A B in his trade, and to entice and seduce away his workmen from their employment, and thereby to injure and oppress the said A B in his trade:—*Quere*—whether they were not too vague. *Ibid.*

CONSUL.

[Power to administer oaths and do notarial acts, see 18 & 19 Vict. c. 42.]

CONTRACT.

[See ACTION—COMPANY—DAMAGES—EVIDENCE—HIGHWAY—INDEMNITY—LANDLORD AND TENANT—PARTNERS—PRINCIPAL AND AGENT—SALE—SPECIFIC PERFORMANCE.]

- (A) WHAT AMOUNTS TO A CONTRACT.
- (B) WHEN VALID OR ILLEGAL.
 - (a) *In general.*
 - (b) *As being contrary to Statute or Public Policy.*
 - (c) *In Restraint of Trade or Residence.*
- (C) CONSTRUCTION OF CONTRACTS.
 - (a) *In general.*
 - (b) *Joint or several.*
 - (c) *As to the Description of Article contracted for.*
 - (d) *As to particular Words.*
 - (1) "Say not less than."
 - (2) "About."
 - (e) *When Performance dependent on certain Events.*
 - (f) *Breach before Performance.*
 - (g) *Condition precedent.*
 - (h) *To procure Employment.*
 - (i) *To execute Railway Works.*
- (D) RESCISSION AND ABANDONMENT.

(A) WHAT AMOUNTS TO A CONTRACT.

The declaration stated that one J A was indebted to the plaintiffs, and that the defendant's agent, by a written instrument, addressed and promised the plaintiffs as follows:—"Mr. A (the defendant) offers to pay a composition of 7*s.* in the pound on your account against his nephew, J A, on your giving proper indemnification to both. In the event of your accepting the offer, I will thank you to forward me full particulars of your account, in order that the same may be properly examined;" that the plaintiffs accepted the offer of the defendant, and forwarded the full particulars of their account to the agent; and although the plaintiffs had always been ready and willing, and offered to give a proper indemnification to J A and the defendant, yet the defendant

did not pay the composition:—Held, on demurrer, that this was merely an incomplete agreement, and that the defendant was entitled to judgment. *Cope v. Albinson*, 22 Law J. Rep. (N.S.) Exch. 37; 8 Exch. Rep. 185.

Certain guardians of the poor issued an advertisement, stating that they would receive tenders for the supply of the workhouse with meat for three months from 30 to 50 stone (setting out the description of meat); that sealed tenders were to be forwarded to the clerk, and that all contractors would have to sign a written contract after acceptance of tender. The defendant wrote to the plaintiffs as follows: "I propose to supply your house with meat according to advertisement for the ensuing three months at 6d. per pound." The defendant's proposal was accepted, and he was informed that he was appointed butcher, upon which he immediately declined the appointment:—Held, that the transaction amounted merely to a proposal for a contract, and that there was no binding contract until a written agreement had been signed. *Governor, Guardians, &c., of the Poor of Kingston-upon-Hull v. Petch*, 24 Law J. Rep. (N.S.) Exch. 23; 10 Exch. Rep. 611.

A wrote to B on the 15th of July proposing a partnership, saying, "As to the time, I certainly should wish it by the end of August." To this B answered on the 16th, "I am ready to accede to your proposal. With regard to time, if you could possibly defer my coming until the second week in September, it would suit much better." On the 19th A again wrote, "The time is very important, and ought not to be later than August:—Held, that those letters did not constitute an absolute agreement; and the Judge of the county court having left it to the jury to determine whether B's letter of the 16th of July was a positive acceptance of A's proposal of the 15th,—Held, a misdirection. *Cheveley v. Fuller*, 13 Com. B. Rep. 122.

A local act of 6 Geo. 4. c. clxxix. for the management of the poor of Brighton, by s. 204, empowered the directors and guardians, when and as they should find it necessary, to alter, enlarge, extend, and repair the existing poor-house, or to erect other houses or buildings for the better receiving, employing, and maintaining the poor: and s. 220 provided that all contracts or agreements made between the directors and guardians and any other person or persons relating to "any act, matter, or thing to be done in pursuance of that act," should be reduced into writing, and signed by the parties thereto. By the Poor Law Act of 7 & 8 Vict. c. 101, the commissioners are for the first time empowered to direct that schools shall be built in parochial districts:—Held, that a contract made by the directors and guardians, by order of the poor-law commissioners, in relation to the erection of an industrial school within the parish, was not a contract for "a thing to be done in pursuance of the local act," and therefore was not required by the 220th section of that act to be in writing. *Armstrong v. Bowdidge*, 16 Com. B. Rep. 358.

R, after some negotiations, contracted with the assignees of Messrs. E, for the purchase of certain claims of the bankrupts against the estate of G F B. He represented that he acted on behalf of himself and M, who was clearly cognizant of the negotiations and contract. Several documents passed between the parties, and finally a draft of a deed was pre-

pared, which recited that the contract was a joint purchase by R and M. This was submitted to M, who approved of it; and at that time he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M objected to the contract, and refused to join in the purchase:—Held, that there was no evidence that M had entered into any agreement, or that R acted as his agent; and that the recital of an agreement in a document intended to be executed, would not bind a party who had done nothing to recognize it, though at one time it was apparent that he was willing to execute it, and the bill was dismissed against M, with costs; but as R admitted the plaintiffs' case, a decree was made against him, without costs. *Foligno v. Martin*, 22 Law J. Rep. (N.S.) Chanc. 502.

(B) WHEN VALID OR ILLEGAL.

[Contracts void for fraud and misrepresentation; see BANKRUPT—BARON AND FEME—FALSE REPRESENTATION. And see INSOLVENT—SHIP AND SHIPFING—WEIGHTS AND MEASURES.]

(a) In general.

An agreement was made, in the following form, between the plaintiff Mary, when unmarried, and the defendant, being the parents of the child mentioned therein:—"Agreement made this 14th day of March 1846, between J L (the defendant), of, &c., and M S (the plaintiff Mary), single woman, of, &c., respecting the maintenance of a certain illegitimate female child. The said J L agrees to pay the sum of 45*l.* to the said child, as follows: 12*l.* to be paid down, and the remaining 33*l.* in four equal payments, in four years. The first of such payments, 8*l.* 5*s.*, to be made on the 30th of December 1846, and every succeeding 30th of December, till the period of four years do expire. But if the said child should die before the said four years do expire as aforesaid, the payment to cease on such decease." Signed by both parties. The 12*l.* was paid down, and the agreement was placed in the possession of one of the attesting witnesses. On the 26th of November in the same year, M S, hearing that the defendant had obtained possession of the agreement, and believing that she had thereby lost her remedy upon it, went before a magistrate for a summons against the defendant, and on the 31st of December an affiliation order was made, and 2*s.* 6*d.* a week ordered to be paid by the defendant, which was regularly done. On the 26th of March 1848 M S intermarried with the plaintiff W C, and an action of *indebitatus assumpsit* was subsequently brought. The first count was for necessities supplied to the child by M S before her marriage, alleging a promise to her. The second count was for necessities supplied by the plaintiffs, and on an account stated between them and the defendant. Plea, non assumpsit. At the trial, the jury found as a fact that M S did not intend to abandon the agreement when she went before the magistrate. A verdict was returned for the plaintiffs, with 8*l.* 10*s.* damages on the first count, and 16*l.* 10*s.* on the second:—Held, that either the agreement merely imported that M S was to support the child, in which case there was no consideration for the defendant's promise, as M S being the child's mother was bound by law to support it, or else the agree-

ment also imported that M S would abstain from obtaining an affiliation order, in which case the consideration had failed. *Crowhurst v. Laverack*, 22 Law J. Rep. (N.S.) Exch. 57; 8 Exch. Rep. 208.

To a declaration in covenant the defendant pleaded that, before the making of the covenant, it was unlawfully agreed between the plaintiff and the defendant that the defendant should sell and the plaintiff purchase certain lands for a certain sum of money, to the intent and in order and for the purpose, as the plaintiff at the time of making the agreement well knew, that the lands should be sold by lottery contrary to the statute; that afterwards, in pursuance of the said illegal agreement, the said lands were conveyed to the defendant, and a part of the purchase-money for the same being unpaid, the defendant to secure the payment thereof made the covenant declared on. A verdict being found for the defendant on the issue on this plea, the plaintiff obtained judgment *non obstante veredicto*:—Held, in error, reversing the judgment below (22 Law J. Rep. (N.S.) Q.B. 270; 2 E. & B. 118), that the plea was good, that after verdict it ought to be taken to mean that the covenant was given in pursuance of the illegal agreement, and, even if not so understood, that the covenant could not be enforced, since it was given as a security for the payment of money due under an illegal contract. *Bridges v. Fisher*, 23 Law J. Rep. (N.S.) Q.B. 276; 3 E. & B. 642.

(b) *As being contrary to Statute or Public Policy.*

[See COMPANY—COVENANT.]

An agreement, for a pecuniary consideration, for the resignation of a commission in the East India Company's service, is the sale of an office within the statute 49 Geo. 3. c. 126, and is therefore illegal and void. *Graeme v. Wroughton*, 24 Law J. Rep. (N.S.) Exch. 265; 10 Exch. Rep. 146.

To an action on a bond conditioned for the payment of 4,000 rupees, the defendant pleaded that he was a lieutenant and the plaintiff was a captain in the 5th Native Cavalry (Madras), and that G was a major in the same regiment, and all were British subjects, and that it was corruptly agreed by and between the plaintiff and the defendant, and the said G and divers other officers of the said regiment subordinate to the said G, that the plaintiff and defendant and the said other officers should subscribe and pay to, and that G should accept a sum of money to induce him to, and on condition that he should give up and relinquish his said office and employment and retire from the said regiment and create a vacancy of major therein, and so occasion a step for promotion in the regiment. The plea then alleged the subscription and payment by the other officers and by the plaintiff for himself and on behalf of the defendant, and by way of loan from the plaintiff to the defendant to G of the said sum, and his resignation and consequent creation of a vacancy, which was filled up by the plaintiff, and that the bond was given as a security for the repayment of the said loan and contribution made by the plaintiff on the defendant's account, the plaintiff having notice of and being privy to the premises:—Held, that the plea constituted a good answer to the action. *Ibid.*

Semble—that the contract was also illegal under the 24 Geo. 3. c. 25. *Ibid.*

The question whether a contract is void as contrary to public policy is for the Court, when the circumstances raising the question are conceded; and, *semble*, that the plaintiff in his declaration, or the defendant in his plea, may introduce averments of circumstances for the purpose of maintaining either side of that proposition. *Tallis v. Tallis*, 22 Law J. Rep. (N.S.) Q.B. 185; 1 E. & B. 391.

(c) *In Restraint of Trade and Residence.*

[See COVENANT.]

An agreement between the plaintiffs and the defendant for the purchase, by the plaintiffs, of the defendant's shop, premises, and stock of wines, and his good-will of the business of a wine and spirit merchant, then carried on at Carnarvon, stipulated that the defendant, in consideration of the premises and of the payments aforesaid, did thereby promise and agree with and to the plaintiffs, that he would not, at any time or times thereafter, by himself, his partner, or agent, or otherwise howsoever, either directly or indirectly, set up, embark in, or carry on the business or trade of a wine and spirit merchant at Carnarvon aforesaid, or at any other town or place within the three counties of Carnarvon, Anglesey, and Merioneth. After the making of the agreement the defendant set up in business as a wine and spirit merchant at Chester, and supplied wine and spirits to persons resident in Carnarvon and other places within Carnarvon, Anglesey, and Merioneth, upon orders solicited within the said town and places personally and by agents, but he had no place of residence or of business within the said town or places:—Held, that it was not necessary to the carrying on of business within the meaning of the agreement that the defendant should have some place of business within Carnarvon or the other prohibited places, and that the defendant had been guilty of a breach of the agreement. *Turner v. Evans*, 22 Law J. Rep. (N.S.) Q.B. 412; 2 E. & B. 512.

The defendant agreed to serve the plaintiff, a solicitor and estate agent, as his clerk at T, the plaintiff being at liberty to determine the agreement by a month's notice, and in case of such determination the defendant agreed that he would not, unless with the consent of the plaintiff, for the space of twenty-one years from the expiration of such notice, and notwithstanding the decease of the plaintiff, reside in the parish of T, or within twenty-one miles thereof, or transact or carry on therein or within the distance aforesaid, any business of the nature or description of the business that might be carried on under the agreement, under a penalty of 2,000*l.* To a declaration on this agreement, alleging by way of breach, that after notice the defendant resided in the parish of T, and also within twenty-one miles thereof, and had transacted and carried on in the said parish of T, and also within the distance of twenty-one miles thereof, business of the nature and description of the business to be carried on under the said agreement, the defendant, treating the declaration as containing two breaches, pleaded to the first breach, that although he had since the expiration of the said notice resided in the said parish of T, and within twenty-one miles thereof, yet he had not so resided as aforesaid for the purpose or with the intention of carrying on business of the nature or

description to be carried on under the said agreement:—Held, that the plea was bad. *Dendy v. Henderson*, 24 Law J. Rep. (N.S.) Exch. 324; 11 Exch. Rep. 194.

Quære—whether, if the true construction of the agreement were to restrain the defendant from residing at T, independently of carrying on the business, it would be void as being contrary to public policy. *Ibid*.

A and B were respectively carrying on the business of a general merchant in a country town. A entered into an agreement with B for the purchase of his business, and one of the terms was, that B should enter into a bond conditioned to pay 2,000*l*. if he, B, should, after a certain date, be “concerned in any trading establishment” within a particular district. Upon a suit by A for specific performance of this agreement, it was held, that the restraint upon B’s trading was not too general, as in construing such a condition a Court of law would take into consideration the circumstances at the time of the execution of the bond, and the nature of the business the goodwill of which was sold. *Avery v. Langford*, 23 Law J. Rep. (N.S.) Chanc. 837; Kay, 663.

(C) CONSTRUCTION OF CONTRACTS.

(a) *In general.*

[See *SALE*.]

[*Letts v. the London and Blackwall Rail. Co.*, 6 Law J. Dig. 179: reversed, 3 H.L. Cas. 470.]

As a general rule, the *lex loci contractus* governs the construction of contracts. *Gibbs v. Premont*, 22 Law J. Rep. (N.S.) Exch. 302; 9 Exch. Rep. 25.

P C while in India made his will, leaving his daughter, who was born there, a lac of rupees. Upon the completion of her education, P C, who had returned to England, sent her back to India, and on that occasion he wrote to a particular friend, to whose guardianship and charge he confided her, “In regard to her settlement in life I shall be naturally anxious.” “You may assure the young gentleman that she may choose that, on his marriage with her, he shall have 2,000*l*. sterling; nor will that be all; she is and shall be noticed in my will, but to what further amount I cannot say, owing to the present reduced, and reducing, state of interest, which puts it out of my power to determine at present what I may have to dispose of.” H M, having made proposals of marriage, was informed of the letter written by P C, and also of the will he had made, and after some negotiations the marriage was solemnized in 1826, and in 1829 H M and his wife returned to England. In the same year P C, who was a domiciled Scotchman, executed, in Edinburgh, another will, by which he gave all his real and personal property for the benefit of his wife and his two sons by her, and, in case of their dying without issue, he gave the whole to the issue of his daughter. P C died in 1831, without having made any provision for his daughter, leaving the will made by him in India in the state it was when he executed it; and upon a bill filed by his daughter, insisting that the testator had contracted to settle a lac of rupees upon her, and that the contract was contained in the letter written by him,—Held, that, in construing contracts, the

Court must ascertain the real meaning of the words used; that when no definite or specific sum was mentioned or referred to, the Court cannot enforce any contract; that the testator had not afforded means of reference to any other document; that except from the answer of H M there was no evidence that he married on the faith and belief that a lac of rupees would be settled; and that it was not evidence to be acted upon in favour of the plaintiff against the estate of the testator, as previous to marriage it had been pointed out to H M that the letter did not state any precise sum; and that the testator had left himself unfettered by any contract: and the bill was dismissed, but without costs. *Moorhouse v. Colwin*, 21 Law J. Rep. (N.S.) Chanc. 177, 782; 15 Beav. 341.

In March 1853, H, by parol, sold goods to the defendant, at an agreed price, and the defendant then took possession. In the following May, by articles of agreement, it was agreed between them as follows: “that H shall sell, and the defendant shall purchase (the same goods), and that the price to be paid for the same shall be the fair amount of the value thereof, such amount to be settled, in case the parties shall differ as to the same, by arbitration in manner hereinafter mentioned, and that the defendant shall pay to H the amount of such price within two calendar months after such price shall have been fixed as aforesaid.” The defendant continued in possession of the goods, and never objected to the price originally fixed. H having become bankrupt in August, his assignees, in November, sued the defendant for the amount, as for goods sold and delivered:—Held, that in the absence of evidence that the parties had differed since March as to the amount then fixed, it was not shewn that the event upon which the arbitration clause was to apply had ever arisen, and that the fair value mentioned in the agreement must be taken to be the value previously ascertained and agreed to. *Cannan v. Fowler*, 23 Law J. Rep. (N.S.) C.P. 48; 14 Com. B. Rep. 181.

It was agreed between M, the lessee of certain premises, and the plaintiff, that M should grant him a lease, which was to contain the usual covenants, and particularly those contained in the lease under which M held the premises, *so that the same* in no way restricted the trade of a retailer of beer. The original lease did contain a restriction against the use of the premises by a retailer of beer:—Held, that whether the words “*so that the same*” referred to the original or the proposed lease, the meaning was that M should grant a lease without the covenant in restraint of trade, and was not a warranty that the original lease contained no such covenant. *Hayward v. Parkes*, 24 Law J. Rep. (N.S.) C.P. 217; 16 Com. B. Rep. 297.

The agreement was made and the plaintiff entered in March 1853, and in August his attorney sent a draft lease containing a covenant in restraint of selling beer. M died in September, and the plaintiff’s attorney returned the draft in November, objecting to the covenant. A correspondence subsequently took place, and early in March 1854 the defendants, as M’s executors, offered a lease pursuant to the agreement, but it was not accepted:—Held, that a reasonable time had not elapsed before the testator’s death for him to grant the lease, nor after it for the executors to do so. *Ibid*.

By memorandum of agreement between the defendants (brewers) and one C (a publican), the defendants agreed to lend C 150*l.* on his promissory note, payable on demand, with interest, C depositing a lease of certain premises as security for the repayment of the 150*l.* and interest, and the defendants agreeing not to call for repayment for two years, on condition that the interest, the rent of the premises, and C's account with the defendants for beer were duly paid; and in case of non-performance of any of the conditions, the defendants were to be at liberty to enforce payment of the note, and if not paid, with costs and interest, they might then sell the lease and deduct from the proceeds the 150*l.* and interest, as also any money due to them from C for beer:—Held, that on tender by C or (he having become insolvent) by his assignee, of the amount of the note and interest, the latter became entitled to the possession of the lease; and that the agreement gave the defendants no right to detain the lease on account of any money due to them from C for beer, the lease being deposited only as security for the 150*l.* and interest. *Chilton v. Carrington*, 24 Law J. Rep. (N.S.) C.P. 10; 16 Com. B. Rep. 206.

(b) *Joint or several.*

The plaintiff, acting on behalf of the members of an orchestra, to which he himself belonged, signed a proposal, "on behalf of the members of the orchestra," to continue their services, provided the defendant would guarantee certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action, for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as the rest:—Held, that the contract was joint, and that he could not recover. *Lucas v. Beale*, 20 Law J. Rep. (N.S.) C.P. 134; 10 Com. B. Rep. 739.

(c) *As to the Description of Article contracted for.*

The plaintiff having agreed to sell to the defendant a quantity of oil, described as foreign refined rape oil, but warranted only equal to samples, and having delivered oil which was not foreign refined oil, but which corresponded with the samples,—Held, that the defendant was not bound to accept the same, as he was entitled to the delivery of oil answering the description of foreign refined rape oil, and that the statement in the contract as to samples related only to the quality of the oil. *Nichol v. Godts*, 23 Law J. Rep. (N.S.) Exch. 314; 10 Exch. Rep. 191.

(d) *As to particular Words.*

(1) *"Say not less than."*

An agreement, dated the 12th of December, between the plaintiff and the defendant, who carried on the business of a puller of wool, stipulated that the defendant should sell to the plaintiff what he might pull up to the 6th of January, "say not less than 100 packs of wool:"—Held, (*dissentiente Coleridge, J.*) that in the absence of an averment that the word "say" had any particular meaning, the agreement imported that the defendant should pull and supply to the plaintiff 100 packs as a minimum during the specified period, and that the plaintiff should take any further quantity which should be pulled by the defen-

dant during the period. *Leeming v. Snaith*, 20 Law J. Rep. (N.S.) Q.B. 164; 16 Q.B. Rep. 275.

(2) *"About."*

A contract for the sale of nitrate of soda was in these terms:—"Sold, for, &c., about 500 tons of nitrate of soda, &c., to be ready for delivery on, &c.," and it then proceeded to state—"It is understood that the above nitrate of soda is to form the full and complete cargo of the J P, 345 tons register, now on her passage, &c., to proceed to, &c., and there load. In the event of the J P being unable to prosecute her voyage, then the sellers to deliver another cargo of about equal quantity," &c. The only ground on which the seller was to be excused was the loss of the J P, or other vessel substituted for her, on the homeward voyage. The J P could not carry 500 tons:—Held, that the contract was for about 500 tons at all events, and not for a less amount, being the whole that the J P could carry. *Bourne v. Seymour*, 24 Law J. Rep. (N.S.) C.P. 202; 16 Com. B. Rep. 337.

Quere—whether, under the above contract, the buyer would have been entitled to more than 500 tons if the J P could have carried more. *Ibid.*

On the argument of demurrers, where the defendant demurred to the second count of the declaration, and the plaintiff demurred to a plea to the first count,—Held, that the plaintiff had the right to begin. *Ibid.*

(e) *When Performance dependent on certain Events.*

The declaration stated that L, being possessed of land, agreed with M, an architect, that he should lay out the land for building purposes, and make surveys, &c.; that he should make no charge for the above services, but in the event of the land being disposed of for building purposes, M should be appointed architect on L's behalf; and the parties building should pay him a per-centage on the outlay, provided they did not employ him as their own architect; but in the event of L, or his executors, wishing to dispense with M's services, that he or they should remunerate him for his services in making the preparations. L made the surveys, &c.; the land was not disposed of for building purposes, and L's executors dispensed with M's services, and put it out of their power to dispose of the land for building purposes, and thereupon L claimed remuneration for the preparations:—Held, that he was not entitled to recover, the disposing of the land for building purposes being the event in which he was to have any remuneration; that even if the declaration could be taken as charging the executors with wrongfully putting it out of their power to dispose of the land for building purposes, no contract could be implied from the agreement that L or they should not dispose of the land otherwise than for building, in which case M was not entitled to anything. *Moffatt v. Laurie*, 24 Law J. Rep. (N.S.) C.P. 56; 15 Com. B. Rep. 583.

(f) *Breach before Performance.*

Declaration, that in consideration that the plaintiff would agree to enter the service of the defendant as a courier, on the 1st of June 1852, and to serve the defendant in that capacity, and travel with him as a courier, for three months certain, from the said 1st of June, for certain monthly wages, the defendant agreed to employ the plaintiff as courier on and from the said 1st of June for three months certain, to travel

with him on the Continent, and to start with the plaintiff on such travels on the said day, and to pay the plaintiff during such employment the said monthly wages. Averment of an agreement to the said terms on the part of the plaintiff, and of his readiness and willingness to enter upon the said employment and to perform the said agreement. Breach, that the defendant, before the said 1st of June, wholly refused to employ the plaintiff in the capacity and for the purpose aforesaid, on or from the said 1st of June or any other time, and wholly discharged the plaintiff from his said agreement and from the performance of the same, and from being ready and willing to perform the same; and the defendant wholly broke and put an end to his promise and engagement:—Held, in arrest of judgment, that, after the refusal by the defendant to employ, the plaintiff was entitled to bring an action immediately, and was not bound to wait until after the day agreed upon for the commencement of performance had arrived. *Hochster v. De Latour*, 22 Law J. Rep. (N.S.) Q.B. 455; 2 E. & B. 678.

In assessing damages in such a case the jury are justified in looking at all that had happened or was likely to happen down to the day of trial, to increase or mitigate the plaintiff's loss. *Ibid*.

(g) *Condition precedent.*

[See *Mason v. Harvey*, title INSURANCE.]

A building contract between A and B contained a proviso that the payments thereby agreed to be made by B should only be due provided the certificate of the surveyor of B for the time being should first be obtained. A having sued in *indebitatus assumpsit* for the balance alleged to be due,—Held, that under the general issue, the absence of the certificate was a good answer to the action, and that the plaintiff was not at liberty to shew that it was withheld fraudulently and in collusion with the defendant. *Milner v. Field*, 20 Law J. Rep. (N.S.) Exch. 68; 5 Exch. Rep. 829.

(h) *To procure Employment.*

Declaration upon an agreement, which stipulated, amongst other things, that it had been mutually agreed between the plaintiff and the defendant; and, first, the plaintiff agreed that he would serve the defendant as a manufacturer and assistant for the term of seven years, at a salary of 100*l.* per annum, &c.; secondly, the defendant agreed to pay the said yearly salary, and if he should, from any cause, give up his business as a manufacturer, or not require the plaintiff's services, then that he would use his best endeavours to procure for the plaintiff employment in some similar business, and for which he would receive a salary of not less than 100*l.* per annum, or in case he should be unable to do so, the defendant would pay the yearly salary of 100*l.* during the residue of the term of seven years. Averment of performance on the part of the plaintiff. Breach, that the defendant did not continue the plaintiff in his employ until the expiration of the seven years, but refused to do so, and wrongfully discharged the plaintiff therefrom, without reasonable or probable cause. And, further, that although the defendant had not continued the plaintiff in his employ, but had discharged him as aforesaid, yet the defendant did not use his best or any endeavours to procure, nor did he procure the

plaintiff employment in some similar business, for which he should receive a salary of 100*l.* a year, but had wholly failed to find the plaintiff such employment. Plea, that at the time when the plaintiff was discharged, the defendant was, and thence hitherto had been, wholly unable to procure for the plaintiff any such employment as in the agreement mentioned:—Held, upon demurrer, that the agreement did not leave it open to the defendant to pay the plaintiff after his discharge 100*l.* a year without first using any endeavours to obtain a situation for the plaintiff; but that the undertaking by the defendant to use his best endeavours to procure employment for the plaintiff in some similar business was a primary part of the agreement, which the defendant was bound to fulfil, and therefore that the second part of the breach was good. *Rust v. Notridge*, 22 Law J. Rep. (N.S.) Q.B. 73; 1 E. & B. 99.

Held, also, that it was not necessary to aver a request by the plaintiff that the defendant would use his best endeavours. That the allegation of performance was sufficient, without any averment of readiness and willingness. And that the mode in which the breach was alleged rendered it unnecessary to aver that a reasonable time had elapsed. *Ibid*.

Held, further, that the plea raised an immaterial issue; and was bad on general demurrer. *Ibid*.

(i) *To execute Railway Works.*

[See COMPANY.]

A railway company agreed with contractors that the latter should work the line, keep the engines and rolling plant in repair, and do certain other acts for seven years, at stipulated amounts of remuneration; if the contractors did not repair, within forty-eight hours after notice, the company might by another notice determine the contract, and resume possession of the plant, sheds, buildings, &c.; and it was agreed that the contractors should make good all damages done by collisions, &c., but they were not to be answerable for loss in respect of death of, or injury to, passengers, &c. by accident, unless arising from their neglect, and then only for 100*l.* in respect of all deaths, injuries, &c. caused by each accident. The company gave a notice to repair, and the repairs could not be completed within the forty-eight hours. The contractors filed a bill, praying a declaration that the true construction of the agreement was that only such repairs were to be done within forty-eight hours as could reasonably be completed in that time, and for an injunction against giving the second notice to determine the contract. One of the Vice Chancellors refused a motion for the injunction, and the contractors appealed:—Held, that, although not in form, the suit was in effect for specific performance, and must be so treated; and, assuming the plaintiffs' case to be true, as it did not fall within any of the classes in which the interference of the Court had been accustomed to be exercised, there being no mutuality, for if the contractors failed to perform their duty the Court could not compel them, and as for any breach of the contract by the company the contractors had a right to sue at law, if the agreement were legal, the motion must be refused. *Johnson v. the Shrewsbury and Birmingham Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 291; 3 De Gex, M. & G. 914.

Semble—that as by the working of a line by other parties than a company itself, the public loses the benefit of the guarantee thereby afforded for care and attention, such an agreement is illegal, as contrary to public policy. *Ibid*.

A contract between a railway company and a building contractor stipulated that payments should be made from time to time, during the progress of the works, be made by the company to the contractor, such payments to be made on certificates granted by the "principal engineer of the company, or his assistant resident engineer." In case of dispute between the contractor and the assistant resident engineer the decision of "the principal engineer of the company" was to be final; but at the completion of the works, if the contractor and the principal engineer differed, the differences between them were to be settled by arbitration. After differences had so arisen between the contractor and the company, it was discovered by the former that the principal engineer was a shareholder in the company. On a bill to have accounts taken, one of the grounds for which was this fact, then first discovered,—Held, that (no fraudulent concealment being alleged) it formed no ground for relief; for that, by the contract, the contractor had bound himself to submit to the judgment of a particular individual, whose position as principal engineer made him interested for the company. The case of *Dimes v. the Grand Junction Canal Co.* (3 H.L. Cas. 759) held not to apply. *Ranger v. the Great Western Rail. Co.*, 5 H.L. Cas. 72.

A contractor undertook to do certain works within a given term, or to pay certain fixed sums; whether these were penalties or unliquidated damages was not necessarily the subject of a bill in equity, but might properly have been decided in an action at law. The fact that a bond with a penalty had been given to secure the payment of them was itself strong evidence to shew that they were liquidated damages. *Ibid*.

A contractor agreed with an incorporated company to do certain works, the contract being under seal. In this contract there was a stipulation, that if the company should think proper at any time to make any addition to the original works, the company should be at liberty to do so on giving him written instructions for that purpose, signed by the principal or assistant engineer. A verbal arrangement was afterwards made by the principal engineer for the execution of certain extension works, allowing for a variance in the prices, but stipulating that with the exception of that variance, all the provisions of that contract should be considered as applicable to the extension work. This work was executed by the contractor under this arrangement:—Held, that he could not afterwards reject the terms of the contract, and claim remuneration for the work as upon a *quantum meruit*, nor could he ask in equity for accounts to be taken independently of the contract. *Ibid*.

In a contract with a railway company for the execution of certain works, there was a clause empowering the company, after notice, to take possession of the plant and to finish the work; the company acted on this clause:—Held, that this did not furnish ground for a bill in equity as putting an end to the contract, though it might be the subject of an action for damages. *Ibid*.

(D) RESCISSION AND ABANDONMENT.

The declaration stated that the plaintiff bought of the defendant divers lots of timber trees, to be felled and removed under certain conditions; and that the defendant would not permit the plaintiff to fell or remove a certain remainder of the lots pursuant to the sale and conditions. The defendant pleaded, first, that before the breach, the plaintiff felled and carried away and converted divers other trees of the defendant in substitution of the remainder mentioned in the declaration; secondly, that before breach the plaintiff fraudulently felled and removed other trees of the defendant not comprised in the lots sold, and to which the plaintiff had no right, and which exceeded in number and value the remainder mentioned in the declaration; that the plaintiff fraudulently pretended that the trees which he so took were the trees which he had purchased; that they were taken in fraudulent substitution of those named in the declaration, and that the plaintiff converted them to his own use:—Held, that these pleas were bad; that they shewed no rescission of the contract stated in the declaration, and that the plaintiff was not estopped by his own fraud and trespass from bringing his action on the contract. *Lewis v. Clifton*, 23 Law J. Rep. (N.S.) C.P. 68; 14 Com. B. Rep. 245.

B agreed to sell her estate and raise 1,000*l.* for A's use, and pay off two mortgages on his estate; in consideration of which, A agreed to pay B interest for life, and to settle his own estate on his wife (B's daughter) and their children. The 1,000*l.* was raised on a mortgage of B's estate, and the joint and several covenant of A and B. Seventeen years elapsed without any further steps being taken to carry the agreement into effect, and A died:—Held, that the agreement must be considered abandoned, and that it could not be enforced. *Cubitt v. Blake*, 19 Beav. 454.

CONTRACTOR.

[See MASTER AND SERVANT.]

CONTRIBUTORY.

[See COMPANY.]

CONVENTIONS BETWEEN NATIONS.

[See *Marshal v. Nichols*, title ACTION, (A) (h).]

A, a British subject, claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French Revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. An act of parliament was passed declaring how claims were to be preferred and liquidated. A presented his claim to commissioners appointed under the act, and adopted the modes of proceeding provided by it; his claim was rejected. After payment of the claims which

were established to the satisfaction of the Commissioners, a surplus remained, which, in accordance with one of the provisions of the act, was paid over to the Lords of the Treasury. A proceeded to make his claim afresh under a petition of right:—Held, that he had no remedy except under the provisions of the statute. *The Baron De Bode v. Regina*, 3 H.L. Cas. 449.

CONVERSION.

[See TROVER.]

- (A) WHAT AMOUNTS TO A CONVERSION.
- (B) EXTENT OF ITS OPERATION.
- (C) MONEY TREATED AS REAL ESTATE.
 - (a) Consols.
 - (b) Trust Monies.
- (D) ELECTION, WHAT AMOUNTS TO.

(A) WHAT AMOUNTS TO A CONVERSION.

Real estate, settled on marriage upon trusts for sale, on request of the husband and wife, or the survivor, was taken by the corporation of London under compulsory powers in the London Bridge Acts, without any conveyance by the trustees, and the value assessed by a jury paid into court, and, on petition of the trustees, invested in consols, upon the trusts of the settlement:—Held, not to amount to a conversion of the real estate into personality. *In re Taylor's Settlement*, 22 Law J. Rep. (N.S.) Chanc. 142; 9 Hare, 596.

A B, having certain property within the limits of deviation allowed to a railway company for the construction of their line, entered into an agreement with the company, that in case they should construct their intended railway under the authority of the act and within the limits of deviation, they should pay to A B for such of his lands as they should require, at the rate of 500*l.* per acre. After the death of A B, the company took five acres of the land in question:—Held, that the contract did not operate as a conversion of the purchase-money into personal estate. *In re Walker's Estate*, 22 Law J. Rep. (N.S.) Chanc. 888; 1 Drew. 508.

After the testator, who was a shopkeeper, had made a will bequeathing his leasehold house and shop and the stock in trade therein to his wife (subject to certain trusts which failed), and giving his residuary estate in another manner, he became insane. No commission of lunacy was taken out, but his wife not being disposed or competent to carry on the trade joined with the persons whom he had named executors, and also with the residuary legatees in an agreement for the sale of the leasehold premises and stock in trade therein for a gross sum to be paid by instalments. After this agreement was made and possession of the property delivered to the purchaser the testator died. The Court in an administration suit approved of the agreement as beneficial to the estate, and directed it to be carried into effect:—Held, that, notwithstanding the agreement for sale and the transfer of the possession of the property specifically bequeathed, none of the parties having any lawful authority to effect such a sale, both the leasehold estate and the stock in trade must be taken as un-

converted at the death of the testator, and passed to the specific legatee. *Taylor v. Taylor*, 10 Hare, 475.

(B) EXTENT OF ITS OPERATION.

Where a testator directs his real estate to be sold, and the proceeds to go as his personal estate, the conversion will be absolute for all the purposes of the will, but the direction will not operate so as to change the character of any share of the proceeds undisposed of by the will. *Phillips v. Phillips*, 1 Myl. & K. 649; s. c. 1 Law J. Rep. (N.S.) Chanc. 214, overruled. *Taylor v. Taylor*, 22 Law J. Rep. (N.S.) Chanc. 742; 3 De Gex, M. & G. 190.

(C) MONEY TREATED AS REAL ESTATE.

(a) Consols.

Lands, settled on A for life, with remainders over, with an ultimate remainder in fee to A, were taken under the authority of an act of parliament which contained the usual disability clauses. The purchase-money was paid into court, and invested in consols, and the dividends were ordered to be paid to A for life. A died intestate. At the time of A's death, the other remainders had failed, and A would have died absolutely entitled to the land in fee, had it not been taken:—Held, that the consols were to be treated as real, and not as personal, estate, of A. *In re Horner's Trusts*, 22 Law J. Rep. (N.S.) Chanc. 369; 5 De Gex & Sm. 483.

Land settled on A for life, with remainder to her children, with remainder to B, in default of children, in fee, was taken under the authority of an act of parliament, which contained the usual disability clauses. The money was paid into court, and invested in consols, and the dividends were ordered to be paid to A for life. In 1844 B died, and in 1849 A died without children. B had done no act in his lifetime shewing any intention to treat the consols as personal estate:—Held, that the consols were to be treated as real, and not personal, estate of B. *In re Stewart's Trusts*, 22 Law J. Rep. (N.S.) Chanc. 369; 1 Sm. & G. 32.

Whether B could, by any act during the life of A, have elected to treat the consols as personal, and not real, estate—*quere*. Ibid.

(b) Trust Monies.

In 1789 certain trustees had in their hands the sum of 1,800*l.* belonging to D, then the wife of C. By a deed dated in 1789, in consideration of this sum of 1,800*l.* paid by the trustees, certain real estate was conveyed to them, upon trust for D, for life, with remainder to her children. There were no words of inheritance used in the gift to the children, and there was no other disposition of the property. In 1801 the real estate was sold, and the purchase-money was invested in consols in the names of the trustees. In 1835 C died. D, by her will, made a general bequest of her personal estate, but there were no words in it affecting real estate. In 1845 D died, leaving E, a grandson, her heir-at-law. There were several children of the marriage, of whom only two survived D:—Held, that the fund in the hands of the trustees was impressed with the character of real estate, and (subject to life interests in a part of it of the two surviving children) belonged to E as the heir-at-law of D. *Gillies v. Longlands*,

20 Law J. Rep. (N.S.) Chanc. 441; 4 De Gex & Sm. 372.

A reversion of real estate, which, subject to an old life estate, was vested in trustees, was sold. The trustees of the settlement had power of sale, with a direction to lay out the produce in land to be settled to the same uses. Upon the sale the trustees, instead of paying the value of the old life estate to the tenant for life, invested the whole in their names, and paid that person the dividends for her life. The old tenant for life, the tenant for life under the settlement, and the party ultimately entitled to the fee simple under that instrument, concurred in the sale and in this dealing with the purchase-money. Upon the death of the old tenant for life, questions were raised as to whether the money representing the sold estate was realty, or whether the acts of the party ultimately entitled to the fee simple did not amount to an election on his part to take the fund as money; and one of the Vice Chancellors decided in favour of the latter view; but, upon appeal,—Held, that the money represented, and must be treated as, real estate. *In re Pedder's Settlement*, 24 Law J. Rep. (N.S.) Chanc. 313; 5 De Gex, M. & G. 890.

(D) ELECTION, WHAT AMOUNTS TO.

Under a marriage settlement the trustees were directed to invest a sum of money in the purchase of real estate to be conveyed to the use of Lord Harcourt for life, with remainder, subject to certain terms of years for raising different sums of money, to the use of the right heirs of Lord Harcourt for ever. The money remained uninvested in lands for upwards of fifty years, and was dealt with by Lord Harcourt in the same manner as the rest of his personal property:—Held, that it was not necessary for a party to express a strict intention to convert, and that the circumstances of this case were sufficiently strong to shew that Lord Harcourt had elected to take this trust money as personal property. *Harcourt v. Seymour*. *Seymour v. Lord Vernon*, 20 Law J. Rep. (N.S.) Chanc. 606; 2 Sim. N.S. 12.

Where real estate is bequeathed in the character of personalty, and is enjoyed unconverted by the legatee, slight circumstances are sufficient to raise a presumption that he has elected to retain it as realty. In the absence of any other circumstances the fact that a person has for a great length of time preserved the property in its actual state will be sufficient to induce the Court to come to this conclusion. A B being entitled to an undivided share in a real estate impressed with the character of personalty, retained possession for between two and three years, and died without having said or done anything to indicate an intention to reconvert:—Held, that at his death it was personalty. *Dixon v. Gayfere*, 17 Beav. 433.

CONVICTION.

[See JUSTICE OF THE PEACE—SESSIONS.]

COPYHOLD.

[As to enfranchising copyhold lands, see stats. 14 & 15 Vict. c. 57; 15 & 16 Vict. c. 51; 16 & 17 Vict. c. 57; and see 16 & 17 Vict. c. 124, continuing the copyhold commissions.]

- (A) CUSTOM.
 - (a) *Free Bench.*
 - (b) *Heriot Custom.*
- (B) SURRENDER AND ADMITTANCE.
 - (a) *Sufficiency and Legality of the Surrender.*
 - (b) *Trustees.*
 - (c) *By Way of Recovery.*
 - (d) *Mandamus to admit.*
 - (e) *Devise by unadmitted Surrenderee.*
- (C) FEES AND FINES.
- (D) FORFEITURE.
- (E) ENFRANCHISEMENT—COSTS OF PETITION FOR INVESTMENT.

(A) CUSTOM.

(a) *Free Bench.*

The custom of the manor of D was, that the wife of a copyholder was entitled to free bench of all the copyhold lands of which the husband was at any time during the marriage seised for an estate of inheritance. A was married in 1843, and purchased a copyhold estate, held of this manor, in February 1851. The terms of the surrender were to such uses as A by surrender or by his will should appoint, and in default of appointment, to A and his heirs; but A was admitted, not according to those terms of the surrender, but simply to hold to him and his heirs. A died in September 1851, having by will devised this estate to trustees on certain trusts:—Held, that A's widow was entitled to free bench out of the copyhold estate. *Powdrell v. Jones*, 24 Law J. Rep. (N.S.) Chanc. 123; 2 Sm. & G. 407.

Copyholds are not affected by the Dower Act (3 & 4 Will. 4. c. 105). *Ibid.*

By the custom of a manor, the widow of a tenant was entitled to free bench in one moiety of the copyhold land of which her husband died seised during the spousals. S B was admitted tenant, and sold and surrendered to G S, who married after the 1st of January 1834, when the act (3 & 4 Will. 4. c. 105.) came into operation. G S died intestate, without having been admitted. The heir of G S was not admitted. The widow claimed free bench, and the Master of the Rolls decided that the heir of G S, until admittance, was a trustee of half the rents for her, for that the seisin of the surrenderee, G S, would take effect from the date of the surrender if the heir were admitted, so as to entitle the widow to free bench; but, upon appeal by the heir of G S,—Held, that the widow had no title to free bench, and that she had no equity to compel the heir of G S to be admitted. *Smith v. Adams*, 24 Law J. Rep. (N.S.) Chanc. 258; 5 De Gex, M. & G. 712; 23 Law J. Rep. (N.S.) Chanc. 525; 18 Beav. 499.

The Dower Act does not extend to free bench. *Ibid.*

(b) *Heriot Custom.*

The plaintiffs, who were lords of a manor, alleged by their bill that thirty-eight estates held by the

defendant within the manor, had been subject, from time immemorial, to the payment of certain sums in lieu of heriots and reliefs; that by reason of the confusion of boundaries, the plaintiffs could not ascertain in respect of what particular estates the payments were respectively due, and were therefore unable to recover the amount by distress. The bill prayed that the plaintiffs might be declared entitled to the several sums claimed, and that the precise boundaries of the estates might be ascertained. The bill alleged the heriots and reliefs to be payable by custom, but there was no allegation of a custom of distress. A demurrer was allowed, without costs, and leave given to amend. *The Mayor, Aldermen, and Burgesses of Basingstoke v. Lord Bolton*, 22 Law J. Rep. (N.S.) Chanc. 305; 1 Drew. 270.

If this had been a bill proving a long usage of rent only, but that by reason of accident or lapse of time the boundaries had become confused, and there was difficulty in the way of obtaining a legal remedy, the Court would have given relief. *Ibid.*

Bill by lord of a manor against the tenant, alleging immemorial payments as rent, or in the nature of rent, on the death of each tenant by his successors in respect of thirty-eight different estates. The payments were in lieu of heriots and reliefs. It appeared by the evidence that the heriots were more properly heriot custom than heriot service, and that the relief was by custom and not by common right or by reservation. Some of them had been paid by the executors of the deceased. It was not shewn that the tenant was in possession of all the lands alleged to be liable, and only the aggregate amount of rent was known, not the proportion due to each estate:—Held, that, under these circumstances, the lord had no equity against the executors of the deceased tenant, although it appeared that, in consequence of the description and identity of the lands being lost, he could not enforce any claim at law. *The Mayor and Corporation of Basingstoke v. Lord Bolton*, 3 Drew. 50.

(B) SURRENDER AND ADMITTANCE.

(a) Sufficiency and Legality of the Surrender.

A surrender by a copyhold tenant to such uses as A B shall appoint, and, in default of and until appointment, to A B, his heirs and assigns for ever, is not such a surrender as, in the absence of any special custom, the lord can be compelled to accept. *Flack v. the Master, Fellows, and Scholars of Downing College*, 22 Law J. Rep. (N.S.) C.P. 229.

Mandamus to receive and enrol a surrender of certain copyholds. It appeared from the writ that a testator, by his will, devised certain copyhold estates to his son G R and others, his executors, upon trust to sell and convey the same by bargain and sale to the purchaser. After the testator's death G R was, according to the custom of the manor, admitted to the said estates, to hold the same for the intents and purposes and subject to the powers declared and contained by and in the will, and on his admittance paid a full fine to the lord of the manor. The executors subsequently, in accordance with the power contained in the will, sold the said estates to G R and executed a conveyance of bargain and sale to him in fee, which was afterwards duly enrolled according to the custom of

the manor. G R was afterwards desirous of surrendering the same out of court according to the custom of the manor, and of having such surrender enrolled, but the steward of the manor refused to receive or to enrol such surrender. Return stating the custom of the manor, from which it appeared that where a will contained a power of sale of copyhold estates it was customary, in order to prevent a seizure into the lord's hands, for the customary heir or some other person to be admitted as tenant to the lord, to hold the said estates for the intents and purposes, and subject to the powers declared and contained in the will, and therefore to pay a full fine; and that, afterwards, upon the execution of the power by bargain and sale, or otherwise, according to the custom and due enrolment of such bargain and sale, or other customary conveyance, the purchaser became fully entitled to be admitted tenant. The return then alleged that G R had not, since the execution of the power in the will, claimed to be admitted tenant, nor paid or offered to pay a fine in respect of the estate conveyed under the said power and the said bargain and sale:—Held, upon demurrer, that as by the custom of the manor there had been only an admittance of G R as donee of the power in the will *quousque*, the effect of such admittance ceased upon the exercise of the power, and that until G R afterwards obtained a fresh admittance, as bargainee under the execution of the power, he could not compel the lord to receive and enrol a surrender by him of the estate. *Regina v. Corbett*, 22 Law J. Rep. (N.S.) Q.B. 335; 1 E. & B. 836.

A surrender of copyhold lands of a married woman (who was examined thereupon as to her consent) was taken out of court by a deputy steward, who was at the time an infant of the age of twenty years and upwards:—Held, affirming the decision of the Court below, that the surrender was not invalid by reason of the infancy of the deputy steward. *Edleston v. Collins*, 22 Law J. Rep. (N.S.) Chanc. 480; 3 De Gex, M. & G. 1; 10 Hare, 99.

(b) Trustees.

A testator devised copyholds to such uses as his two trustees, or the survivor of them, or the executors or administrators of such survivor, within twenty-one years after the death of such survivor should, by deed, appoint; and subject thereto to the use of his two trustees, their heirs and assigns for ever; and he directed them to sell the same, and gave them power to give receipts for the purchase-money:—Held, that a purchaser who had agreed to buy was bound to complete on having a proper deed of appointment from the trustees without the trustees being first admitted. *Glass v. Richardson*, 22 Law J. Rep. (N.S.) Chanc. 105; 2 De Gex, M. & G. 658; 9 Hare, 698.

Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the debts of the testator, and an order was made in the cause, and pursuant to the 1 Will. 4. c. 47, that the guardian of the infant should surrender them to the purchaser:—Held, that the purchaser was entitled to require that an order should be made discharging the contingent rights of the unborn issue of the infant under section 20. of the Trustee Act, 1850. *Wood v. Beetlestone*, 1 Kay & J. 213.

An order under the Trustee Act, 1850, may be made in a cause without petition. *Ibid.*

(c) *By Way of Recovery.*

J and S, two married women, being joint tenants in tail in remainder, after the death of the tenant in free bench, of certain descendible copyhold lands, J. and her husband, in 1831, without the concurrence of the tenant for life, surrendered their estate in the premises to such uses as the husband should appoint by will. J died, leaving her husband and S surviving her. The husband died, having by his will appointed the surrendered share to his executors. Upon bill by S and her husband, claiming the entirety of the premises by right of survivorship:—Held, upon appeal, that by analogy to the rule in the case of freehold estates, the surrender did not operate to bar the remainders for want of the concurrence of the tenant for life. *Edwards v. Champion*, 23 Law J. Rep. (n.s.) Chanc. 123; 3 De Gex, M. & G. 202.

A surrender by one joint tenant to the uses of a will of a third party who survived the joint tenant, will not operate as a severance of the joint tenancy—semble. *Ibid.*

(d) *Mandamus to admit.*

[See post, (C) Fees and Fines.]

The Court will grant a mandamus to compel the lord of a manor to admit a person who claims as heir of a deceased copyholder, if he has made out a *prima facie* case of title by descent according to the custom of the manor; even though the lord suggests that the tenement has escheated to himself for want of an heir. *Regina v. Dendy*, 22 Law J. Rep. (n.s.) Q.B. 39.

Mandamus to the lord and steward of the manor of C, to admit E H P, upon payment of the usual fines and fees, to certain copyhold estates which were alleged in the writ to have descended to the said E H P, as the heiress-at-law of S T, deceased, who was her maternal uncle and the person last seised. The return alleged that the said copyhold estates did not descend to the said E H P, as the heiress of S T, and that the said E H P was a stranger in blood to the said S T, and not entitled to the said estates, whereof the said S T died so seised. Pleas, first, that the said estates did descend to the said E H P, as the heiress-at-law of the said S T; secondly, that the said E H P was not a stranger in blood to the said S T as alleged; thirdly, that E H P was, on the death of S T, entitled to the said estates whereof S T died so seised:—Held, upon demurrer to the second plea, that it was to be considered as a distinct and single plea, and that it traversed an immaterial allegation in the return, and was, therefore, bad. And, *per Erle, J.*, that one plea, traversing the whole of the allegation in the return, would have been good. *Per Crompton, J.*, that the rule of pleading, which admitted of the whole of an allegation being put in issue though too much had been alleged, did not apply. *Regina v. Dendy*, 22 Law J. Rep. (n.s.) Q.B. 247; 1 E. & B. 829.

(e) *Devise by unadmitted Surrenderee.*

The surrenderee of a copyhold, who has not been admitted, cannot by devise give a legal title to his devisee; and the devisee does not gain such title by admittance; and the case is the same whether the surrender was for value or voluntary. *Matthew v.*

Osborne, 22 Law J. Rep. (n.s.) C.P. 241; 13 Com. B. Rep. 919.

(C) FEES AND FINES.

Where a copyhold estate is devised to several as joint tenants, the lord is bound to admit any one of them to the entirety, and cannot refuse to do so on the ground that the amount of fine claimed by him is not paid. *Regina v. the Lord of the Manor of Wanstead*, 23 Law J. Rep. (n.s.) Q.B. 67.

By the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 95, every conveyance to the promoters of an undertaking of copyhold land is to be enrolled on the rolls of the manor, on payment to the steward of such fee as he would have been entitled to on the surrender of the same to a purchaser, and on enrolment the conveyance shall have the same effect as if the lands had been of freehold tenure, but until enfranchisement the same fines, trusts, &c. are to be paid to the lord as before the conveyance. The 96th section provides that the promoters shall procure the lands to be enfranchised on application to the lord, on payment of compensation; and in estimating such compensation, the loss in respect of fines, services, &c., or any other matters which would be lost by the vesting of the lands in the promoters, shall be allowed for:—Held, on the conveyance of a copyhold to a railway company, that the lord is not entitled to a fine on the execution of the conveyance by the copyholder or its enrolment under the 95th section, or as a part of the compensation for loss by the vesting of the land under the 96th section. *The Ecclesiastical Commissioners v. the London and North-Western Rail. Co.*, 23 Law J. Rep. (n.s.) C.P. 177; 14 Com. B. Rep. 743.

Tenant in fee of copyhold hereditaments devised them to E, M, and W on certain trusts. E demanded admittance; the steward refused admittance except on payment of a treble fine. Mandamus granted to admit, the right to the fine accruing only by reason of the admittance. *Regina v. Wellesley*, 2 E. & B. 924.

A, by will, devised a copyhold tenement to B, C, and D, upon certain trusts, and appointed the trustees executors, who all proved the will, and acted thereunder. C and D refused to be admitted tenants of the copyhold, and by a deed made between them and B, reciting that C and D were desirous of releasing their estate and interest in the copyhold to B, to the intent that B alone might be admitted tenant thereof, to hold the same upon the trusts of the will, C and D “granted, released, and confirmed” the said copyhold tenement to B, to the intent that she might be solely seised thereof. B thereupon claimed to be admitted to the entirety of the copyhold, and to pay only a single fine. The lord claimed a treble fine:—Held, that the deed should be construed so as to carry into effect the intention of the parties, as a disclaimer by C and D of their right to be admitted; and that their having acted in the trusts of the will would not prevent its having this operation; and that, consequently, A became the sole tenant of the copyhold, and the lord was entitled only to a single fine. *Wellesley v. Withers*, 21 Law J. Rep. (n.s.) Q.B. 131; 4 E. & B. 750.

(D) FORFEITURE.

An act of parliament incorporated certain persons

as a company for the purpose of making a canal, and gave them powers to purchase and hold lands for the purposes of the act; it authorized persons to "contract for, sell and convey their lands," gave a form of conveyance "of all the estate, right, title and interest" of the person conveying, and enacted that all such contracts, agreements, sales, conveyances and assurances should be valid to all intents, &c. S was a tenant of copyhold land, a portion of which was wanted for the purposes of the canal; he sold it to the company, and executed a conveyance according to the form given by the act. The land was then applied to the purposes of the canal. On the death of S the lord made a proclamation for the heir of S to come in and be admitted as a tenant on the rolls of the manor. No one appeared to claim admittance, and the lord seized the land *quousque*. He afterwards brought ejectment against the canal proprietors, and obtained judgment against them on the ground that the conveyance under the Canal Act had only vested in them an equitable estate in the copyhold land. He then interfered to stop the course of the navigation. The canal proprietors filed a bill against him, praying that the customary heir of S, or such other person as the plaintiffs might appoint, might be admitted to the copyhold premises, the plaintiffs undertaking to pay the fine and fees upon such admission; and further, praying for a perpetual injunction and general relief. The Vice Chancellor made a decree directing that the customary heir of S (who had been a party to the suit) should be admitted tenant to the copyhold premises in question, and when admitted should hold the same as trustee for the plaintiffs in the suit, and the amount of the fine was referred to the Master, and an injunction was granted as prayed:—Held, that the decree of the Vice Chancellor was right. *Dimes v. the Grand Junction Canal Co.*, 3 H.L. Cas. 794; s. c. 6 Law J. Dig. 192.

Where a copyhold tenant makes a lease under a licence from the lord, and afterwards is guilty of forfeiture, the lease continues to subsist as against the lord; and a defendant actually in possession by receipt of rent, defending under the Common Law Procedure Act, 1852, is entitled to set up the lease in an action of ejectment by the lord. *Clarke v. Arden*, 24 Law J. Rep. (n.s.) C.P. 24; 16 Com. B. Rep. 227.

Quere—Whether a bankrupt copyholder can commit a forfeiture. *Ibid.*

Semble—that a licence enures as a lease between the lord and the lessee. *Ibid.*

(C) ENFRANCHISEMENT—COSTS OF PETITION FOR INVESTMENT.

A bishop, lord of a manor, enfranchised certain copyhold lands held of the manor under the Copyhold Enfranchisement Act, and the consideration money was paid into court. A petition was presented by the bishop for the investment of the money:—Held, that the Copyhold Commissioners had a right to appear at the hearing of the petition, and that their costs of the petition and those of the bishop were payable out of the consideration money. *Ex parte the Bishop of Hereford*, 21 Law J. Rep. (n.s.) Chanc. 608; 5 De Gex & Sm. 265.

COPYRIGHT.

[International, see 15 & 16 Vict. c. 12.—Foreign reprints of books, see 16 & 17 Vict. c. 107. ss. 46, 166, and 18 & 19 Vict. c. 96. ss. 39, 40.]

(A) BOOKS AND OTHER PUBLICATIONS.

(a) *Title to the Copyright.*

(b) *Actions and Suits for Infringement of Copyright.*

(1) *When maintainable.*

(2) *Undertaking as to Damages.*

(B) DRAMATIC AND MUSICAL PIECES.

(C) PRINTS AND ENGRAVINGS.

(D) DESIGNS.

(E) ENTRY ON REGISTER AT STATIONERS' HALL.

(F) ASSIGNMENT OF.

(A) BOOKS AND OTHER PUBLICATIONS.

(a) *Title to the Copyright.*

There is no copyright at common law; it is the creature of statute. *Jefferys v. Boosey* (in error), 24 Law J. Rep. (n.s.) Exch. 81; 4 H.L. Cas. 815: overruling *Jefferys v. Boosey* (in error), 20 Law J. Rep. (n.s.) Exch. 354; 8 Exch. Rep. 580.

The statute 8 Ann. c. 19. was passed to encourage literature among British subjects. It does not extend to foreigners resident abroad at the time of the publication of their works in this country, even though such works should be published here before they are published abroad. *Ibid.*

In order to give the proprietor of a periodical a copyright in articles composed for him by others and paid for by him, under the 18th section of the Copyright Act, 5 & 6 Vict. c. 45, it is not necessary that there should be an express contract that he should have the property in the copyright. *Sweet v. Benning*, 24 Law J. Rep. (n.s.) C.P. 175; 16 Com. B. Rep. 459.

Therefore, where the proprietors of a periodical containing law reports agreed to pay the reporters so much per sheet, and no mention was made as to the proprietorship of the copyright,—Held, that it must be inferred that the agreement was made on the implied terms that the copyright should be the property of the proprietors, and that they were, therefore, entitled to such property. *Ibid.*

An author agreed with a firm of publishers that the author should prepare a legal work and correct proofs, &c. and the publishers should pay the expenses, and the author and publishers should divide the profits equally: if a second or subsequent edition or editions should be called for, the author was to make all necessary alterations, and the publishers were to print and publish on the same conditions; the account was to be finally settled at the end of five years. A first and second edition were published. One of the publishers retired from the concern, and a new partner was taken in. One of the new firm became bankrupt, and by two instruments all the interest of the new firm in the work and the unsold copies of the second edition were assigned for value to S & N. A third edition was prepared by the author and published by another publisher, and S & N filed a bill against the new publisher and the author, praying an injunction and other relief:—Held, affirming

a decision of one of the Vice Chancellors, that the agreement between the author and the original publishers was not an assignment of the copyright; that the agreement was of a personal nature, involving mutual duties and obligations, and was not of such a nature as could be assigned without the author's consent; and that the Court would not grant the injunction. *Stevens v. Benning*, 24 Law J. Rep. (N.S.) Chanc. 153; 6 De Gex, M. & G. 223; 1 Kay & J. 168.

A foreigner resident temporarily in England, published in England a work for the first time. A bookseller, being in the course of selling pirated copies of this work,—Held, that the foreigner was entitled to the usual injunction to restrain the bookseller from selling them. *Ollendorff v. Black*, 20 Law J. Rep. (N.S.) Chanc. 165; 4 De Gex & Sm. 209.

The plaintiff, who was the author of a guide-book, published the first edition before the passing of the Copyright Act, 5 & 6 Vict. c. 45, which was registered at Stationers' Hall. Five subsequent editions were published after that act, but were not registered. Upon motion for an injunction to restrain the defendant from publishing a book, which was alleged to be a piracy from the plaintiff's work, it was held, that the plaintiff could only sue in respect of the first edition of his work, and such parts of the subsequent editions as were contained in the first edition, but could not be protected in respect of such parts of the subsequent editions as were new, without registration under the Copyright Act. *Murray v. Bogue*, 22 Law J. Rep. (N.S.) Chanc. 457; 1 Drew. 353.

Held, also, upon comparison of the two works, that the defendant had not made an unfair use of the plaintiff's book; and the injunction was refused. *Ibid.*

Prints in books containing letter-press and prints, the prints being illustrative of the letter-press, are protected by the 5 & 6 Vict. c. 45. *Bogue v. Houlston*, 21 Law J. Rep. (N.S.) Chanc. 470; 5 De Gex & Sm. 267.

The provisions of the 8 Geo. 2. c. 13. as to the date of the publication and the name of the proprietor being printed on every print, apply only to prints published separately, and do not apply to prints forming parts of books made up of prints and letter-press. *Ibid.*

The plaintiffs alleged that they were the proprietors and publishers of a periodical containing original articles: that all the articles had been composed for the use of the plaintiffs by persons employed by them on the terms that the copyright therein should belong exclusively to the plaintiffs, and should be paid for by them: that the plaintiffs were entitled to the sole liberty of publishing the articles in the said periodical, subject to the provisions of the Copyright Act, and that such articles were their exclusive property. An injunction had been granted *ex parte* to restrain the piracy of one of the articles in the plaintiffs' publication:—Held, upon motion to dissolve the injunction, that actual payment to the author by the publisher of a periodical was a necessary condition to the vesting of the copyright of any article in the publisher, but that the plaintiffs had sufficiently alleged such actual payment. *Richardson v. Gilbert*, 20 Law J. Rep. (N.S.) Chanc. 553; 1 Sim. N.S. 336.

An alien residing abroad composed three musical pieces in a foreign country, and sold the copyright in

the country to the plaintiff, a British subject, who published the work in London. The work was on the same day published in Prussia. On motion, in a suit instituted by the purchaser of the copyright against a person who, without leave, published the three musical compositions in this country:—Held, that the publication was within the Copyright Act, 5 & 6 Vict. c. 45, and the Court granted an injunction restraining the unauthorized publication. *Buxton v. James*, 5 De Gex & Sm. 80.

Where the plaintiff had contracted to correct and complete, from materials to be furnished by the defendant, a book which the defendant expressed his intention to write, and agreed also to supply the legal information connected with the subject, for which the plaintiff was to be paid a certain remuneration, according to the number of the pages the work might contain, the Court refused an injunction to restrain the defendant from printing, publishing, or selling the legal part of the work (which the plaintiff had contributed) with any material alteration or omission, and also refused an injunction to restrain the defendant from printing, publishing, or selling the work, until he had paid the plaintiff the sum agreed upon for his assistance and contribution; for such payment may be enforced at law, and the title to it is not a ground for the interposition of a court of equity. *Cox v. Cox*, 11 Hare, 118.

Semble—unless there be a special contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper. *Ibid.*

(b) Actions and Suits for Infringement of Copyright.

(1) When maintainable.

Under the Copyright Act, 5 & 6 Vict. c. 45, an action will lie at the suit of the owner of the copyright in a musical composition, for lithographing copies of it for the private use of the members of a musical society who perform gratuitously, and not for the purpose of sale or exportation. *Novello v. Ludlow*, 21 Law J. Rep. (N.S.) C.P. 169; 12 Com. B. Rep. 177.

The 5 & 6 Vict. c. 45, s. 2. declares the word "copyright" to mean "the sole and exclusive liberty of printing or otherwise multiplying copies" of any book, and the 3rd and 4th sections define the terms for which such copyright is to exist. The 15th section provides that if any one print or cause to be printed either for sale or for exportation any book in which there is existing copyright, such offender shall be liable to a special action on the case:—Held, that this provision does not restrict the right conferred by the previous sections of the act, and that the owner of copyright is entitled by common law to his remedy by action for the infringement of that right. *Ibid.*

The defendants published a monthly periodical professing to be a digest of the cases decided in the courts during the previous month, and inserted, among others, head or marginal notes copied verbatim from the plaintiffs' publication:—Held, *dissentiente Maule, J.*, that the defendants were guilty of piracy under the 15th section of the act.—*Crowder, J. dubitante* as to both points. *Sweet v. Benning*, 24 Law J. Rep. (N.S.) C.P. 175; 16 Com. B. Rep. 459.

The copyright of an alien was sold to a British

subject, who published it in this country in 1844. The copyright was infringed in 1849, but the state of the law then rendered it very doubtful whether the copyright was protected, and the purchaser merely protested against the infringement; but in 1851, within a reasonable time after the decision of a case in the Exchequer Chamber had established the general question of copyright in an alien, he filed his bill, and moved to restrain the publication of the pirated work:—Held, that there had been no such delay as to disentitle him to an injunction. *Buxton v. James*, 5 De Gex & Sm. 80.

(2) *Undertaking as to Damages.*

A plaintiff claiming copyright in a work by a foreigner and assigned to him, obtained an injunction on giving an undertaking to abide by any order the Court might make respecting damages the defendant might sustain by reason of the injunction. The House of Lords (after conflicting decisions in the courts of law) decided, that a party in the situation of the plaintiff in this suit had no title to copyright; and the injunction was dissolved without opposition. The defendant moved for an inquiry as to damage, but one of the Vice Chancellors refused it, and merely dismissed the bill with costs, refusing the plaintiff's motion to dismiss without costs:—Held, upon appeal, overruling part of the judgment of the Vice Chancellor, that the defendant was entitled to an inquiry what, if any, damage he had sustained. *Novello v. James*, 24 Law J. Rep. (n.s.) Chanc. 111; 5 De Gex, M. & G. 876.

(B) DRAMATIC AND MUSICAL PIECES.

[See *post*, (E) Entry on Register at Stationers' Hall.]

By the 3 & 4 Will. 4. c. 15. s. 2: persons representing dramatic pieces without the consent in writing of the author are made liable to certain penalties:—Held, that the consent need not be in the handwriting of the author, and may be given by any agent having due authority. If not limited in its terms, it may apply as well to dramas composed after it was given, as to those which were then in existence. *Morton v. Copeland*, 24 Law J. Rep. (n.s.) C.P. 169; 16 Com. B. Rep. 517.

The plaintiff was a member of the Dramatic Authors' Society, which published prospectuses and rules announcing that leave might be obtained from the secretary to represent the pieces belonging to the members at certain prices mentioned in a list, and that lists should be published from year to year containing the names of the new pieces. In 1849, the secretary of the society gave the defendant leave in writing, signed by himself, to play "dramas belonging to the authors forming the Dramatic Authors' Society, upon his punctual transmission of the monthly bills, and payment of the prices for the performances of such dramas." In 1854, the defendant performed three pieces of the plaintiff's which were composed after 1849, and had never been published in an annual list, the society having neglected to continue the publication of annual lists since 1846:—Held, that the defendant was not liable to penalties; that the document given by the secretary in 1849 amounted, under the circumstances, to a "consent in writing of the author"; that it applied to dramas which might be composed by the plaintiff after its date as well as those composed before; and

that the condition on which it was given was a condition subsequent and not precedent. *Ibid*.

Semble, per Maule, J., that if the plaintiff had been entitled to bring the action for penalties, he would not have lost his right by accepting money paid under the agreement. *Ibid*.

(C) PRINTS AND ENGRAVINGS.

The proprietor of a foreign print cannot claim copyright therein under the International Copyright Act (7 & 8 Vict. c. 12) unless the date of publication and name of the proprietor are engraved on the plate and printed on the print, as required by the 8 Geo. 2. c. 13. *Avanzo v. Mudie*, 10 Exch. Rep. 203.

(D) DESIGNS.

By 6 & 7 Vict. c. 65, a limited copyright is granted for "any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article," provided such design is registered. *Rogers v. Driver*, 20 Law J. Rep. (n.s.) Q.B. 31; 16 Q.B. Rep. 102.

A newly-invented brick, the utility of which consisted in its being so shaped that when several bricks were laid together in building, a series of apertures was left in the wall by which the air was admitted to circulate, and a saving in the number of bricks required was effected, is a design capable of being registered under the above statute. *Ibid*.

Semble—that where the invention is the subject of a patent it may still be registered under the Copyright of Designs Act. *Ibid*.

A design was registered for a new ventilator, consisting of an oblong pane of glass fixed in a frame, which was inserted into an ordinary window frame, and was hinged at the top so as to open and admit the air by means of a screw acted upon by cords passing over its head, and having a half pane of glass fixed in the lower portion of the frame in which the ventilating frame moved, so as to prevent a downward draught. The claim of the inventor was stated to be for the general configuration and combination of the parts, none of which if taken *per se* and apart from the purposes thereof were new or original:—Held, that this was not a design for the shape and configuration of an article of manufacture within the 6 & 7 Vict. c. 65, and therefore not the subject of registration. *Regina v. Bessell*, 20 Law J. Rep. (n.s.) M.C. 177; 16 Q.B. Rep. 810.

A conviction for the infringement of such a registered design was quashed for want of jurisdiction. *Ibid*.

The Copyright of Designs Act, 5 & 6 Vict. c. 100. s. 4. excludes from the protection of the act the proprietor of any registered design applied to an article of manufacture, unless every such "article of manufacture" published by him has thereon the letters "Rd." One class of articles of manufacture mentioned in the statute is "paper-hangings." According to the usage of the trade, paper-hangings are sold for the purpose of papering rooms, in lengths of twelve yards, but it is also the practice of manufacturers to sell, or otherwise issue in the way of their trade, patterns of paper-hangings in pieces of twenty-seven inches long, cut off from the lengths

of twelve yards, and where the design is a registered one, the practice is almost universal of marking with the letters "Rd." each of these pattern pieces:—Held, that such patterns were an "article of manufacture" within the meaning of the statute, and that a proprietor who had issued them to the trade without such mark was not entitled to recover against a party who had imitated the design. *Dis-sentiente Coleridge, J. Heywood v. Potter*, 22 Law J. Rep. (N.S.) Q.B. 133; 1 E. & B. 439.

The owner of a design, before it had been applied to any fabric or been registered, exhibited it to his customers in his place of business for the purpose of soliciting orders in respect of goods to which it was to be applied. Whether this amounted to a publication of the design within the Designs Copyright Act, 5 & 6 Vict. c. 100—*quere. Dalglisch v. Jarvie*, 20 Law J. Rep. (N.S.) Chanc. 475.

(E) ENTRY ON REGISTER AT STATIONERS' HALL.

To entitle any one but the author of a literary work to register it at Stationers' Hall pursuant to the 5 & 6 Vict. c. 45. s. 13, there must be an absolute assignment of the copyright. An entry having been improperly made on the register, the Court granted a rule to "vary or expunge it." *Ex parte Bastow*, 14 Com. B. Rep. 31.

C brought an action against D for publishing three pieces of music alleged to be copyright of C. Before the action three entries had been made in the registry at Stationers' Hall, kept under 5 & 6 Vict. c. 45. s. 11. These entries as they stood would afford *prima facie* evidence of C's copyright in the three pieces. D obtained a rule *nisi* to expunge or vary those entries. It was obtained on an affidavit, by which it appeared that D claimed no copyright in the airs himself, but that his case was that they were old pieces, and that the persons who on the entries professed to be the authors were not really the authors; and the affidavit deposed to information and belief as to facts, which, if true, proved that the pieces were older than the supposed authors. The counsel for C refused to consent not to use these entries on the trial. The Court declined to expunge the entries, but enlarged the rule till the trial of an issue to determine the question of copyright in which C should be plaintiff, and on the trial the entries should not be used; proceedings to be stayed in the mean time. *Ex parte Davidson*, 2 E. & B. 577.

(F) ASSIGNMENT OF.

The defendant having been applied to by the plaintiff for permission to publish a work, wrote to him as follows: "You formerly made me an offer of 50*l.* for the exclusive right of publishing for ten years Captain M's work, 'Monsieur Violet,' which offer I accepted, and wrote to you to that effect. I possess but few of the copyrights of the earlier portions of Captain M's works, and they are many of them published in a cheap edition. I will let you know in a few days those of the works that belong to me that I feel disposed to offer to you. In the mean time, I shall be glad to know if you received my last letter, accepting your offer for 'Monsieur Violet,' and if not whether you still hold the same proposal." The 50*l.* was afterwards paid, for which the defendant gave a receipt to the plain-

tiff, expressed to be "for permission to publish Captain M's work, 'Monsieur Violet,' so long as the copyright may endure, that right to be exclusively his own for ten years":—Held, that this amounted to an express warranty by the defendant that he had the title to the copyright in question. *Simms v. Marryat*, 20 Law J. Rep. (N.S.) Q.B. 454; 17 Q.B. Rep. 281.

Prior to the above transaction, Captain M, by an instrument in writing, not sealed or attested so as to pass the legal copyright, agreed to assign the copyright in 'Monsieur Violet' to R B for 300*l.*, with a stipulation that a deed of assignment of the copyright should be executed. The 300*l.* was duly paid by R B:—Held, that the effect of this was to vest the equitable copyright in R B, who would be entitled to a decree for a specific performance of the contract, and that the plaintiff was consequently entitled to succeed upon issues denying the defendant's title to grant the copyright, and alleging that R B was equitably the proprietor thereof, and had the sole right to grant permission to publish. *Ibid.*

An assignment of copyright by a foreigner resident abroad to another foreigner resident abroad, valid according to the law of the country where it was made, will not give to the assignee a title in this country to copyright in the unpublished work of which he is assignee, so that he can transfer it by assignment to an Englishman, though such last-mentioned assignment may be executed with all the forms required by the laws of this country. *Jefferys v. Boosey*, 24 Law J. Rep. (N.S.) Exch. 81; 4 H.L. Cas. 815: overruling *Boosey v. Jefferies* (in error), 20 Law J. Rep. (N.S.) Exch. 354; 8 Exch. Rep. 580.

Quere—whether there can be a partial assignment of copyright. *Ibid.*

CORONER.

[Compensation to, see COUNTY.]

CORPORATION.

[See COMPANY—MUNICIPAL CORPORATION.]

COSTS, AT LAW.

[In particular cases, see ARBITRATION—ATTORNEY AND SOLICITOR—BANKRUPTCY—COMPANY—EJECTMENT—ERROR—EXECUTION—EXECUTORS AND ADMINISTRATORS—MANDAMUS—PRACTICE, New Trial—PATENT—QUO WARRANTO.]

(A) IN GENERAL.

- (a) *By and against the Crown.*
- (b) *Concurrent Proceedings at Law and in Equity.*
- (c) *Motions and Rules.*
 - (1) *Generally.*
 - (2) *Rule making Judge's Order a Rule of Court.*
- (d) *Meaning of Words "On Payment of Costs" in Judge's Order.*
- (e) *Appeal from County Court.*
- (f) *Actions by Paupers.*

- (g) "Full Costs" under 17 Car. 2. c. 17.
- (h) *Special Case without Pleadings.*
- (i) *Demurrer.*

(B) PLAINTIFF'S RIGHT TO.

- (a) *Certificate.*
 - (1) *To deprive Plaintiff of Costs.*
 - (2) *To give Plaintiff his Costs.*
- (b) *Recovery by Verdict of less than 40s.*
- (c) *Operation of the County Court Acts and other Inferior Courts.*
 - (1) *In general.*
 - (2) *Where Title in Question.*
 - (3) *Balance of Account* [see post, (9)].
 - (4) *Judgment by Default.*
 - (5) *Several Plaintiffs and Defendants* [see post, (6)].
 - (6) *Concurrent Jurisdiction — Residence and Place of Business.*
 - (7) *Officers of the Court.*
 - (8) *Tender and Payment into Court* [see post, (9).]
 - (9) *Amount recovered.*
 - (10) *Judge's Order for Costs.*
 - (i) *In what Cases.*
 - (ii) *Whether discretionary or imperative on Judge to grant.*
 - (iii) *Application for.*
 - (iv) *Appeal from Judge's Decision.*
 - (11) *Suggestion on the Roll.*
 - (i) *When necessary.*
 - (ii) *Affidavit; necessary Averments.*

(C) DEFENDANT'S RIGHT TO.

- (a) *For not proceeding to Trial.*
- (b) *On Discontinuance.*
- (c) *Feigned Issue.*

(D) SECURITY FOR COSTS.

- (a) *Application for.*
- (b) *Discharge of Order for.*
- (c) *Residence Abroad.*
- (d) *Foreigners.*
- (e) *Insolvents.*
- (f) *Felons under Sentence.*

(E) TAXATION OF COSTS.

- (a) *Notice of Taxation.*
- (b) *Scale of Taxation.*
- (c) *Costs in the Cause.*
- (d) *Several Issues.*
- (e) *Several Defendants.*
- (f) *Two Plaintiffs suing by one Attorney.*
- (g) *Evidence occasioned by Negligence.*
- (h) *Search for Documents.*
- (i) *Notice of Action, and to admit.*
- (j) *Witnesses.*

(A) IN GENERAL.

- (a) *By and against the Crown.*

[See stats. 16 & 17 Vict. c. 107. s. 263, and 18 & 19 Vict. c. 90.]

Refusal of the House of Lords to award costs against the Crown. State of the authorities regarding the rule that the Crown neither pays nor receives costs. *The Lord Advocate v. Hamilton*, 1 Macq. H.L. Cas. 46.

DIGEST, 1850—1855.

- (b) *Concurrent Proceedings at Law and in Equity.*

Proceedings having been taken in a court of law and in equity in respect of the same subject-matter, the plaintiff was put to his election by an order of the Court of Chancery, and elected to proceed with his claim there. A Judge at chambers having made an order for the payment by the plaintiff of the costs of the action,—the Court ordered it to be rescinded; holding that the defendant's remedy, if any, was by application to the Court of equity. *Simpson v. Sadd*, 16 Com. B. Rep. 26.

- (c) *Motions and Rules.*

- (1) *Generally.*

[See Reg. Gen. Hil. term, 1853, i. 137, 23 Law J. Rep. (n.s.) xvii; 1 E. & B. App. xxiv.]

- (2) *Rule making Judge's Order a Rule of Court.*

[See Reg. Gen. Hil. term, 1853, r. 159, 22 Law J. Rep. (n.s.) xvii; 1 E. & B. App. xxvi.]

F obtained a Judge's order directing G to deliver up the draft or drafts of a will, and as G did not deliver all the drafts which F thought G had, F made the Judge's order a rule of court, on an affidavit that the order had been served on G, and disobeyed; the rule, therefore, was drawn up directing G to pay the costs of making the order a rule:—Held, that G, on his satisfying the Court that he had delivered all the drafts of the will in his possession or power, was entitled, though no demand had been made for the costs, to have rescinded so much of the rule of court as ordered him to pay the costs of making the order a rule of court. *In re Farrant*, 21 Law J. Rep. (n.s.) Q.B. 272; 1 Bail. C.C. 64.

Costs of making a Judge's order a rule of court. *Crowther v. Crowther*, 16 Com. B. Rep. 177.

- (d) *Meaning of Words "on Payment of Costs" in Judge's Order.*

On the 19th of March previously to the Surrey Spring Assizes, the defendants obtained a Judge's order, in substance as follows:—That the plaintiff should shew the defendants certain letters within ten days, and that the defendants should be at liberty to take copies; that if the plaintiff should not be able to produce the letters he should make an affidavit to that effect within ten days, and that in default thereof all further proceedings be stayed till payment; that the venue be changed to Middlesex, on payment of costs, become fruitless by such change of venue; and that the time for inspection under the order of the 13th of March be also enlarged for ten days. The venue, not having been changed by the defendants, was afterwards changed by the plaintiff:—Held, that the defendants were liable to pay the costs, which had become fruitless by the change of venue, the words "upon payment of costs" being, under the circumstances of the case, words of agreement and not words of condition. *Horton v. the Westminster Improvement Commissioners*, 21 Law J. Rep. (n.s.) Exch. 325; 7 Exch. Rep. 911.

- (e) *Appeal from County Court.*

In appeals from county courts brought in the Court of Exchequer, the successful party in the appeal will, as a general rule, have costs. *Robinson v. Lawrence*, 21 Law J. Rep. (n.s.) Exch. 36; 7 Exch. Rep. 123

In appeal from the county courts into the Court of Exchequer, the appellant will have costs, if the decision below be reversed. *Hunt v. Wray*, 21 Law J. Rep. (n.s.) Exch. 37; 7 Exch. Rep. 125.

(f) *Actions by Paupers.*

[See Reg. Gen. Hil. term, 1853, rr. 121, 122, 22 Law J. Rep. (n.s.) xvi; 1 E. & B. App. xxii.]

A plaintiff, who applies to the Court to compel his attorney to repay him the amount of the costs of the day which he had been forced to pay, as he alleged, by reason of the misconduct of the attorney, is not privileged, by reason of his suing *in formâ pauperis*, from having to pay the costs of the motion, if the rule is discharged. *Bell v. the Port of London Assurance Co.*, 20 Law J. Rep. (n.s.) Q.B. 72.

The defendant, in June 1853, retained the plaintiff, an attorney, to conduct an action for him, and in July obtained an order to sue *in formâ pauperis*. On the 8th of December an order for dispaupering him was obtained from the Master of the Rolls, who ordered it to relate back to the 31st of October, at which time the defendant became possessed of property on the death of his father. The defendant whilst the pauper order was in force had stated to the plaintiff that he would pay his costs on his father's death:—Held, that as the dispaupering order only related to the litigating parties and not to their attorney, the plaintiff was not entitled to claim from the defendant payment of the costs incurred between the 31st of October and the 8th of December; that the defendant's promise to pay the same was *nudum pactum*, and that the plaintiff was not entitled to be paid his charges for copying, nor for counsel's fees which he had not paid. *Holmes v. Penney*, 23 Law J. Rep. (n.s.) Exch. 132; 9 Exch. Rep. 584.

A plaintiff, suing *in formâ pauperis*, who recovers a verdict exceeding 5*l.* and obtains a certificate for his costs, is only entitled to recover from the defendant such costs as he has paid or is liable to pay; he cannot be allowed in taxation any fees to counsel or attorney, as he is not liable to pay such fees under the 11 Hen. 7. c. 12. and the 121st of the General Rules of Hilary term, 1853. *Dewley v. the Great Northern Rail. Co.*, 24 Law J. Rep. (n.s.) Q.B. 25; 4 E. & B. 341.

(g) "*Full Costs*," under 17 Car. 2. c. 17.

The term "full costs," which occurs in the 17 Car. 2. c. 17. s. 3, has the same meaning as ordinary "costs." In an action of replevin, in respect of a distress for arrears of a rent-charge, both the plaintiff and the defendants had taken down the record for trial, and the defendants obtained a verdict:—Held, that under the 17 Car. 2. c. 7, which gives "full costs" to successful defendants in replevin, the defendants were entitled to ordinary costs only, and that they were entitled to the costs of taking down the record, but not to the costs of making the distress. *Jamieson v. Trevelyan*, 24 Law J. Rep. (n.s.) Exch. 74; 10 Exch. Rep. 748.

(h) *Special Case without Pleadings.*

Where, in a special case without pleadings under the Common Law Procedure Act, 1852, the plaintiff succeeds as to a part only of his claim, and the defendant as to the residue, the plaintiff is entitled to

the general costs of the action, and the defendant to so much as he can satisfy the Master was exclusively expended upon that part of the case upon which he succeeded. *Elliott v. Bishop*, 24 Law J. Rep. (n.s.) Exch. 33; 10 Exch. Rep. 522.

(i) *Demurrer.*

[See *Abley v. Dale*, post, (B) (c) (9).]

Under the 3 & 4 Will. 4. c. 42. s. 84. the party who is successful upon a demurrer is entitled to a judgment for his costs irrespective of the termination of the suit; and where such judgment had been given for the plaintiff prior to the trial of the issues in fact, the withdrawal of a juror, with an agreement that no further action was to be brought, was held to be no waiver of the plaintiff's right to these costs. *Bentley v. Dawes*, 23 Law J. Rep. (n.s.) Exch. 279; 10 Exch. Rep. 347.

(B) PLAINTIFF'S RIGHT TO.

(a) *Certificate.*

(1) *To deprive Plaintiff of Costs.*

A certificate to deprive the plaintiff of costs under the 43 Eliz. c. 6. s. 2. is inoperative if granted after final judgment, and it makes no difference that at the time of granting the certificate the amount of costs has not been inserted in the judgment book. The Court will, nevertheless, under particular circumstances, give effect to the certificate by setting aside the judgment. *Lyons v. Hyman*, 20 Law J. Rep. (n.s.) Exch. 1; 5 Exch. Rep. 749.

(2) *To give Plaintiff his Costs.*

Under the 9 & 10 Vict. c. 95. s. 129. (the County Courts Act) a Judge of a superior court may certify for costs at any time before the costs are taxed. *Tharratt v. Trevor*, 20 Law J. Rep. (n.s.) Exch. 189; 6 Exch. Rep. 187.

The Court will not lay down any rule to regulate the discretionary power as to certifying for costs, which is given by the 13 & 14 Vict. c. 61. s. 12. to the Judge who tries the cause. *Palmer v. Richards*, 20 Law J. Rep. (n.s.) Exch. 323; 6 Exch. Rep. 335.

Where a plaintiff recovers 5*l.* as damages in an action of tort in a superior court, a Judge may certify for costs, under the 13 & 14 Vict. c. 61. s. 12. *Garby v. Harris*, 21 Law J. Rep. (n.s.) Exch. 160; 7 Exch. Rep. 591.

Under the City of London Small Debts Acts, 15 Vict. c. lxxvii. ss. 119, 120, and 121, in actions on contract, where less than 20*l.* is recovered, the certificate of the Judge must be granted at the trial; but where the recovery is of a sum between 20*l.* and 50*l.* the certificate may be granted at any time. *Chaplin v. Levy*, 23 Law J. Rep. (n.s.) Exch. 200; 9 Exch. Rep. 673.

(b) *Recovery by Verdict of less than 40s.*

[See post, (c) (1), (4) and (9).]

The first count charged the defendants with damaging a party-wall by excavating it, and overloading it. Plea, as to the overloading, not guilty; and as to the excavating, payment of 30*l.* into court. Replication, damages ultra. At the trial, the verdict was entered for the plaintiff, damages 2,000*l.*, costs 40*s.* subject to the award of an arbitrator, to whom

the cause was referred on the usual terms, but without power to certify for costs under the 3 & 4 Vict. c. 24. s. 2, and he directed the verdict to be entered for the plaintiff on the first issue, with 20s. damages, and for the defendant on the second:—Held, that the plaintiff had recovered by verdict less than 40s. damages, and that, therefore, the 3 & 4 Vict. c. 24. s. 2. applied, and deprived him of costs. *Reid v. Ashby*, 22 Law J. Rep. (n.s.) C.P. 215; 13 Com. B. Rep. 897.

In an action of trespass a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to have the powers of a Judge at Nisi Prius, and to enter the verdict as he thought fit. He entered it for the plaintiff, with less damages than 40s. and did not certify:—Held, that this was a recovery, by the verdict of a jury, within the meaning of the 3 & 4 Vict. c. 24. s. 2; and the plaintiff was therefore entitled to no costs. *Cooper v. Pegg*, 24 Law J. Rep. (n.s.) C.P. 167.

(c) *Operation of the County Court Acts and other Inferior Courts.*

(1) *In general.*

Plaintiff sued in trespass in the Supreme Court of the Island of Jamaica, laying his damages at 3,000l. a sum above the limit of the jurisdiction of the local Courts in the island, constituted by the Jamaica Act, 5 Vict. c. 26, and recovered a verdict for 40s.:—Held, first, that the sum recovered by the verdict and sanctioned by the judgment, and not the sum laid in the declaration, was the test to be applied, to ascertain the right to sue in the Supreme Court, and to entitle the plaintiff to Supreme Court costs. Secondly, that the plaintiff having recovered by the verdict a sum not exceeding 40s., he was not entitled to more costs than damages, and the judgment of the Court, giving Supreme Court costs, reversed. *Emery v. Binns*, 7 Moore, P.C.C. 195.

(2) *Where Title in Question.*

Where to an action of trespass *quare clausum fregit* the defendant pleaded "not possessed," but no question of title in fact came in question:—Held, that the jurisdiction of the county court was not ousted. *Latham v. Spedding*, 20 Law J. Rep. (n.s.) Q.B. 302; 17 Q.B. Rep. 440.

(3) *Balance of Account.*

[See *post*, (9) Amount Recovered.]

(4) *Judgment by Default.*

The exception in the 11th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, as to costs in the case of judgment by default, applies to interlocutory as well as to final judgment by default. *Glynne v. Roberts*, 23 Law J. Rep. (n.s.) Exch. 64; 9 Exch. Rep. 253.

Where a plaintiff in an action of contract, after judgment on demurrer, recovers less than 20l. on an inquiry of damages, he is deprived of his costs by the 13 & 14 Vict. c. 61. s. 11, the case not coming under the exception as to judgment by default. *Prew v. Squire*, 20 Law J. Rep. (n.s.) C.P. 175; 10 Com. B. Rep. 912; 2 L. M. & P. P.C. 346.

Quere—whether the word "verdict" in the 12th section of the 13 & 14 Vict. c. 61. means a verdict at the trial of the cause only, or includes a verdict

on a writ of inquiry—see *Reed v. Shrubsole*, 18 Law J. Rep. (n.s.) C.P. 225. *Ibid.*

(5) *Several Plaintiffs and Defendants.*

[See *post*, (6).]

(6) *Concurrent Jurisdiction—Residence and Place of Business.*

Where one of several plaintiffs dwells beyond twenty miles from the defendant, the superior courts have concurrent jurisdiction with the county court, under the 9 & 10 Vict. c. 95. s. 128, and the plaintiffs will be therefore entitled to costs under the 13 & 14 Vict. c. 61, notwithstanding less than 20l. is recovered. *Hickie v. Salomo*, 21 Law J. Rep. (n.s.) Exch. 271; 8 Exch. Rep. 59.

Where some only of several defendants reside within the jurisdiction of the county court within which the cause of action arose, the superior courts have concurrent jurisdiction with the county court within the meaning of the 128th section of the 9 & 10 Vict. c. 95. For this purpose the persons who fill the office of sheriff of Middlesex are distinct persons. *Doyle v. Lawrence and Robertson v. Gunning*, 2 L. M. & P. P.C. 368.

Where the plaintiff in an action in a superior court, resided at Inverness, more than twenty miles from the defendant, but had been in the habit for some years of coming to London and residing for some months in Golden Square, for the purposes of his business, within the jurisdiction of a county court and less than twenty miles from the defendant, and was residing there during the whole time of the action,—Held, that the plaintiff did not "dwell" in Golden Square, within the meaning of the 128th section of the 9 & 10 Vict. c. 95, but at Inverness; and that therefore the superior court had concurrent jurisdiction with the county court under that section. *Macdougall v. Paterson*, 21 Law J. Rep. (n.s.) C.P. 27; 11 Com. B. Rep. 755.

Semble—That if the plaintiff dwells at two places, one of them less and the other more than twenty miles from the defendant, the superior courts have concurrent jurisdiction. *Ibid.*

The 13th section of the 13 & 14 Vict. c. 61, which provides that if the plaintiff, in an action in a superior court, in which less than 20l. is recovered, shall make it appear to the satisfaction of the Court or of a Judge at chambers upon summons that the action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 9 & 10 Vict. c. 95. s. 128, the Court or Judge may direct that the plaintiff shall recover his costs, does not give the Court or Judge any discretion, but only confers upon them an *authority* to make such an order, which they are *bound* to exercise if it appears by affidavits that the case falls within section 128. [Overruling *Jones v. Harrison and Palmer v. Richards*.] *Ibid.*

The defendant had entered into a written agreement to take 20,000 bricks of the plaintiff at a stated price. After the delivery of 3,000 he refused to take any more, or to pay for those already delivered, alleging that they were not the sort specified in the agreement. The plaintiff and defendant resided less than twenty miles apart, but in different county court districts. The bricks were delivered at the plaintiff's place of

business, but the agreement was signed by the defendant at his own residence. The plaintiff sued the defendant to recover the price of the 3,000 bricks delivered, and recovered less than 20*l*. At the trial the agreement was put in as part of the plaintiff's case.—Held, that the plaintiff was not entitled to recover his costs, as the cause of action arose in some material point within the jurisdiction of the county court where the defendant dwelt, and the action ought not to have been brought in the superior court. *Norman v. Marchant*, 21 Law J. Rep. (N.S.) Exch. 256; 7 Exch. Rep. 723.

Where a Judge has made an order giving the plaintiff his costs under 15 & 16 Vict. c. 24. s. 4. and 9 & 10 Vict. c. 95. s. 128, on the ground that "the cause of action did not arise wholly or in some material point within the jurisdiction of the county court within which the defendant carried on his business at the time of the action brought," the Court has power to review such order, and to rescind it if the Judge has drawn a wrong conclusion from the affidavits. *Stokes v. Grissell*, 23 Law J. Rep. (N.S.) C.P. 141; 14 Com. B. Rep. 678.

Though the onus of proof in such a case is upon the plaintiff, it is the onus of proving a negative; and therefore when the plaintiff states that he is informed and believes, and gives some reason for his belief, that the defendant did not carry on any business at the time of action brought, it lies upon the defendant to satisfy the Court that he did carry on some business within the jurisdiction of the county court. *Ibid*.

Per *Jervis, C.J.* and *Maule, J.*—The "twenty miles" mentioned in the 9 & 10 Vict. c. 95. s. 128, are to be measured "as the crow flies." *Ibid*.

Under the 128th section of the 9 & 10 Vict. c. 95, which gives the county court a concurrent jurisdiction with the superior courts in cases where the plaintiff dwells more than twenty miles from the defendant, this distance is to be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access. *Lake v. Butler*, 24 Law J. Rep. (N.S.) Q.B. 273.

Corporations and quasi corporations, under the Joint-Stock Companies Act, 7 & 8 Vict. c. 110, are within the jurisdiction of the county court, and plaintiffs suing them in the superior courts are within the operations of sections 128. and 129. of the 9 & 10 Vict. c. 95. depriving parties of costs in certain cases. The exception in those sections of cases where the plaintiff dwells more than twenty miles from the defendant either does not apply at all to corporations, or, if applicable, a trading corporation "dwells" at the place where its business is carried. *Taylor v. the Crowland Gas and Coke Co.*, 24 Law J. Rep. (N.S.) Exch. 233.

Semble—As there is no power in the county court to issue execution against members of a joint-stock company in the cases where such execution may be issued in actions in the superior courts under the 7 & 8 Vict. c. 110. s. 66, proof that a plaintiff cannot otherwise obtain satisfaction of his debt, is a sufficient reason for suing a joint-stock company in the superior courts within the 15 & 16 Vict. c. 54. s. 4, which enables the Court or a Judge to give full costs if there was sufficient reason for bringing the action in the superior court. *Ibid*.

Upon a motion to enter a suggestion to deprive

the plaintiff of costs under the London Small Debts Act, 15 & 16 Vict. c. lxxvii. s. 119, it is enough if the affidavit shews with *reasonable certainty* that the plaintiff and defendant did not, at the time of the commencement of the action, dwell more than twenty miles apart. *Shepherd v. Baker*, 16 Com. B. Rep. 544.

And, it seems, the motion may be made at *any time before the costs are taxed*. *Ibid*.

(7) Officers of the Court.

If an action be brought in the superior courts against the high bailiff of a county court, in respect of a claim to goods and chattels taken in execution of the process of the court, and the jury give less than 20*l*. damages, section 139. of the statute 9 & 10 Vict. c. 95. deprives the plaintiff of costs, unless the Judge certify that the action was proper to be brought in such superior court; and the plaintiff is not entitled to costs under section 128, for the case falls within the exception in that section. *Mann v. Buckerfield*, 20 Law J. Rep. (N.S.) Q.B. 265; 2 L. M. & P. P.C. 55.

On the plaintiff proceeding to tax his costs, it was admitted before the Master that the defendant was the high bailiff, and no objection was then taken that the defendant had not applied to enter a suggestion, and the Master declined to tax the costs:—Held, that the objection of the want of proof that the defendant was high bailiff, and of the want of a suggestion, could not be taken on a motion to review the Master's decision. *Ibid*.

(8) Tender and Payment into Court.

[See *post*, (9).]

(9) Amount recovered.

[See *post*, (E) (b).]

The 129th section of the 9 & 10 Vict. c. 95. deprives a plaintiff who recovers less than 5*l*. in an action on tort, in a superior court, of the costs of a demurrer on which he has succeeded, as well as the costs of issues in fact. *Abley v. Dale*, 21 Law J. Rep. (N.S.) C.P. 104; 11 Com. B. Rep. 889.

Where the sum sued for, exceeding 20*l*. is reduced below that amount by a plea of tender of part (which is confessed), and a verdict is found for the plaintiff for the residue, the plaintiff is not deprived of his costs by the county courts acts. *Cross v. Seaman*, 20 Law J. Rep. (N.S.) C.P. 177; 2 L. M. & P. P.C. 273.

The words "balance of account" in section 58. of the County Court Act are not limited to cases where the parties have met and settled an account; but include a debt reduced below 20*l*. by payment on account; and in such case where in an action in the superior courts less than 20*l*. is recovered by the verdict, the plaintiff is not entitled to costs, unless the Judge certifies that the action is fit to be brought in the superior court. *Turner v. Berry*, 20 Law J. Rep. (N.S.) Exch. 89; 5 Exch. Rep. 858.

Under the City of London County Court Act, 15 & 16 Vict. c. lxxvii. ss. 49, 119, 120, an attorney plaintiff is not deprived of his costs if he recovers more than 20*l*., though not more than 50*l*., his privilege to sue in the superior court when more than 20*l*. is recovered not being taken away by that act.

Borradaile v. Nelson, 23 Law J. Rep. (N.S.) C.P. 159; 14 Com. B. Rep. 655.

Where, in an action on a solicitor's bill of costs in Chancery, a verdict was given for the amount, subject to taxation, and a Judge's order was made to tax the bill, and the bill was afterwards taxed by an officer of the Court of Chancery, this Court refused to review the taxation. *Ibid*.

The Judge's order for taxation directed that the parties, if the bill should be reduced on taxation, should remain in the same position as to costs as if the verdict had been found for the smaller amount; and between the making of that order and the taxation the Judge before whom the cause was tried died, so that it was impossible to get a certificate from him under the County Court Act to save the plaintiffs' costs. The Court refused, after the bill had been taxed under 50*l.*, to rescind the Judge's order so far as regarded the state of parties as to costs after taxation. *Ibid*.

The rule that a plaintiff refusing a sum tendered by the defendant at one stage of an action and afterwards accepting the same sum, is to be deprived of his costs subsequent to the refusal, was held not to apply where the defendant, having paid part, tendered 6*s.* 4*d.* for the residue of the debt claimed, and the plaintiff refused it, but afterwards took 7*s.*, paid into court by the defendant, the plaintiff having intended to go on *bonâ fide* for a larger sum, but having abandoned his claim on account of the difficulty of proving it. *Semble*—that the rule does not apply where the sum accepted exceeds the sum tendered by any amount however small. *Shaw v. Hughes*, 24 Law J. Rep. (N.S.) C.P. 84; 15 Com. B. Rep. 660.

If a plaintiff, suing in a superior court for a debt exceeding 20*l.*, take out and accept, in satisfaction of his cause of action, a sum under 20*l.*, paid in by the defendant, he is not deprived of his right to costs by the statute 13 & 14 Vict. c. 61. s. 11, as money so taken out is not a sum recovered in the action within the meaning of the above section. *Chambers v. Wiles*, 24 Law J. Rep. (N.S.) Q.B. 267.

(10) Judge's Order for Costs.

(i) In what Cases.

The Court, or a Judge at chambers, has the power of certifying to give costs under the 13th section of the 13 & 14 Vict. c. 61. (the County Courts Extension Act), notwithstanding the power of certifying as a Judge at Nisi Prius to give costs under the 12th section of that act has by an order of reference been given to an arbitrator, who has failed to certify; the certificate under the 13th section being one which a Judge at chambers or the Court has power to give, and different from that which a Judge at Nisi Prius is empowered to give under the 12th section. *Sharp v. Eveleigh*, 20 Law J. Rep. (N.S.) Exch. 282.

(ii) Whether discretionary or imperative on Judge to grant.

[See *Macdougall v. Paterson*, ante, (6), and *Orchard v. Moxsy*, post, (iv).]

The power given by the 13 & 14 Vict. c. 61. s. 13. to the Court, or a Judge at chambers, to make an order that the plaintiff in an action shall recover his costs, notwithstanding the provisions of the 11th section, is discretionary, and not in any case com-

pulsory. *Jones v. Harrison*, 20 Law J. Rep. (N.S.) Exch. 166; 6 Exch. Rep. 328.

The 13th section of 13 & 14 Vict. c. 61, which provides that where less than 20*l.* is recovered in an action in the superior courts, and it shall be made to appear to the satisfaction of the Court or a Judge at chambers, that the action was of the description therein specified, such Court or Judge "may thereupon by rule or order direct that the plaintiff shall recover his costs," confers a power upon the Court or a Judge to grant costs, which is imperative in cases falling within that section. *Crake v. Powell*, 21 Law J. Rep. (N.S.) Q.B. 183.

In all cases where the superior courts have a concurrent jurisdiction with the county courts, under the 128th section of the 9 & 10 Vict. c. 95, or where no plaintiff could have been entered in any county court, or where the cause is removed from the county court by *certiorari*, the Court or a Judge is bound, by the 13 & 14 Vict. c. 61. s. 13, on being satisfied that the case falls within the 128th section, to make an order that the plaintiff who has recovered less than 20*l.* in a superior court shall recover his costs. *Asplin v. Blackman*, 21 Law J. Rep. (N.S.) Exch. 78; 7 Exch. Rep. 386.

(iii) Application for.

Where a plaintiff recovers in a superior court a less sum than those mentioned in the 13 & 14 Vict. c. 61. s. 11, in any of the actions there specified, the onus of proving that he is entitled to costs under section 13. of the same act is cast upon him; and if he claims his costs upon the ground that title was in question, under the 9 & 10 Vict. c. 95. s. 58, he is bound to establish the fact that the title did really *bonâ fide* come in issue, and not merely that the defendant so pleaded that it might possibly have come in issue. *Latham v. Spedding*, 20 Law J. Rep. (N.S.) Q.B. 302; 2 L. M. & P. P.C. 378.

No time is fixed within which an application for costs is to be made under the 15 & 16 Vict. c. 54. s. 4, in cases where the county courts and the superior courts have concurrent jurisdiction. *Reed*, or *Reid*, v. *Gardner*, 22 Law J. Rep. (N.S.) Exch. 253; 8 Exch. Rep. 651.

Judgment was obtained by the plaintiff in February 1852, and the damages paid, but no application for costs was made until January 1853, the defendant having been out of the jurisdiction during that time:—Held, that the plaintiff was entitled to his costs. *Ibid*.

A cause was, on the 2nd of April 1852, referred to arbitration: the costs to abide the event. On the 9th of the following June the arbitrator certified that the plaintiff was entitled to 6*l.* 18*s.* 6*d.*, in addition to the sum of 10*l.* which the defendant had paid into court. No steps were taken by the plaintiff to obtain his costs until the 7th of February 1853, when an application for the same, under the 13 & 14 Vict. c. 61. s. 13, was made to a Judge at chambers. On the hearing of the summons it was objected that the application was too late. The learned Judge refused to decide the question, but referred the parties to the Court:—Held, that the application was not too late, and that the plaintiff was, therefore, entitled to his costs. *Morris v. Bosworth*, 22 Law J. Rep. (N.S.) Q.B. 276; 2 E. & B. 213.

In any action in the superior courts in which the plaintiff shall *prima facie* be disentitled to costs by reason of section 11. of the statute 13 & 14 Vict. c. 61, if there be facts which would take the case out of the prohibition of that section, *semble* that the Master could not take notice of those circumstances, but that application should be made to the Court or a Judge under section 4. of the statute 15 & 16 Vict. c. 54, for an order directing that the plaintiff shall recover his costs before the plaintiff applies to the Master to tax them. *Levi v. M'Rae*, 22 Law J. Rep. (n.s.) Q.B. 311.

An application to a Judge by a plaintiff for costs under the County Courts Extension Act, need not be supported by affidavit unless the facts are controverted by the defendant. *Power v. Jones*, 6 Exch. Rep. 121.

(iv) *Appeal from Judge's Decision.*

[See *Stokes v. Grissell*, *ante*, (6).]

Applications to review the decision of a Judge at chambers should be made in the course of the next term after the decision has been made. *Meredith v. Gittens*, 21 Law J. Rep. (n.s.) Q.B. 273; 18 Q.B. Rep. 257.

In April 1851 the plaintiff recovered in a superior court less than 20*l.* In June 1851 a summons for costs, under 13 & 14 Vict. c. 61. s. 13, was taken out before a Judge at chambers, who indorsed it "No order." In January 1851 an application to the same effect was made to the Court:—Held, that this could only be by way of appeal from the decision of the Judge at chambers, and was therefore too late. *Ibid.*

Where a Judge declined to make an order to give the plaintiff his costs under the County Courts Act, 13 & 14 Vict. c. 61. s. 13, and an application is made to the Court, fresh affidavits may be used in addition to those made use of before the Judge. *Sanderson v. Procter*, 23 Law J. Rep. (n.s.) Exch. 320; 10 Exch. 189.

In a case where the Court of Queen's Bench had concurrent jurisdiction with the county court by stat. 9 & 10 Vict. c. 95. s. 128, the plaintiff recovered only 40*s.* damages. This sum he accepted from the defendant without prejudice to any claim for costs: and he summoned the defendant to shew cause before a Judge at chambers why the costs should not be taxed, and paid by defendant to plaintiff. The Judge, considering that a discretion on this point was vested in him by stat. 13 & 14 Vict. c. 61. s. 13, refused to make an order. In the next term but one after this decision, the plaintiff moved the Court of Queen's Bench that the costs might be taxed and paid to him by the defendant; relying on a decision of the Court of Common Pleas, since the hearing at chambers, that the Judge, under section 13, was bound to grant costs:—Held, that the application was too late. *Orchard v. Mossy*, 2 E. & B. 206.

Quære—whether the enactment in stat. 13 & 14 Vict. c. 61. s. 13, that the Judge in the cases there mentioned, "may" order costs, be imperative or only permissive. *Ibid.*

(11) *Suggestion on the Roll.*

(i) *When necessary.*

Where the defendants's affidavits, on motion for a suggestion under the County Courts Act to deprive the plaintiff of costs, stated that the residence of the

plaintiff was within twenty miles of that of the defendant, and that the cause of action arose wholly within the jurisdiction of the County Court of B, which facts were denied by the affidavit of the plaintiff, the Court refused to determine those questions on affidavits, and directed a suggestion to be entered. *Lewis v. Forsyth*, 20 Law J. Rep. (n.s.) Exch. 25; 5 Exch. Rep. 904.

Quære—whether the London Small Debts Act, the 10 & 11 Vict. c. lxxi., is affected by the 13 & 14 Vict. c. 61. so as to render unnecessary a suggestion on the roll for the purpose of depriving a plaintiff of costs under the provisions of the former act. *Hewitt v. Paterson*, 20 Law J. Rep. (n.s.) Exch. 337; 6 Exch. Rep. 689.

The construction of the 119th and 120th sections of the City of London Small Debts Act is, that where a plaintiff in the superior courts recovers less than 20*l.* in an action on contract, or less than 5*l.* in an action on tort, which might have been brought in the city court, he loses his costs, without any suggestion; and if he recovers 20*l.*, and not more than 50*l.*, in an action on contract (except in certain specified actions), he will lose his costs, if the defendant enters a suggestion. *Castrique v. Page*, 24 Law J. Rep. (n.s.) C.P. 145; 13 Com. B. Rep. 458.

(ii) *Affidavit; necessary Averments.*

On motion for a suggestion to deprive a plaintiff of costs under the County Courts Act, an affidavit which stated that the plaintiff dwelt within twenty miles from the defendant, instead of from the residence of the defendant, was held to be bad. *Room v. Cottam*, 20 Law J. Rep. (n.s.) Exch. 24; 5 Exch. Rep. 820.

An affidavit for a suggestion to deprive a plaintiff of costs under the County Courts Act stated as follows:—"That the plaintiff now dwells, and at the time of the commencement of this action dwelt, at Birmingham, in the county of Warwick, which is within twenty miles from Bilston, the place where the defendant now dwells, and also within twenty miles from Wolverhampton, in the county of Stafford, the place where the defendant dwelt and carried on his business at the time this action was commenced":—Held, insufficient. *Pry v. Whittle*, 20 Law J. Rep. (n.s.) Exch. 231; 6 Exch. Rep. 411.

(C) DEFENDANT'S RIGHT TO.

[See (A) In general, (e).]

(a) *For not proceeding to Trial.*

[See 15 & 16 Vict. c. 76. s. 99.—Reg. Gen. Hil. term, 1853, r. 39, 22 Law J. Rep. (n.s.) xi; 1 E. & B. App. x.]

A remanet cannot be countermanded; therefore, where a cause was made a remanet from one sittings to another, and four days before the last sittings the plaintiff gave the defendant notice that he had withdrawn the record and should not proceed to trial, it was held that he was liable to pay costs. *Tempany v. Rigby*, 24 Law J. Rep. (n.s.) Exch. 32; 10 Exch. Rep. 476.

(b) *On Discontinuance.*

[See Reg. Gen. Hil. term, 1853, r. 23, 22 Law J. Rep. (n.s.) ix; 1 E. & B. App. vi.]

The defendant having died after issue joined and

notice of trial given, a suggestion of his death was duly made, and his administratrix appeared and pleaded to the suggestion. The plaintiff afterwards applied to a Judge at chambers for leave to discontinue on payment of the costs of the pleas to the suggestion, but the Judge made the usual order on payment of full costs:—Held, that the order was right; for that the 138th section of the Common Law Procedure Act put the administratrix in the same position as if she had been the original defendant in the action. *Benge v. Swaine*, 23 Law J. Rep. (N.S.) C.P. 182; 15 Com. B. Rep. 784.

(c) *Feigned Issue.*

Where the Court has granted an application for a feigned issue, under the statute 8 & 9 Vict. c. 118. s. 44, to try whether a certain close be part of a particular manor, and the applicant, the plaintiff in the feigned issue, fails on the trial, the Court will order him to pay the costs of it to the defendant in the feigned issue. *Regina v. Kelsey*, 20 Law J. Rep. (N.S.) Q.B. 283; 2 L. M. & P. C. 134.

(D) SECURITY FOR COSTS.

[See title STAYING PROCEEDINGS.]

(a) *Application for.*

[See Reg. Gen. Hil. term, 1853, r. 22, 22 Law J. Rep. (N.S.) ix; 1 E. & B. App. xi.]

(b) *Discharge of Order for.*

A plaintiff who, being abroad, has, after service of the writ of summons on the defendant, been ordered to give security for costs, with a stay of proceedings in the mean time, and does not give security, but, on his return to England, has the order discharged, is at liberty to declare, although more than a year has elapsed since the service of the summons. *Ross v. Green*, 24 Law J. Rep. (N.S.) Exch. 193; 10 Exch. Rep. 891.

(c) *Residence Abroad.*

The plaintiffs, a railway company, whose line was in Ireland, carried on their business in Westminster, having no property of the company in Ireland, and their property in England not being sufficient to answer the defendant's costs. The most affluent of four-fifths of the shareholders resided in England, none of them except three had paid up more than 2l. 10s. per share, and a considerable number of the said four-fifths were responsible to the extent of the capital not paid up. The plaintiffs were compelled to give security for costs. *The Kilkenny and Great Southern and Western Rail. Co. v. Fielden*, 20 Law J. Rep. (N.S.) Exch. 141; 6 Exch. Rep. 81; 2 L. M. & P. C. 124.

If a plaintiff resident abroad has real estate in England liable to the defendant's execution for costs, he is not bound to give security for costs; but where the plaintiff's affidavit stated "that he was possessed of landed estates in the county of Durham, of considerable value over and above all charges affecting the same," the Court held, that it did not sufficiently shew that the estate was available to process by the defendant. *Swinbourne v. Carter*, 23 Law J. Rep. (N.S.) Q.B. 16; 1 Bail C.C. 209.

A plaintiff resident abroad and engaged in the civil service of the East India Company as a civil and

sessions Judge, is not exempt from the rule requiring plaintiffs to give security for costs. *Plowden v. Campbell*, 23 Law J. Rep. (N.S.) Q.B. 384.

(d) *Foreigners.*

Security for costs will not be required from a plaintiff who is a foreigner if he is actually in this country. *Tambisco v. Pacifico*, 21 Law J. Rep. (N.S.) Exch. 276; 7 Exch. Rep. 816.

It is not sufficient ground for requiring security for costs that the plaintiff is a foreigner lately come to this country, having no family connexions or permanent abode in it and likely soon to leave it, if it be sworn that he has a permanent residence abroad. So held, where plaintiff was a negro sailor lately brought to England from America as cook of a merchant vessel and was paid off in London. And a rule *nisi* was refused. *Drummond v. Tillinghist*, 16 Q.B. Rep. 740.

(e) *Insolvents.*

The Court will require security for costs to be given by a plaintiff who is insolvent, and who sues not for his own benefit, but for that of the person to whom he has assigned the debt. *Goatley v. Emmart*, 24 Law J. Rep. (N.S.) C.P. 38; 15 Com. B. Rep. 291.

(f) *Felons under Sentence.*

Where a plaintiff, after being convicted of felony, sentenced to transportation, and confined in Portland Prison, brought an action, the Court compelled him to give security for costs. *Barrett v. Power*, 23 Law J. Rep. (N.S.) Exch. 162; 9 Exch. Rep. 338.

(E) TAXATION OF COSTS.

[See 15 & 16 Vict. c. 76. s. 223—Reg. Gen. Hil. term, 1853, rr. 59, 60, 61, 22 Law J. Rep. (N.S.) vi.; 1 E. & B. App. xxviii.]

(a) *Notice of Taxation.*

Where judgment has been signed, costs taxed, and execution issued for the amount of debt and costs without notice of taxation, the Court will not set aside the judgment or execution, but will direct a review of the taxation. *Field v. Partridge*, 21 Law J. Rep. (N.S.) Exch. 269; 7 Exch. Rep. 689.

(b) *Scale of Taxation.*

To an action for a money demand exceeding 20l. the defendant pleaded a tender as to 23l., and never indebted, and other pleas to the residue. A verdict was found on the issue on the plea of tender for the defendant, and on the other issues for the plaintiff for 3l.:—Held, that the plaintiff was entitled to have his costs taxed on the higher scale, as the amount of the tender was part of the sum recovered in the action, which consequently exceeded 20l. *Cooch v. Maltby*, 23 Law J. Rep. (N.S.) Q.B. 305.

Where a cause is referred on the usual terms, costs to abide the event, the costs of the reference and award to be at the discretion of the arbitrator, and by the award less than 20l. is recovered; and the costs of the reference and award are awarded to be paid by the defendant; the costs of the reference are not to be taxed on the lower scale. *Holland v. Vincent*, 23 Law J. Rep. (N.S.) Exch. 78; 9 Exch. Rep. 274.

After writ issued, and before any pleadings, the cause and all matters in difference were referred; the

costs of the cause to abide the event, the costs of the reference and award to be in the discretion of the arbitrator. The award directed that all further proceedings in the cause should cease, that the defendant should pay to the plaintiffs 190*l.* in satisfaction and discharge of all claims and demands in the cause and matters in difference, and then disposed of the costs of the reference and award:—Held, that the award was sufficiently final and certain, for that it was to be inferred that something was due to the plaintiffs in the cause, and the amount was immaterial, as the rule as to costs upon the lower scale does not apply to awards. *Nicholson v. Sykes*, 23 Law J. Rep. (n.s.) Exch. 193; 9 Exch. Rep. 357.

(c) *Costs in the Cause.*

[See post, (j) Witnesses.]

Assumpsit by an engineer for making the surveys and plans for a proposed railway. Pleas, general issue and payment. On the trial the cause was referred, the costs to abide the event. To support his case the plaintiff relied on the evidence of H (who had been examined under a commission) to prove that the plans and surveys were correct. The defendant sent engineers down to examine the ground, and called them as his witnesses, to prove that the work was badly done. The arbitrator found for the plaintiff on the first, and for the defendant on the second issue. On the taxation of costs the Master disallowed the defendant the costs of cross-examining H, and the costs of the journeys and surveys of his engineers, though he allowed the costs of their attendance before the arbitrator:—Held, that the Master was right on both points, with regard to H, as his evidence related only to the first issue, and with regard to the costs of the engineers that it is a general rule of taxation that expenses of preparing witnesses to give evidence are not costs of litigation chargeable to the losing party. *Gravatt v. Attwood*, 21 Law J. Rep. (n.s.) Q.B. 215.

In an action by a carrier against a railway company, to recover back excessive and unequal charges made upon him for the conveyance of his goods, a verdict was entered for the plaintiff, for 10,000*l.*, subject to a special case to be settled by a barrister, who, in the event of the Court deciding in favour of the plaintiff, was by the order of reference empowered to direct for what amount the verdict should be entered, and to whom the cause and all matters in difference between the parties were referred, subject to the special case, —the costs “of the action” to abide the event of the award, and the costs “of and incident to the reference and award” to be in the discretion of the arbitrator. The special case, as settled by the referee, divided the plaintiff’s claim into six several heads; and, the Court having decided in the plaintiff’s favour upon four of them, and for the defendants on the rest of the case, the matter went back to the arbitrator, who ultimately directed that the verdict should be entered for the plaintiff for 3,115*l.*, and that so much of the issue as related to that sum should be found for the plaintiff, and the residue thereof for the defendant: and he further directed that all the costs of and incident to the reference and award should be paid by the defendants:—Held, that the costs of the attendances before the referee to settle the special case were costs in the cause; and therefore that the Master was justified in apportioning them according to the decision

of the Court upon the several heads of claim in the special case. *Edwards v. the Great Western Rail. Co.*, 12 Com. B. Rep. 419.

(d) *Several Issues.*

[See 15 & 16 Vict. c. 76. s. 80.—Reg. Gen. Hil. term, 1853, r. 62, 22 Law J. Rep. (n.s.) xii; 1 E. & B. App. xiii.]

Where a plaintiff succeeds on all of several issues of fact, and the defendant has judgment of demurrer, the plaintiff is entitled to the costs of the issues found for him, under the 4 & 5 Ann. c. 16. s. 5. *Callander v. Howard*, 20 Law J. Rep. (n.s.) C.P. 66; 10 Com. B. Rep. 302; 1 L. M. & P. P.C. 755.

[Supporting *Bird v. Higginson*, 5 Ad. & E. 83; s. c. 6 Law J. Rep. (n.s.) K.B. 262; and *Clarke v. Allatt*, 4 Com. B. Rep. 335: overruling *Partridge v. Gardner*, 4 Exch. Rep. 303; s. c. 18 Law J. Rep. (n.s.) Exch. 415, and *Howell v. Rodbard*, 4 Exch. Rep. 309; s. c. 19 Law J. Rep. (n.s.) Exch. 350.]

The defendant pleaded seven pleas to a declaration in assumpsit. Issues in fact were joined on six of them, which were all found for the plaintiff at the trial. To the seventh plea, which went to the whole declaration, the plaintiff demurred, and judgment on the demurrer was, after the trial of the issues in fact, given for the defendant, on the ground that the declaration was bad:—Held, that the plaintiff was not entitled to the costs of the issues in fact found in his favour under the statute 4 Ann. c. 16. s. 5, as that statute applies only to cases where the declaration discloses a good cause of action. *Partridge v. Gardner* (in error), 20 Law J. Rep. (n.s.) Exch. 307; 6 Exch. Rep. 621.

To debt for work and labour the defendant pleaded, except as to 59*l.*, never indebted; except, &c., set-off; except, &c., payment; and as to 59*l.*, payment into court. The cause was referred, and the plaintiff gave evidence before the arbitrator, who found the first issue for him, and the other two for the defendant:—Held, that the plaintiff was not entitled to his costs as a witness, unless called to give evidence exclusively applicable to the first issue; and that evidence that a larger debt ever existed than was covered by the pleas of payment and set-off, was not exclusively applicable to the first issue. *Clothier v. Gann*, 22 Law J. Rep. (n.s.) C.P. 98; 13 Com. B. Rep. 220.

The declaration contained three counts, to the first and third of which the defendant demurred, paying 25*s.* into court on the second, and pleading non assumpsit to the fourth. The plaintiff joined in demurrer, took out the 25*s.* in satisfaction as to the second count, and joined issue on the plea to the fourth count. At the trial there was a verdict for the defendant on the issue upon the fourth count, and a contingent assessment of damages for the plaintiff on the demurrers:—Held, that the defendant having succeeded on the only issue of fact, was entitled to the costs of the trial,—deducting the costs which the plaintiff would have been entitled to upon a writ of inquiry, as to the first and third counts. *Smith v. Hartley*, 11 Com. B. Rep. 678.

To a count in formodon, the tenant pleaded three pleas, upon two of which issues of fact were joined, and upon the third an issue in law. All the issues, as well of law as of fact, were found for the defendant:—Held, that he was not entitled to the costs of

the issues of fact, under the 4 & 5 Ann. c. 16. s. 5, that section not applying to real actions; but that he was entitled to the costs of the demurrer, under the 3 & 4 Will. 4. c. 42. s. 34, the words being general, and comprehending all actions. *Cannon v. Rimington*, 12 Com. B. Rep. 514.

(e) *Several Defendants.*

Where there are several defendants who defend separately and obtain a verdict generally, the costs of all need not be taxed at the same time. *Brueford v. Griffin*, 20 Law J. Rep. (N.S.) Exch. 287; 6 Exch. Rep. 461.

(f) *Two Plaintiffs suing by same Attorney.*

Two plaintiffs brought separate actions and recovered damages against the same defendant, in respect of a distinct injury sustained by each of them from the same cause. The same attorney was employed by both plaintiffs, and the briefs in each case were to a certain extent similar. The Master, in taxing the plaintiffs' costs, treated those portions of the briefs in each action which were similar as a brief and a draft brief, and taxed the costs accordingly. He then added together the costs of such brief and of the draft, and allowed half the aggregate amount to each plaintiff.—Held, that the taxation was wrong, it not being the duty of the Master to take into consideration that the same attorney was employed by two parties, unless the action had been consolidated. *Mucklow v. Whitehead and Openshaw v. the Same*, 23 Law J. Rep. (N.S.) Exch. 97; 9 Exch. Rep. 384.

(g) *Evidence occasioned by Negligence.*

A bill of exchange on which an action had been brought having been burnt by the negligence of the clerk of the plaintiffs' attorney,—*Quære*, whether plaintiffs were entitled on taxation to the costs of producing two witnesses at the trial to prove the destruction of the bill for the purpose of rendering admissible secondary evidence of its contents. Per *Pollock, C.B.* and *Martin, B.*, that they were not entitled to such costs. Per *Alderson, B.*, and *Platt, B.* that they were entitled. *Mathews v. Livesey*, 24 Law J. Rep. (N.S.) Exch. 252; 11 Exch. Rep. 221.

(h) *Search for Documents.*

Replevin; and cognizance by the defendants, as collectors of Crown rents. At the trial much old documentary evidence was adduced by the defendants, and they obtained the verdict. A new trial was subsequently granted for the improper reception of one of these documents, and a fresh notice of trial was then given by the plaintiff; but before the trial he discontinued the action.—Held, that the defendants were entitled to the costs of the search for all the documents properly admitted at the trial, and also of the briefs then used; and that the search, having been made by an officer of the Crown, did not alter the right to the costs of such search. *Daniel v. Wilkin*, 22 Law J. Rep. (N.S.) Exch. 73; 8 Exch. Rep. 156.

(i) *Notice of Action and to admit.*

A company's act of incorporation, 5 & 6 Will. 4. c. 107. s. 223, requiring that they should have a notice of action,—the plaintiff, at great labour and expense, prepared and delivered a notice accom-

panied by voluminous accounts of the several packages upon which the overcharges were alleged to have been made, together with the dates and other particulars. The Master having allowed the plaintiff 100*l.* for the preparation of the notice and the accompanying accounts, and 170*l.* for one fair copy only,—The Court, on the plaintiff's motion, refused to order a review of the taxation, on the ground that the allowance for preparing the notice was inadequate, and that two fair copies should have been allowed; and afterwards, upon the defendants' motion, directed a review, on the ground that the 100*l.* was an excessive allowance, inasmuch as this was an expense necessarily incurred by the plaintiff in preparing himself to bring the action. *Edwards v. the Great Western Rail. Co.*, 12 Com. B. Rep. 419.

The Master also disallowed a charge of 566*l.* 1*s.* 4*d.* for a voluminous notice to admit, pursuant to the rule of Hil. term, 2 Will. 4. r. 20, setting forth descriptions of upwards of 21,000 tickets and receipts for goods carried by the company for the plaintiff, and monies paid on account thereof.—Held, that the Master had exercised a sound discretion in so doing,—the notice, though apparently in strict compliance with, being virtually in fraud of, the rule of court. *Ibid.*

(j) *Witnesses.*

[See ARBITRATION.]

Under the directions to taxing officers of Hil. Vac. 4 Will. 4. the allowance to witnesses for travelling is to be the expenses actually paid, not exceeding 1*s.* per mile, unless under special circumstances.—Held, that the Masters are bound to allow only what has been reasonably expended by the witnesses, not exceeding 1*s.* a mile, and that they cannot look to what has been paid by the party to the witnesses for their travelling expenses. *Hunter v. Liddell*, 20 Law J. Rep. (N.S.) Q.B. 200; 16 Q.B. Rep. 402.

The simple fact of a successful party to an action being examined as a witness is not sufficient to entitle him to recover his expenses as a witness against the opposite party, and if it appear that his attendance was unnecessary or for the purpose of superintending the conduct of the cause, such costs will not be allowed. *Hoves v. Barber*, 21 Law J. Rep. (N.S.) Q.B. 254; 18 Q.B. Rep. 588.

The plaintiff, the captain of a ship, sued the owner for wages, and could only make out his claim by his own evidence or by sending out a commission abroad. He remained in England for the purpose of being examined at the trial, at which he recovered, and the Master made him the like allowance for maintenance from the service of the writ until the day of trial as would have been made to a third person, a witness, under similar circumstances.—Held, that such costs were properly allowed. *Ibid.*

The expenses of witnesses employed by the plaintiff to seek for the defendant, in order to identify him as the party who had committed the wrong of which the plaintiff complains in an action on the case, cannot be allowed as costs of the cause for the plaintiff after verdict in his favour, as they are not costs incidental to the trial, but merely expenses of qualifying the witnesses to give evidence. *Small v. Batho*, 21 Law J. Rep. (N.S.) Q.B. 254; 1 Bail C.C. 43.

The plaintiff engaged a passage to Australia in the

defendant's vessel, but being turned out of it, and the ship having sailed without him, he sued the defendants for not carrying him according to their contract. The plaintiff could have had another passage in the course of a few days, but he remained until the trial of the cause, several months, and gave evidence in his own favour. A verdict was found for him:—Held, on motion to review the Master's taxation of costs, that if the plaintiff was detained *bond fide* for the purpose of giving evidence in the cause, and it was proper to call him as a witness at the trial, he ought to be allowed the expense of his maintenance while so remaining in this country as costs against the defendant, although he was not a seafaring man. *Ansett v. Marshall*, 22 Law J. Rep. (N.S.) Q.B. 118; 1 Bail C.C. 147.

In an action for a wrongful dismissal, the plaintiff, who was a material and necessary witness on his own behalf, and was examined at the trial, obtained a verdict. A rule *nisi* for a new trial was obtained by the defendants, which, upon argument, was afterwards discharged. The plaintiff, it appeared, was a seafaring man, and had remained in this country from the commencement of the action to the time of the rule for a new trial being discharged; and he stated in his affidavit that, during the time of his residence here he had not earned any money, but had been wholly unemployed and unable to exercise his ordinary occupation of a ship's purser, and to avail himself of numerous opportunities of employment in the way of his business by reason of his being necessarily detained as a material witness in the cause. The Master, on taxation, allowed the plaintiff expenses of maintenance from the commencement of the action down to the discharge of the rule for a new trial:—Held, that, under the peculiar circumstances of the case, expenses of maintenance between the first trial and the discharge of the rule for a new trial might be allowed as part of the costs of the rule. But that as a general rule, it was not to be considered that a witness might be detained at the expense of the losing party after a rule for a new trial had been obtained. *Dowdell v. the Royal Australian Steam Navigation Company*, 23 Law J. Rep. (N.S.) Q.B. 369; 3 E. & B. 902.

On taxation of costs, it is a general rule to disallow the expenses of a witness rejected by the Judge at the trial, as between party and party. *Galloway v. Keyworth*, 23 Law J. Rep. (N.S.) C.P. 218; 15 Com. B. Rep. 228.

The same rule applies to a witness rejected by an arbitrator; and where a case on being called on for trial was referred, and a witness who attended at the place of trial and afterwards before the arbitrator on the reference, was rejected by the arbitrator, the Master was held to have rightly disallowed his expenses, as between party and party. *Ibid.*

The materiality of a witness is *prima facie* a question for the Master, but the Court may review his decision on that point. *Ibid.*

In an action for a proportion of the saving of coals effected by a patent boiler erected by the plaintiff according to a contract, an engineer attended at the trial and before the arbitrator, who had not seen the boilers in question, but had seen the working of similar ones. *Quære*—whether he was a material witness. *Semble, per Maule, J.*, that he was not material as between party and party. *Ibid.*

If a witness does not arrive at an assize town until after the cause for which he has been subpoenaed has been referred to arbitration, his expenses will not be allowed as costs in the cause. *Fryer v. Sturt*, 24 Law J. Rep. (N.S.) C.P. 154; 16 Com. B. Rep. 218.

If he attends at the reference his expenses will be costs of the reference and not of the cause. *Ibid.*

The Court allowed witnesses who came from a distance their expenses of one day to come to, and of one day to return from, the assize town. *Ibid.*

Except under special circumstances, the expenses of the attendance of witnesses, on the commission day at the assizes cannot be allowed. *Harvey v. Divers*, 16 Com. B. Rep. 497.

An attorney who, in his affidavit of increase on taxing costs, represents that he has paid money to witnesses in the cause when he has not in fact paid it (though he may have taken steps for doing so), or who, without proper ground, makes statements tending to heighten the costs payable to witnesses, with intent to favour such witnesses or to oppress the opposite party, commits an offence for which, on a timely application, he may be punished by the Court. But, where the losing party in a cause complained that the adverse attorney had claimed payments for the production of maps by witnesses at the trial, which maps, it was said, were not in fact produced, and of a counterpart, produced by a witness but not used or required; also for money alleged to have been paid by the attorney to a witness, whereas such money was not paid till long after the affidavit of increase was sworn; but such complaint was not made till nearly a year and a half after the taxation, the complainant's attention having been drawn to the subject recently and by accident,—Held, that it was too late, unless upon a very strong case, to bring such details before the Court as charges to be answered by an attorney; and a rule to answer matters was refused. *Doe d. Mence v. Hadley*, 17 Q.B. Rep. 571.

COSTS, IN EQUITY.

- (A) IN GENERAL.
- (B) PETITION.
- (C) RE-HEARING AND APPEAL.
- (D) MOTIONS.
- (E) CASE SENT TO A COURT OF LAW.
- (F) ADMINISTRATION SUITS.
- (G) CREDITORS' SUITS.
- (H) TRUSTEES AND EXECUTORS.
- (I) HEIR-AT-LAW.
- (J) NEXT FRIEND.
- (K) SETTING OFF.
- (L) UPON WHAT FUND CHARGEABLE.
- (M) TAXATION OF COSTS.
 - (a) Practice as to, in general.
 - (b) What Charges are allowed.
 - (c) Solicitors' Bills.
- (N) RATE OF—PAUPER SUITS.
- (O) SECURITY FOR COSTS.

(A) IN GENERAL.

At the hearing of special cases, under the 13 & 14 Vict. c. 35, the Court has power to give directions as

to costs. *Jackson v. Craig*, 20 Law J. Rep. (N.S.) Chanc. 204.

The Court has no jurisdiction, under the 3 & 4 Vict. c. 87 (Metropolitan Improvement Act), to order the costs and expenses of making out a title to land required by the Commissioners to be paid by them, or in the case of a tenant for life, out of the purchase-money. *In re Strachan's Estate*, 20 Law J. Rep. (N.S.) Chanc. 511; 9 Hare, 185.

The defendant having satisfied the demand for which the suit was instituted, the Court refused to allow it to be proceeded with for the costs; but upon the terms of an agreement, to which the plaintiff had consented, but which the defendant had not strictly observed, ordered the defendant to pay the costs of the plaintiff out of pocket in the suit and on this notice of motion. *Tapp v. Tanner*, 20 Law J. Rep. (N.S.) Chanc. 559.

A bill was filed on the authority of *The London and North-Western Railway Company v. Smith*, and an injunction to restrain the defendant from proceeding under the compensation clauses of the Lands Clauses Consolidation Act was refused, and the bill was dismissed, without costs; but on appeal, (the cause, by consent, being considered as regularly on for hearing,) the defendant had leave given him to apply to the Court as to the costs of the suit if he should, before a given day, establish a right to compensation. *The Sutton Harbour Improvement Co. v. Hitchens*, 21 Law J. Rep. (N.S.) Chanc. 568; 1 De Gex, M. & G. 161; 15 Beav. 161.

Where a suit is instituted on the authority of a case, and the doctrine upon which the same was founded has been since got rid of, the plaintiff is entitled to have his bill dismissed without costs. *Ibid.*

Of the two objects of a bill, one succeeded and the other failed. The costs not being easily separable, a decree was made without costs on either side. *Rochdale Canal Co. v. King*, 22 Law J. Rep. (N.S.) Chanc. 604; 16 Beav. 630.

A suit heard twice in this court, and twice sent to a court of law, and afterwards carried by appeal to the House of Lords, when it was remitted to this court again, with a declaration that the plaintiff had no title: upon its coming on,—Held, that the declaration of the House of Lords must be inserted in the decree with a stay of all further proceedings; that the plaintiff was not liable for the costs up to the first hearing, or for the first trial at law, or for the subsequent hearing before this Court; that the plaintiff must pay the costs of the second trial at law, and the subsequent hearing before this Court; that the plaintiff and the defendant must each pay his own costs of the appeal to the House of Lords, and of the proceedings which the plaintiff had taken in the Master's office, under the decree made after the second trial at law. *Wilson v. Eden*, 23 Law J. Rep. (N.S.) Chanc. 105.

The general costs of a suit being reserved, the costs of two disclaiming defendants were ordered to be paid by the plaintiff without prejudice to the question by whom and out of what fund they ought eventually to be borne. *Jones v. Powell*, 13 Beav. 433.

Costs of suit for dissolution of a partnership, on the ground that the defendant had become a lunatic, though not so found by inquisition, ordered, after

decree declaring the partnership dissolved, to be paid out of the partnership. *Jones v. Welch*, 1 Kay & J. 765.

Although there is no rule that in every instance in which a defendant takes several grounds of defence, one tenable and successful, the rest doubtful or invalid, that circumstance ought to avail the plaintiff on the subject of costs, yet where, upon the evidence, the plaintiff's case failed absolutely and wholly as a case for equitable relief, but the defendant had in the suit endeavoured to support claims without any just foundation, and had vexatiously disputed the legal title of the plaintiff:—Held, that the bill ought to be dismissed without costs. *Clowes v. Beck*, 2 De Gex, M. & G. 731.

A bill contained charges of fraud which were neither supported nor repelled by evidence; but inasmuch as the costs were not increased by such charges,—Held, that the costs of the suit ought not to be affected thereby. *Staniland v. Willott*, 3 Mac. & G. 664.

(B) PETITION.

An unopposed petition contained statements which were immaterial to the prayer. The Court inserted in the order a direction to the taxing Master, in taxing the costs, to have regard to such statements. *Hyder v. Coleman*, 21 Law J. Rep. (N.S.) Chanc. 592.

Real estate subject to several incumbrances was sold by the first incumbrancer under a power of sale in his mortgage deed, and the surplus purchase-money was paid into court under the Trustees' Relief Act. The second incumbrancer, whose debt was greater than the fund in court, presented a petition, stating the other incumbrances, and praying for payment of the fund to himself. This petition was served on the other incumbrancers, with a notice by the solicitor of the petitioner to each incumbrancer that, if he appeared on the petition the payment of his costs out of the fund would be resisted:—Held, that the incumbrancers so served who appeared at the hearing of the petition were not entitled to their costs out of the fund. *Roberts v. Ball*, 24 Law J. Rep. (N.S.) Chanc. 471; 3 Sm. & G. 168.

Proceedings were stayed as against the legal personal representative. A petition having been presented, professing to deal with funds standing to the general credit of the cause, he was served therewith, and with a notice not to appear:—Held, nevertheless, that he was entitled to his costs of appearance. *Rowley v. Adams*, 16 Beav. 312.

(C) RE-HEARING AND APPEAL.

Where, upon appeal, the order of the Court below was varied, and, by inadvertence, the cause was heard on further directions by the Court of Appeal,—Held, that this circumstance ought not to affect the right of the successful party to those costs which he would otherwise have been entitled to. *Malcolm v. Scott*, 20 Law J. Rep. (N.S.) Chanc. 17; 3 Mac. & G. 29; 2 Hall & Tw. 440.

Where a Court of Appeal agrees with the main part of the relief granted in the court below, it will not depart from its rule for adjudication of the costs, excepting in a very strong and clear case. *Blenkinsopp v. Blenkinsopp*, 21 Law J. Rep. (N.S.) Chanc. 401; 1 De Gex, M. & G. 495.

Where the Master of the Rolls or a Vice Chancellor has given substantial relief against a defendant, with costs against him personally, it is competent to this Court, in affirming the decree as to relief, to vary it as to costs, if its dissent from the decree as to costs is strong, clear and undoubting. *Reynell v. Sprye*, 21 Law J. Rep. (N.S.) Chanc. 633; 1 De Gex, M. & G. 660.

When a decree is affirmed upon the general merits of the case, an objection founded on an obvious inadvertency in such decree, and which might have been taken in the court below, ought not to affect the costs of the appeal, if taken for the first time in the Appellate Court. *Smith v. Pincombe*, 3 Mac. & G. 653.

(D) MOTIONS.

A party was ordered to pay the general costs of certain suits. Pending an appeal, he moved for leave to file a supplemental bill in the nature of a bill of review, and obtained leave to do so on depositing 50*l.* with the Registrar, and he was ordered to pay the costs of the motion. He paid the 50*l.* but not the costs of the motion, and filed a supplemental bill; but the Court held that the payment of the costs of the motion was a condition annexed to the order giving leave to file the supplemental bill, and that therefore all proceedings in the supplemental bill must be stayed until payment of them. *Sprye v. Reynell*, 21 Law J. Rep. (N.S.) Chanc. 664; 1 De Gex, M. & G. 712.

Where a party is ordered to pay the general costs of a suit, and also the costs of a particular motion, and then files a bill against the party entitled to all those costs, if the latter moves to stay all proceedings in the new suit until the costs of the particular motion are paid, that is a waiver of any right he may have to stay proceedings until the general costs of the suit are paid, and the Court will only stay the proceedings until payment of the costs of the particular motion. *Ibid.*

(E) CASE SENT TO A COURT OF LAW.

In a suit against several persons A B and G, the decree directed an issue as to G, and reserved the costs of A and B, and the "subsequent" costs of all other parties, and further directions. G was successful on the issue:—Held, that he was entitled to all his costs. *Rice v. Gordon*, 14 Beav. 508.

(F) ADMINISTRATION SUITS.

In a suit for the administration of the estate of a testator, A brought in a claim upon the estate before the chief clerk. The claim was resisted by the executors, and disallowed:—Held, that the costs of the executors incurred in resisting the claim were payable by A. *Hatch v. Searles*, 23 Law J. Rep. (N.S.) Chanc. 467; 2 Sm. & G. 147.

The validity of a will having been questioned in the ecclesiastical court, the will was established, but the costs of the opposing party were ordered to be paid out of the estate. A suit was afterwards instituted in this court to administer the estate:—Held, that the costs of the litigation in the ecclesiastical court were to rank with other charges upon the estate, and must be postponed to the payment of the costs of the suit in this court. *Major v. Major*, 23 Law J. Rep. (N.S.) Chanc. 718; 2 Drew. 281.

A died intestate, and letters of administration of his estate were granted to B, the solicitor of the Treasury, on behalf of the Crown. Afterwards C, one of the next-of-kin, obtained a decree in the ecclesiastical court, by which the letters granted to B were revoked, and letters of administration of the estate of the intestate were granted to C, who thereupon filed a claim against B for the transfer of the estate of the intestate:—Held, upon appeal, confirming the order below, that the Crown was not entitled to the costs of the suit. *Kane v. Reynolds*, 24 Law J. Rep. (N.S.) Chanc. 321; 4 De Gex, M. & G. 565: affirming 23 Law J. Rep. (N.S.) Chanc. 638; 2 Sm. & G. 331.

Semble—that where the Crown obtains administration to the estate of an intestate, it does so for its own benefit and not in a fiduciary character. *Ibid.*

Costs given to the plaintiff in a legatee's suit as between solicitor and client, where the fund is insufficient to pay the legacies in full. *Waldron v. Frances*, 10 Hare, App. x.

In a bill filed by a married woman to administer the estate of a testator, and to establish her equity to a settlement, to which her husband and his assignees in bankruptcy were made defendants, the Court held that the husband was entitled to his costs, but refused to give the assignees their costs. *Rolleram v. Battson*, 2 Sm. & G. App. viii.

(G) CREDITORS' SUITS.

A simple contract creditor obtained an order to administer the intestate's estate. He afterwards had notice that the estate was insufficient to pay the specialty creditor and the costs of the administratrix, but he still persisted in prosecuting the suit:—Held, that the fund must be applied, first, in paying the costs of the administratrix, then in paying the plaintiff's costs down to the notice, and the residue in payment of the specialty creditor. *Sullivan v. Beavan*, 20 Beav. 399.

A creditors' bill was filed after notice of a decree in a simple administration suit by one of the next-of-kin of the intestate, but the decree was at that time imperfect in not containing the usual preliminary inquiries. The frame of the creditors' suit was also different in making the heir-at-law a party, and in containing charges as to real estate, and as to the destruction of documents. The creditors' suit having been brought to hearing, the Vice Chancellor made an order directing the plaintiff to pay a stated sum to the heir-at-law in lieu of costs, and ordered the administratrix to pay the plaintiff's costs of suit:—Held, that, inasmuch as the creditor might have obtained all the relief to which she was entitled in the former suit, the bill ought to have been dismissed with costs; and that, under the circumstances, the appeal to the Lord Chancellor did not fall within the rule precluding an appeal for costs. *Menzies v. Connor*, 3 Mac. & G. 648.

(H) TRUSTEES AND EXECUTORS.

A solicitor and trustee, acting for himself and his co-trustees, will not be allowed professional charges in matters of their trust estate (where there is not an express provision to the contrary), except in a suit in respect of the trust property to which such solicitor is a necessary party, and in which the costs are not increased by his conduct. *Lincoln v.*

Windsor, 20 Law J. Rep. (N.S.) Chanc. 531; 9 Hare, 158.

If trustees take upon themselves to inquire into matters which do not concern them, and to raise questions of the title of their *cestuis que trust*, they must bear their own expenses of proceedings resulting from their own conduct. And the fact of their acting under the advice of counsel will not, in all cases, entitle them to the costs of a suit. *Devey v. Thornton*, 22 Law J. Rep. (N.S.) Chanc. 163; 9 Hare, 222.

Affidavits at the hearing, pursuant to the 13 & 14 Vict. c. 35, received as evidence. *Ibid*.

Where one of a set of trustees is a solicitor, and, by the direction of his co-trustees, acts professionally in matters relating to the trust estate (such business being done out of court, and not in a cause in Chancery), he will not be allowed any remuneration for his professional services, but only be entitled to his costs out of pocket. *Broughton v. Broughton*, 24 Law J. Rep. (N.S.) Chanc. 190; 2 Sm. & G. 422; affirmed 25 Law J. Rep. (N.S.) Chanc. 250; 5 De Gex, M. & G. 160.

Where one of a set of trustees is one of a firm of solicitors, and the firm act, by the direction of the trustees, professionally in matters relating to the trust estate (such business being done out of court, and not in a cause in Chancery), the firm will not be allowed any remuneration for their professional services, but only be entitled to costs out of pocket. *Ibid*.

Trustees had lent money on a technically insufficient security. In the Master's office they entered into evidence to prove its sufficiency, but failed; and they afterwards presented a petition for calling in and investing the money. This was done, and no loss occurred.—Held, that the trustees were entitled to their costs of both proceedings. *Royds v. Royds*, 14 Beav. 54.

In a suit by a trustee against his co-trustee, a solicitor, and the parties beneficially interested under a will, some of them being infants, the costs of all parties had been ordered to be taxed and paid. It appeared that the defendant trustee, the solicitor, had conducted his defence by his partner. The taxing Master allowed the solicitor trustee costs out of pocket only.—Held, that the rule which had allowed to solicitor trustees costs out of pocket only being well established, the Court would not, with reference to the question of costs, inquire whether the conduct of the suit by the partner of the solicitor trustee was beneficial for all parties, though no party objected to such inquiry, but that all costs beyond those out of pocket must be disallowed. *Lyon v. Baker*, 5 De Gex & Sm. 622.

(I) HEIR-AT-LAW.

A testator devised his real estates to A, and died, leaving B his heir-at-law. B brought an action of ejectment against A, in respect of a part of the testator's real estate, on the grounds of the incompetency of the testator, and fraud on the part of A. The action was tried and failed, and a motion for a new trial was refused. A bill was then filed by A against B for the purpose of establishing the will. B, in his answer, set up the incompetency of the testator, and fraud on the part of the devisee, and entered into a good deal of evidence in support of

his case. At the hearing, issues were directed to try the validity of the will. The issues were tried. B at the trial merely cross-examined A's witnesses, and did not enter into any independent evidence. A verdict was given in support of the will. On the coming on again of the cause on the question of the costs of the suit and issues,—Held, that B was not entitled to any of the costs of the suit or issues, but was bound to pay so much of the costs of the suit and issues as were occasioned by his raising the above-mentioned questions of incompetency and fraud. *Grove v. Young*, 21 Law J. Rep. (N.S.) Chanc. 95; 5 De Gex & Sm. 38.

A contracted to sell an estate to B. Before the completion of the purchase B died intestate. A bill was filed by A against the heir and administrator of B, praying for a re-sale of the estate and for the application of the purchase-money to the payment of A's expenses and the sum agreed to be paid by B:—Held, that A was bound to pay the costs of the heir, with liberty to add them to his own. *Popple v. Henson*, 21 Law J. Rep. (N.S.) Chanc. 311; 5 De Gex & Sm. 318.

In a charity case the heir, though unsuccessful, allowed his costs, but only as between party and party. *Whicker v. Hume*, 14 Beav. 528.

(J) NEXT FRIEND.

The solicitor for a married woman, the plaintiff in a suit, placed the name of A on the record as her next friend. On a motion to dismiss the bill for want of prosecution, it was stated by A that his name had been put on the record without his knowledge or sanction, that he had no acquaintance with the plaintiff or any of the parties to the suit, that he had no means of hearing of the suit, and that he had never heard of it until he was served with the notice of motion:—Held, that A was nevertheless liable to pay to the defendants all the costs of the suit. *Bligh v. Tredgett*, 21 Law J. Rep. (N.S.) Chanc. 204; 5 De Gex & Sm. 74.

A next friend of a married woman placed on the record after the institution of the suit is liable, not only for the costs of the suit incurred after his name was so placed, but to all the costs of the suit. *Ibid*.

(K) SETTING OFF.

A in an action became entitled to receive costs from B, and in a suit respecting the same matters he became liable to pay costs to B. A, being unable to obtain payment, asked by petition that the costs might be set off, but the application was refused. *Colletti v. Preston*, 15 Beav. 458.

(L) UPON WHAT FUND CHARGEABLE.

The costs of a suit instituted to obtain the opinion of the Court upon a specific devise of real estate, in which infants were interested, were directed to be raised by sale or mortgage of a sufficient part of the estate. *Mandeno v. Mandeno*, 23 Law J. Rep. (N.S.) Chanc. 50; Kay, App. ii.

A general direction in a will that costs shall be paid out of a particular fund provided for that purpose, is applicable only to discharge the costs which relate to the office of executors. *Lord Brougham v. Lord William Powlett*, 24 Law J. Rep. (N.S.) Chanc. 233; 19 Beav. 119.

Where there are several estates subject to trusts

for different persons, each must bear the particular charges affecting it, notwithstanding a fund has been created for the payment of costs. *Ibid.*

Costs incurred for a purpose necessarily applicable to the whole of the trusts contained in a will, must be borne proportionately by the several estates affected by the will. *Ibid.*

In a suit between the owners of a ship for the sale of the cargo and a division of the proceeds:—Held, the fund being deficient, that the costs of all parties must be paid out of the fund; that the captain, from having given a notice to the dock company not to part with the cargo until the freight was paid, was properly made a party to the suit; that he was liable for the wages of seamen, &c., and having been made a party, there were sufficient grounds for his not disclaiming, and that he must be paid his costs out of the fund. *Alexander v. Simms*, 24 Law J. Rep. (N.S.) Chanc. 618; 20 Beav. 123.

Executors and trustees having appropriated a legacy and divided the residue:—Held, that the costs of a suit to secure the particular legacy must be paid thereout. *The Governesses' Benevolent Institution v. Rusbridger*, 18 Beav. 467.

A stock legacy bequeathed to several in succession was appropriated by the executors and the residue paid over. In a suit between the remainderman and the executors alone, the legacy was transferred into Court, and the costs of suit were paid thereout. The tenant for life afterwards filed a claim to have the amount of costs recouped out of the residue. It was dismissed with costs. *Richardson v. Rusbridger*, 20 Beav. 136.

A testator devised his freehold farm called W upon certain trusts, and bequeathed his leasehold farm at H upon trust for sale and payment thereof of his debts, funeral and testamentary expenses, in exoneration of his general personal estate, and subject thereto in trust for the trustees (who were also his executors) beneficially. There was a general residuary gift subject only to the payment of such of the testator's debts as the proceeds of the leaseholds at H should be insufficient to pay:—Held, that the costs of the suit to determine whether certain leasehold land was comprised in the devise of W, the bequest of H, or the gift of the residue, were properly payable out of the proceeds of H. *Morrell v. Fisher*, 4 De Gex & Sm. 422.

(M) TAXATION OF COSTS.

(a) Practice as to, in general.

Practice of the Taxing Master's office as to the taxation of costs not requiring service, or where service is dispensed with. *In re Harvey's Settlement*, 10 Hare, App. lxxv.

The plaintiffs were ordered to pay to the defendant so much of the costs "as had been occasioned" by one object of the suit, and a decree was made with costs as to the other objects. The Taxing Master considered the suit to be for two objects, and allowed the plaintiff one-half only of the general costs common to both:—Held, that he was right. *Hardy v. Hull*, 17 Beav. 355.

(b) What Charges are allowed.

Where the Court had ordered in a suit that money should be raised by mortgage, and the mortgage deed was submitted to counsel on behalf of the

mortgagee, the fees for settling the deed were directed to be allowed by the officer in taxing the mortgagee's costs, the mortgagee having been ordered to have his costs, charges and expenses. *Nicholson v. Jeyes*, 22 Law J. Rep. (N.S.) Chanc. 833; 1 Sm. & G. App. xiii.

Where, on the taxation of costs between party and party, the necessity of employing three counsel on one side has been considered, and the costs of the third counsel disallowed, the Court will not interfere with the discretion of the taxing Master. *The Midland Rail. Co. v. Brown*, 22 Law J. Rep. (N.S.) Chanc. 1092; 10 Hare, App. xlv.

According to the new practice under the 15 & 16 Vict. c. 86, s. 56, in case of sale by the Court, an abstract of title is submitted to counsel to prepare the conditions of sale. Counsel having made certain queries upon four sheets of the abstract, the vendor's solicitor charged 1l. 1s. for perusing the same, &c., and 4l. 6s. 8d. for a second fair copy of the abstract for the purchaser's solicitor. The taxing Master disallowed the first item, and reduced the second to 13s. 4d., which he allowed for recopying the four spoiled sheets of the abstract to render it fit to be sent to the purchaser's solicitor. On a petition to review, held, that the taxing Master was right, and that they were matters entirely within the discretion of the taxing Master. *Rumsey v. Rumsey*, 21 Beav. 40.

The solicitor usually charges for drawing the conditions of sale, though they are really drawn by counsel, and he is thereby remunerated for the trouble of answering counsel's queries. *Ibid.*

A second fair copy of abstract is not allowed except under special circumstances, as where the notes of counsel render the copy laid before him wholly unfit to go to the purchaser. *Ibid.*

(c) Solicitors' Bills.

A trustee is not a proper party to a petition presented by a *cestui que trust* for the delivery and taxation of bills of costs paid by a trustee. *In re Mole*, 22 Law J. Rep. (N.S.) Chanc. 455.

(N) RATE OF—PAUPER SUITS.

The Court of Chancery having given a married lady leave to sue *in forma pauperis*, on evidence that she could not procure a next friend, made a decree in her favour. One of the defendants appealed, but the appeal was dismissed, with costs:—Held, that the appellant defendant must pay the lady herself *dives* costs. *Wellesley v. Wellesley, The Countess of Mornington v. the Earl of Mornington*, 21 Law J. Rep. (N.S.) Chanc. 733; 1 De Gex, M. & G. 501.

A pauper asking for costs of an abandoned motion is entitled to *dives* costs. *Lady Mornington v. Keane*, 24 Law J. Rep. (N.S.) Chanc. 400.

(O) SECURITY FOR COSTS.

A married woman cannot be allowed to sue by a next friend who is incapable of giving security for costs. *Stevens v. Williams*, 21 Law J. Rep. (N.S.) Chanc. 57; 1 Sm. N.S. 545.

A new next friend of a *feme covert* having been substituted, the old next friend, who was a defendant to the suit, was ordered to give security for costs up to the time of his appointment, and proceedings

were stayed in the mean time. No security having been given, it was asked that in default of its being completed within a limited time, the bill might be dismissed, with costs, but the application was refused. *Payne v. Little*, 21 Law J. Rep. (N.S.) Chanc. 718; 14 Beav. 647.

The next friend of a married woman went to reside abroad. The defendant was held entitled either to security for costs from this next friend, or to have a new next friend appointed. *Alcock v. Alcock*, 21 Law J. Rep. (N.S.) Chanc. 740; 5 De Gex & Sm. 671.

Where a plaintiff goes out of the jurisdiction, pending a suit, for a purpose which is likely to keep him abroad for such a length of time that there is no reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs, the Court will direct him to give security for costs. *Blakeney v. Dufaur*, 22 Law J. Rep. (N.S.) Chanc. 389; 2 De Gex, M. & G. 771; 16 Beav. 292.

A plaintiff domiciled in Scotland, but having lodgings in London for no fixed time, will be required to give security for costs. *Ainslie v. Sims*, 22 Law J. Rep. (N.S.) Chanc. 834; 17 Beav. 57.

A plaintiff in equity who was also plaintiff in an action at law between the same parties, relating to the same subject-matter, having obtained leave to amend his bill on payment of costs, and having accordingly paid the costs and amended his bill, left his residence, and the return to a writ of *ca. sa.* issued against him for the costs of the action was that he could not be found. An application that the plaintiff might be ordered to give security for costs in the suit was refused, with costs, he having sworn that his absence was only for a temporary purpose. *Manby v. Bewicke*, 24 Law J. Rep. (N.S.) Chanc. 664.

The bond of "The British Guarantee Association," incorporated by act of parliament, held a sufficient security under an order to give security for costs. *Pleatov v. Johnson*, 1 Sm. & G. App. xx.

A plaintiff described himself as resident within the jurisdiction. By amendment he described himself as of the ship *W*, "now on a voyage to Sydney and back to London, master mariner." It not appearing when he would return within the jurisdiction, security for costs was ordered to be given. *Stewart v. Stewart*, 20 Beav. 322.

COSTS, IN ECCLESIASTICAL COURTS.

[See *Knapp v. Willesden*, title CHURCH, Pews.]

A guardian, in instituting or carrying on a matrimonial suit on behalf of a minor wife against her husband, must exercise sound judgment and discretion; if he carry on such suit without a just foundation, he will be condemned in the costs of the husband. Under no circumstances can a wife in a matrimonial suit be condemned in costs. *Brown v. Brown*, 2 Rob. Ec. Rep. 302.

On motion made for a decree calling upon the executor of a will, of which probate had been granted in 1835, to prove the same *per testes*, otherwise to shew cause why the probate should not be revoked, &c., the Court granted the motion on security being given for costs in 100*l.*, and observed—there is no

limitation, as to time, in requiring a will to be proved in solemn form. *In the goods of Topping*, 2 Rob. Ec. Rep. 620.

COSTS, IN CRIMINAL CASES.

- (A) COSTS OF PROSECUTION FOR ASSAULT.
- (B) CRIMINAL INFORMATION.
- (C) TAXATION.
- (D) AFTER REMOVAL BY CERTIORARI.
- (E) PRACTICE.

(A) COSTS OF PROSECUTION FOR ASSAULT.

[See 14 & 15 Vict. c. 55. s. 3.]

On an application for costs, under the stat. 14 & 15 Vict. c. 55. s. 3, in a case of assault, the Judge must be satisfied that the defendant was taken before magistrates for their summary decision of the case, and by them sent for trial at the assizes; but the production of the summons granted by one magistrate for the defendant to appear at N before such magistrate as should be then there, to answer the complaint and be further dealt with according to law, is sufficient for this purpose. *Regina v. M'Gavaron*, 3 Car. & K. 320.

(B) CRIMINAL INFORMATION.

Where, in a criminal information for a libel, the defendant recovers a verdict and judgment, he is entitled to recover from the prosecutor the costs sustained by reason of the information, under the 6 & 7 Vict. c. 96. s. 8, although the only plea upon the record is not guilty, and the Judge at the trial certifies, under the 4 & 5 W. & M. c. 18. s. 2. that there was reasonable cause for exhibiting such information. *Regina v. Latimer*, 20 Law J. Rep. (N.S.) Q.B. 129; 15 Q.B. Rep. 1077.

(C) TAXATION.

The Court of Queen's Bench has no jurisdiction to review the taxation, by the clerk of assize, of the costs of an indictment for libel tried on the Crown side at the assizes. *Regina v. Newhouse*, 22 Law J. Rep. (N.S.) Q.B. 127; 1 Bail C.C. 129.

(D) AFTER REMOVAL BY CERTIORARI.

Where a child was found in the streets with marks of violent beating and ill-treatment upon it, and it was taken to the workhouse of a union, and the guardians, being informed that its father had committed the injuries upon the child, preferred an indictment against him for a misdemeanour, which the defendant removed by *certiorari*, and was on the trial found guilty,—Held, that the guardians were, under 5 W. & M. c. 11. s. 3, entitled to their costs as civil officers, prosecuting upon account of a fact committed or done that concerned them as officers to prosecute. *Regina v. Anon.*, 20 Law J. Rep. (N.S.) M.C. 53; 15 Q.B. Rep. 1060.

In order to entitle a prosecutor to costs under that section, it is sufficient to shew that he prosecuted in pursuance of some moral obligation, and was not a mere volunteer. *Ibid.*

Where, upon a case reserved at the sessions, points are raised in favour of both sides, and the

Court of Queen's Bench confirms the order of Sessions and decides against all the points raised, neither party is entitled to costs under 5 Geo. 2. c. 19. s. 2. *Regina v. the Southampton Dock Co.*, 20 Law J. Rep. (N.S.) M.C. 228.

Upon removal of an indictment by *certiorari* from the Sessions to the Queen's Bench, the sureties in the recognizance became bound as sureties for the payment of the costs in the event of a verdict being found for the Crown, although there are no words to that effect in the conditions to the recognizance; the 3rd section of the 5 & 6 W. & M. c. 11. being, in effect, incorporated with the recognizance. The recognizance was stated to have been entered into before "J T, Esq., one of the Justices for the county of," &c.:—Held, good. *Regina v. Hodgson*, 21 Law J. Rep. (N.S.) M.C. 181; 7 Exch. Rep. 915.

An indictment for an assault was preferred by order of the Lord Mayor of London, and removed into this court by a *certiorari* obtained by the defendant, who was afterwards found guilty. The city solicitor had the conduct of the prosecution, and the costs, it appeared, would be defrayed out of a fund provided for such purposes by the corporation:—Held, that the costs of the prosecution could not be recovered, under the 5 W. & M. c. 11. s. 3; that section being intended to indemnify a prosecutor against costs which he would otherwise be liable to pay. *Regina v. Wilson*, 22 Law J. Rep. (N.S.) M.C. 53; 1 E. & B. 597; 1 Dears. C.C.R. 79.

(E) PRACTICE.

[See CERTIORARI.]

Where a side-bar rule has issued under the 5 & 6 W. & M. c. 11. s. 3, and an attachment is moved for by the prosecutor for non-payment of the costs, it is not necessary to have an affidavit that the prosecutors are the parties grieved. *Regina v. Hills*, 22 Law J. Rep. (N.S.) Q.B. 322; 2 E. & B. 176.

COUNSEL.

[See BARRISTER—COSTS.]

COUNTY.

DIVISION OF COUNTIES INTO DISTRICTS.

The 7 & 8 Vict. c. 92. enables the Queen by Order in Council to direct that any county shall be divided into districts, to each of which a separate coroner is to be appointed; and by section 6. where "any such county has been customarily divided into districts for the purpose of holding inquests during seven years before the passing of the act, and it shall seem expedient to Her Majesty that the same division of the county be made under the act, each of such districts shall be assigned to the coroner usually acting in and for the same district; but if it shall appear expedient to Her Majesty that a different division of such county be made, and any coroner shall present a petition praying for compensation for the loss of his emoluments arising out of such change, Her Majesty may direct the Lords of the Treasury to assess the amount of such compensation":—Held, that the power to direct compensation to be assessed extended only to those cases where a county had been customarily divided into

districts for seven years before the passing of the act, and where a different division is ordered under the act. *Regina v. Leckmere*, 20 Law J. Rep. (N.S.) Q.B. 169; 16 Q.B. Rep. 284.

COUNTY COURT.

[See COSTS—INFERIOR COURT.]

COVENANT.

[See ACTION—COMPANY—DAMAGES—DEED—LEASE.]

- (A) COVENANTS BY IMPLICATION.
- (B) VOLUNTARY COVENANTS.
- (C) DEPENDENT OR INDEPENDENT COVENANTS.
- (D) COVENANTS RUNNING WITH THE LAND.
- (E) DISCHARGE OF COVENANTS.
- (F) CONSTRUCTION OF COVENANTS.
 - (a) *In general.*
 - (b) *In Restraint of Trade.*
 - (c) *Auxiliary Covenant.*
 - (d) *As to Notice.*
- (G) ACTIONS AND SUITS.

(A) COVENANTS BY IMPLICATION.

[See the *Great Northern Rail. Co. v. Harrison*, title COMPANY.—*Bower v. Hodges*, post, (F) (c).]

A lease of certain coal mines contained the following covenant by the lessees:—"That they the said lessees, their executors, &c. or their servants or workmen, should and would, once in every month, or oftener, during the said term, at their own expense, draw to bank at some of the pits or shafts of the said collieries or coal mines thereby demised (provided that the same should be pits or shafts from which the coals of the thereby demised collieries should not be worked by an outstroke)"—*i.e.* by means of pits or shafts upon the surface of the adjoining mines—"and lay in some convenient place in that behalf, upon the said lands and premises of the said lessors, for the said lessors, their heirs or assigns, all the manure, compost and dung, to be made and bred by the horses employed underground in working the said demised collieries, and should spend and bestow so much thereof, and of all such dung, manure, compost, &c. as should be made, bred, or arise, in, under or upon the said estate and premises of the said lessors, or any part thereof, as might be necessary for that purpose, in dressing and manuring any lands or grounds which they the said lessees, their executors, &c. or any of them, might during the said term thereby granted, occupy as tenants to the said lessors or either of them, their or either of their heirs or assigns." The lease contained various clauses which spoke of the pits or shafts to be sunk on the demised premises, but did not contain any express covenant by which the lessees were either bound to sink a pit or work the mines; and it was also doubtful whether the lessees were empowered to work the demised mines by "outstroke":—Held, that no covenant could be implied from the preceding covenant, which imposed

upon the lessees, upon the mines being worked and manure being made within them, the obligation of sinking a pit or shaft upon the demised lands, although they might be liable for a breach of covenant in working the mines by outstroke. *James v. Cochran*, 21 Law J. Rep. (n.s.) Exch. 229; 7 Exch. Rep. 170: affirmed (in error), 22 Law J. Rep. (n.s.) Exch. 201; 8 Exch. Rep. 556.

A declaration in covenant recited a deed of the 2nd of March, 1841, whereby two pieces of land were conveyed to the defendants, subject to the performance by them of certain agreements: in this deed the piece of land in question was described as "a slip of land then being intended to be formed into a new course for the river Beult." The declaration then made profert of the deed of covenant upon which the action was brought, and stated that the defendants thereby covenanted with the plaintiffs that they, the defendants, should and would, within a reasonable time, "at their own costs and expense, make and cut the said intended new course for the said river Beult, and also, within such like reasonable time as aforesaid, divert the stream of the said river into the said intended new course for the same." It then went on to state a covenant to make a bridge over the intended new cut, for the plaintiffs' use, within a given time, and a covenant to make good the banks of the new cut, and, after the same should have been so made good, and the railway completed, to re-convey to A, one of the plaintiffs, the slip of land which should form the new course of the river, and also to fill up and level the then existing course, so far as the same should have been diverted. The declaration then charged breaches of covenant, in not making a new cut, in not diverting the stream of the Beult, in not constructing a bridge over the new cut, in not perfecting its banks, in not re-conveying to A the slip of land "with the water of the said river duly diverted into the said new course," and in not filling up the existing course of the Beult, "so far as the stream thereof should and ought to have been diverted as aforesaid." The defendants, after craving oyer of the deed of covenant, and setting it out *in hec verba*, demurred generally to the declaration. The deed, as set out on oyer, did not in express terms contain any covenant to make and cut the new course, or to divert the stream of the river; but it did contain express covenants to the effect of all the other covenants stated in the declaration:—Held, that there was no implied covenant on the part of the defendants to make the cut, and divert the stream of the Beult; and, consequently, that there could be no breach of the express covenants to build the bridge, &c. unless the cut was made, and the stream diverted. *Rashleigh v. the South-Eastern Rail. Co.*, 10 Com. B. Rep. 612.

Under a parol demise, the law will imply an agreement for quiet enjoyment, but not for good title. Where, therefore, a tenant under a written demise, containing no agreement for quiet enjoyment or for good title, having been distrained on by the grantee of an annuity charged upon the land prior to the demise, in an action against his landlord alleged in his declaration breaches for quiet enjoyment, and for good title, and obtained a verdict, the Court granted a new trial, on payment of costs by the plaintiff, to enable him to amend by striking out of the declara-

tion the allegation as to covenant for title. *Bandy v. Cartwright*, 22 Law J. Rep. (n.s.) Exch. 285; 8 Exch. Rep. 913.

(B) VOLUNTARY COVENANTS.

A voluntary covenant by a party to pay a sum of money to persons therein mentioned either in his lifetime or in a certain time after his decease is a valid covenant, and creates a valid debt though the deed was kept in the covenantor's possession till his death and its execution was unknown to the covenantees or *cestuis que trust*. *Alexander v. Brame*, 19 Beav. 436.

But, *quære*, whether a like covenant to pay to trustees a sum of money in trust for a charity is valid or void as a device to defeat the Statute of Mortmain when it must be satisfied out of chattels real. The Court directed the parties to try its validity by an action at law. *Ibid*.

(C) DEPENDENT OR INDEPENDENT COVENANTS.

In a deed by which A assigned to B for a term of years an exclusive licence to use a certain patent, after covenants for payment of certain sums in the nature of royalties, there was the following clause: "that if it shall happen in any year during the continuance of the term that the royalties or sums of money hereinbefore covenanted to be paid shall not amount to the sum of 2,000*l.* sterling, then B shall, within fourteen days after the expiration of any year in which it shall so happen, pay to A such a sum of money as with the said royalties will amount to 2,000*l.* for that year, or if B shall at any time make default in payment of such sum of money aforesaid within the time appointed for payment, then it shall be lawful to and for A, by writing, signed by him and indorsed on the said indenture or duplicate thereof, to declare that the said indenture and the licence and power thereby granted shall cease and determine:—Held, that this was not an absolute covenant by B to pay 2,000*l.* a year during the term, but only empowered A to put an end to the grant upon non-payment of that sum. *Tielens v. Hooper*, 20 Law J. Rep. (n.s.) Exch. 78; 5 Exch. Rep. 830.

A became tenant to B of a colliery and also of some farm land, at distinct rents. The lease contained very numerous covenants as to the payment of the rents, and as to the management of each property. The term created was for forty-two years; but the tenant was to have liberty to put an end to the term, on giving eighteen months' notice before the expiration of the first eight years, or of any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words: "Then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed,) this lease, and every clause and thing therein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, cease, determine, and be utterly void..... But, nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." The Court of Exchequer had held that this proviso did not make the performance of all the covenants a condition precedent to the tenant's power to put an end to the

lease (*Friar v. Grey*, 19 Law J. Rep. (n.s.) Exch. 368; 5 Exch. Rep. 584). The Court of Exchequer Chamber held, that the proviso did make the performance of the covenants a condition precedent (*Grey v. Friar*, 20 Law J. Rep. (n.s.) Exch. 365; 5 Exch. Rep. 597). The Lords were equally divided, and so the judgment of the Exchequer Chamber was affirmed. 4 H.L. Cas. 565.

An agreement made on the 21st of July 1849, between the plaintiff and the defendants, recited that the plaintiff had erected a factory on land of the defendants for the purpose of manufacturing patent fuel; that the defendants had advanced the plaintiff 2,500*l.* towards the erection of the factory and had agreed to grant the plaintiff a lease of the land and buildings, and to enter into conditions for the supply of coal for the manufactory and otherwise. The agreement contained the following clauses:—1. The defendants were to grant the plaintiff a lease of the land, &c. for the term of twelve years from the 25th of March last past, at a peppercorn rent, and the plaintiff was immediately thereupon to assign the lease by way of mortgage to the defendants, as security for the repayment of the advance and interest. 3. All the coals used by the plaintiff for the purpose of his manufactory during the term of twelve years were to be purchased of the defendants, provided they could supply him with the quantity that should be from time to time required by him, the coal to be good for the purpose of manufacturing steam fuel, and of that kind known as small coal; and that he was to use no other coal at the factory during the term than that bought of the defendants, except when he required more small coal than the defendants could supply him with, and except coal for the purposes of experiment. 4. The defendants were not to be liable to supply more than 500 tons per week, and if they should be unable from some substantial cause to supply small coal, they were to give the plaintiff six months' notice of such inability. The 5th and 6th clauses contained provisions for screening the coal and returning rubble coal. 7. If the coal delivered should not be of such quality as to be fit for the purposes of his manufactory, fourteen days' notice was to be given by the plaintiff. 10. The plaintiff was not to remove or take down the factory or machinery, but the same was to remain as security to the defendants for advances and for the price of the coal; and on the payment of the balance due during or at the end of the term, the company were to take the machinery and fixtures at a valuation. 11. In the lease to be granted to the plaintiff a covenant was to be inserted that the plaintiff was not to use the premises for any other purpose but the manufacture of patent fuel. 12. In case the plaintiff should cease to use the small coal of the defendants by reason of their inability to supply him, and should continue to occupy the premises, he was to pay 100*l.* a year for the rent of the premises. 13. That the agreement, determinable as aforesaid, should continue for the term of twelve years from this date. An action was brought by the plaintiff for a breach of the implied contract to supply 500 tons of small coal weekly:—Held, on demurrer to several pleas, first, that the granting of a lease by the defendants was not a condition precedent to supplying the coal; that the two covenants were independent; and that the "term of twelve years" in the third clause of the

agreement did not refer to the other twelve years for which the lease was to be granted. Secondly, that the inability to supply the coal from a substantial cause mentioned in the fourth clause was no excuse for not supplying it, unless the six months' notice of the inability had been given by the defendants. Thirdly, that the agreement referred only to coals required by the defendants for the manufacture of patent fuel. *Wood v. the Governor and Company of Copper Miners in England*, 22 Law J. Rep. (n.s.) C.P. 209; 14 Com. B. Rep. 428.

E H, by indenture, dated the 31st of May 1852, demised to the defendant for ninety-nine years a piece of land and four unfinished dwelling-houses, the defendant covenanting that he would on or before the 25th of June, finish the houses "under the direction and to the satisfaction of the surveyor of E H." Proviso, that in case of default, E H might enter "into the demised premises or any part thereof in the name of the whole, and repossess, retain and enjoy the same as of his former estate." By indenture of the 30th of July 1852, between E H and the plaintiff, after reciting a lease of the 18th of February 1852, whereby S W demised to E H certain land (including the land in question), and that E H had made under-leases, E H assigned to the plaintiff the leasehold premises "and also the estate, right, title and interest of him the said E H in, to and out of the said premises," for the residue of the term of years granted by the aforesaid indenture of lease, subject nevertheless to the under-leases. The defendant not having finished the houses in time, the present ejectment was brought. No surveyor had been appointed:—Held, first, that the appointment of a surveyor was a condition precedent to the liability of the defendant to finish the houses: secondly, that the 8 & 9 Vict. c. 106. s. 6. does not authorize the assignment of a right of entry for condition broken, but relates only to an original right where there has been a disseisin or where the party has a right of entry and nothing but that remained. *Hunt v. Bishop*, 22 Law J. Rep. (n.s.) Exch. 337; 8 Exch. Rep. 675.

Semble—that there existed a right of re-entry, and that the forfeiture was waived by the assignment. *Ibid.*

The E. C. Railway Company by deed covenanted with the defendants to purchase, and the defendants covenanted to supply, all the coke required by the company for working their lines; the company to take and the defendants to supply, for seventeen years, 550 tons of coke per week at B, and 100 tons per week at C at least. If the company should require more coke, they engaged to take the same from the defendants, and if the consumption should be materially diminished, the company was to give three months' notice to the defendants:—Held, that the covenant by the company to take all it required was not a condition precedent to the defendants' liability to supply, but that the covenants were independent. *The Eastern Counties Rail. Co. v. Philipson*, 24 Law J. Rep. (n.s.) C.P. 140; 16 Com. B. Rep. 2.

Therefore, in an action, by the company, for not supplying the 550 tons and 100 tons when required, a plea to the effect that the company was not ready and willing to take all the coke it required, but wrongfully took and purchased extra supplies from other persons, without the knowledge or permission of the defendants, was held bad. *Ibid.*

(D) COVENANTS RUNNING WITH THE LAND.

The mortgagor and mortgagee of one undivided moiety, and the owner of the other, joined in a demise of the whole premises to G for twenty-one years; G covenanting with the three jointly and severally to pay (not saying to whom) the reserved rent. G entered, and having become bankrupt, his assignees accepted the lease:—Held, on the authority of *Wakefield v. Brown*, that the assignees were liable in an action, at the suit of the three lessors, for rent due since their acceptance of the lease. *Magnay v. Edwards*, 22 Law J. Rep. (N.S.) C.P. 170; 13 Com. B. Rep. 479.

Where an original agreement for the sale of a piece of land contained a clause that no building should be erected beyond a stated line, and the other part of the land was conveyed by deed reciting the original agreement, the clause was held to bind the land in whosoever hands it might come; and, therefore, the Court confirmed an order for an injunction granted by the Court below, at the instance of the assignee of the piece of land comprised in the original agreement against the assignee of the land contained in the subsequent deed, restraining the latter from building on his land beyond the stated line. *Cole v. Sims*, 23 Law J. Rep. (N.S.) Chanc. 258; 5 De Gex, M. & G. 1: affirming 23 Law J. Rep. (N.S.) Chanc. 37; Kay, 56.

Semble—that a clause in the original agreement, that for every breach of covenant a specified sum should be paid for liquidated damages, does not exclude the jurisdiction of the Court to try the question, whether it be penalty or liquidated damages. *Ibid.*

(E) DISCHARGE OF COVENANTS.

[By parol, see *Ellen v. Topp*, title APPRENTICE, *ante*, page 27—also *Healey v. Spence*, title ACCORD AND SATISFACTION, *ante*, page 2.]

Where under an executory contract for the manufacture and supply of goods from time to time, to be paid for after delivery, the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete his contract, he may, without manufacturing and tendering the rest of the goods, sue the purchaser for breach of contract, and will be entitled to a verdict, on pleas traversing allegations that he was ready and willing to perform the contract, and that the defendant refused to receive the residue of the goods, and prevented and discharged the plaintiff from manufacturing and delivering them. *Cort v. the Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 460; 17 Q.B. Rep. 127.

A declaration in covenant stated a contract under seal, whereby the plaintiffs agree to supply to the defendants (a corporation) 3,900 tons of cast-iron chairs in certain quantities per month from February 1847 to May 1848; payments to be made by the defendants a month after delivery; and the engineer to have power from time to time to alter the deliveries in any way or proportion. It then averred that although the defendants accepted a portion of the said chairs, and although the plaintiffs were ready

and willing to perform the said contract until the refusal and discharge by the defendants thereafter mentioned, yet the defendants wholly refused to accept or receive the residue of the said chairs, and wholly prevented and discharged the plaintiffs from supplying the said residue, and from the further performance of his contract. Issues were joined on pleas denying that the plaintiffs were ready and willing to perform his contract; and that the defendants refused to accept or receive the residue of the chairs, or prevented or discharged the plaintiffs from supplying the same, or for the performance of their contract. The evidence was, that soon after the delivery commenced, the engineer, who had a general authority to act on behalf of the company, requested them to be made more slowly, and afterwards desired the plaintiffs to send all the chairs then made, but not to make any more. The plaintiffs accordingly discontinued making any more, but were in a position to have supplied the specified quantities if required so to do:—Held, that the plaintiffs were entitled to the verdict on both issues. *Ibid.*

The plaintiffs had contracted with other parties for the supply of some of the chairs at a price rather above the average price to be paid to them by the defendants, and were obliged to pay 500*l.* to get off their sub-contract; and they had also entered into arrangements with iron-founders for the supply of iron, and had built a large foundry for the manufacture of the chairs:—Held, that these matters were properly taken into consideration in assessing the damages. *Ibid.*

(F) CONSTRUCTION OF COVENANTS.

[As to extent of liability, see title INDEMNITY, and *Yates v. Dunston*, title DAMAGES (C).—What amounts to a breach, see *Ellen v. Topp*, title APPRENTICE, *ante*, page 27.—And see *Bland v. Crowley*, and *Gage v. the Newmarket Rail. Co.*, title COMPANY.]

(a) In general.

A vendor conveyed to a purchaser a piece of land with a house, being No. 7 in a particular row of houses called Windsor Terrace, on the west side of a road, and covenanted with the purchaser that no building, excepting monuments and tombs should be erected on any part of the land belonging to the vendor, "lying on the east side of the said terrace, and opposite to the plot of land thereby conveyed:—"Held, affirming the decision of one of the Vice Chancellors, that the covenant applied only to that part of the vendor's land which was opposite to, and of the same width as, the piece conveyed. *Patching v. Dubbins*, 23 Law J. Rep. (N.S.) Chanc. 45; Kay, 1.

The purchaser having filed his bill for an injunction to restrain the erection of buildings on the vendor's land, and the Court having dismissed it, the Vice Chancellor held, that as the construction of the covenant had been decided against the plaintiff, he must, the question not arising on a will, pay the costs; and the Appeal Court affirmed the same, but gave no costs of the appeal. *Ibid.*

A B covenanted with his lessee for quiet enjoyment as against any person "claiming by, from or under" him. An eviction by a prior appointee of A B and C D is a breach of the covenant:—Held, that the case was not altered by the gran tto

the lessee being "as far as in his power lay, or he lawfully might or could." *Calvert v. Sebright*, 15 Beav. 156.

(b) *In Restraint of Trade.*

A declaration in covenant stated that the plaintiff and the defendant had carried on, in partnership, the business of publishers in various places in Great Britain and Ireland at a greater distance than 150 miles from the General Post Office, London, of which a certain branch was known as the canvassing trade, consisting of publishing in parts works in some of which the copyright had ceased, and of employing canvassers to go from house to house to solicit purchasers for such publications, and that upon the dissolution of the partnership the defendant covenanted (*inter alia*) that he would not at any time thereafter carry on that part of the trade of a publisher, known as the canvassing trade, within the distance of 150 miles from the General Post Office, London. Breach, that the defendant carried on the canvassing trade in London, and within 150 miles of the General Post Office:—Held, that the restraint was not unreasonable. *Tallis v. Tallis*, 22 Law J. Rep. (N.S.) Q.B. 185; 1 E. & B. 391.

Seemle, also, that a part of the covenant which restrained the defendant from carrying on the canvassing trade in Edinburgh or Dublin, or within fifty miles of either of them, or in any place in Great Britain or Ireland where the plaintiff or his successors in the said business might, by themselves or their agents, at such time carry on the said trade, or might have carried it on within six months preceding, was not unreasonable. *Ibid*.

Such a covenant is valid unless it plainly appears that a restriction is imposed by it beyond what the interest of the plaintiff requires. *Ibid*.

The plea stated that a small number only of the books in which the copyright had ceased had been published by the plaintiff and the defendant during the partnership, and that at the time of making the covenant it was not probable, nor was there any intention on the part of the plaintiff, that he or his successors in business would publish the residue of such books, except a very small number, and that a large proportion of the residue might be published by the defendant with great advantage to the public; that the canvassing trade extended to all works, whether their authors were living or dead, published in parts, and sold by canvassers employed to go from house to house to solicit purchasers, and that during the partnership there were a large number of places within 150 miles of the General Post Office, where the plaintiff and the defendant had not carried on the business of publishers or the canvassing trade; and that it was not reasonably necessary for the protection of the plaintiff in the said business that the defendant should not at any time during the remainder of his life carry on the canvassing trade with respect to such of the before-mentioned works as had not been before published by the plaintiff, either alone or jointly with the defendant, and with respect to which there never had been any intention or probability that the plaintiff would publish them, or with respect to works of living authors never published or sold in the canvassing trade by the plaintiff:—Held, upon demurrer to the plea, that even if the reasonableness of the restriction were to be considered

with reference to the facts stated in the declaration and plea, the plea was no answer; as it did not shew plainly that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's publications were excluded. *Ibid*.

The question whether a contract is void as contrary to public policy is for the Court, when the circumstances raising the question are conceded; and, *semble*, that the plaintiff in his declaration, or the defendant in his plea, may introduce averments of circumstances for the purpose of maintaining either side of that proposition. *Ibid*.

In the conveyance of a house at Kemp Town, Brighton, a covenant was contained that the purchaser should not carry on any trade, business, or calling in the said house, or permit the same to be used to the annoyance, nuisance or injury of any of the houses in Kemp Town:—Held, that keeping a girls' school was a breach of the covenant; and that the Court would interfere by injunction, notwithstanding other schools had been permitted to be carried on upon the same property in houses which were subject to a similar covenant. *Kemp v. Sober*, 20 Law J. Rep. (N.S.) Chanc. 602; 1 Sim. N.S. 517.

On a sale by a wine-merchant of his stock in trade and business, he covenanted that he would not set up or carry on at C, or in any other place within the counties of C, A or M, the business of a wine and spirit merchant. The vendor gave up his place of business at C, and had no place of business within the prescribed district, but he solicited and obtained orders within it:—Held, by *Lord Cranworth*, confirming the decision of the *V. C. Kindersley*, that the question whether this was a breach of the covenant was too doubtful to entitle the plaintiff to an injunction; but held by the *Lord Justice Knight Bruce* and the Court of Queen's Bench, that it was a breach of the covenant. *Turner v. Evans*, 2 De Gex, M. & G. 740.

(c) *Auxiliary Covenant.*

The declaration stated that by deed, A the patentee of machinery for making pipes granted B and his assigns the exclusive licence to manufacture iron pipes, yielding a royalty of so much for every ton of pipes made or sold by B or his assigns, "to be paid" within twenty-one days of the end of each quarter, B covenanting for himself and assigns to render an account in writing within seven days of the end of each quarter, of the amount manufactured, and to pay within twenty-one days the sum which should appear due on the face of the account; that B transferred his interest in the licence to the plaintiff, who transferred it to M and R in trust for the defendants, who were to carry on business as the Welded Iron Tube Company; that the defendant covenanted with the plaintiff to perform the covenants made by B to A in the first deed; that the Patent Welded Iron Tube Company made quantities of iron tubes in pursuance of the licence, whereby royalties became due to the plaintiff. Breaches, that the defendant did not pay the royalties, and did not render an account:—Held, that the declaration was good on general demurrer, although it did not directly aver that any iron pipes were made by B or his assigns; and that the covenant to render an account was only auxiliary to and did not controul the

preceding covenant to be implied from the words "to be paid." *Bower v. Hodges*, 22 Law J. Rep. (N.S.) C.P. 194; 13 Com. B. Rep. 765.

(d) *As to Notice.*

The declaration stated that the plaintiff agreed with the defendants to construct sewers, lay pipes, build engine-house, &c., but the defendants would not suffer him to complete them. Plea—that it was covenanted that the defendants' engineer should have power to direct the way in which various portions of the works should be done, and if it should appear to him that they were not properly executed and with due expedition, it should be lawful for him to give notice to the plaintiff to alter any improper or to supply proper materials and labour, and with due expedition to proceed therewith; and if the plaintiff should within seven days fail to comply, the engineer might take the work out of his hands; that the engineer gave notice to the plaintiff to supply proper and sufficient materials and labour for the due prosecution of the works, and with due expedition to proceed therewith; that the plaintiff for seven days refused to comply, whereupon the engineer took the work out of the plaintiff's hands. Replication, that the notice to the plaintiff was "to supply all proper and sufficient materials and labour for the due prosecution of the said work, and with due expedition to proceed therewith":—Held, that the notice was sufficiently specific. *Pauling v. Mayor, &c. of Dover*, 24 Law J. Rep. (N.S.) Exch. 128; 10 Exch. Rep. 753.

(G) ACTIONS AND SUITS.

[By and against assignees of covenants, see title LEASE. And see title ACTION, FORM OF.—*Cort v. the Ambergate, &c. Rail. Co.*, ante, (E).]

By deed, dated the 30th of March, made between J P of the first part, the plaintiffs (a corporation) of the second part, and the defendants of the third part, J P covenanted with the plaintiffs that he would, "on the execution of these presents," commence building a gas-holder tank, and finish it within three months from the date of the deed, or in default thereof he would forfeit a certain sum; and the defendants, as sureties for J P, covenanted that J P should perform his covenants, "which should be subsisting and not annulled," and in default thereof the defendants should pay the plaintiffs such sum, not exceeding 300*l.*, as liquidated damages, as J E should adjudge to be reasonable. To an action by the plaintiffs to recover the sum adjudged by J E to be reasonable for J P's default, the defendants pleaded, first, that the plaintiffs did not execute the deed until after the expiration of the three months; and, secondly, that before the adjudication by J E the defendants and J P revoked any submission to arbitration contained in the deed:—Held, on demurrers to the pleas, that the first plea was bad, for that the execution of the deed by the plaintiffs was not a condition precedent to the commencement and completion of the works by J P; and that the second plea was bad, for that the adjudication by J E was merely an appraisal, and not an award as to any matter in dispute between the parties. *The Northampton Gas-light Co. v. Parnell*, 24 Law J. Rep. (N.S.) C.P. 60; 15 Com. B. Rep. 630.

A in 1842 conveyed land to B, and entered into a covenant for quiet enjoyment, but not into any covenants for title. B mortgaged to C in the same year. In 1846, an ejectment was brought, which B defended, but was evicted. B then sued A at law for damages upon the covenant, who pleaded that at the time of eviction the legal estate was in C the mortgagees. B submitted to the plea, and afterwards A, the original vendor, paid off the mortgage, and obtained possession of the mortgage deed, whereupon was an acknowledgment of the receipt of the mortgage money, and that the same was in full discharge of the same, and interest, and all right of action or demand of C the mortgagee against A in respect of the covenants in the conveyance to B. B filed a bill against A, praying that B might be declared entitled to the benefit of the covenant, and that a reference might be sent to the Master to assess the damages sustained by him by reason of the breach of it. The Court below dismissed the bill: but, on appeal:—Held, that the plaintiff was entitled to have the damages assessed, and gave him leave to bring an action upon the covenant, and restrained A, the defendant, the original vendor, from setting up the mortgage deed or indorsement by way of defence. *Thornton v. Court*, 22 Law J. Rep. (N.S.) Chanc. 361; 3 De Gex, M. & G. 293.

CRIMINAL LAW.

[See the various titles of offences. Also titles COSTS IN CRIMINAL CASES—INDICTMENT—JURIES OF THE PEACE—PLEADING—PRACTICE—SESSIONS.]

CROWN.

[See COSTS.]

Rights of.

The right of the Crown to the sea-shore is limited by the line reached by the average of the medium high tides between the spring and the neap, in each quarter of a lunar revolution during the whole year. *Attorney General v. Chambers, Attorney General v. Rees*, 23 Law J. Rep. (N.S.) Chanc. 662; 4 De Gex, M. & G. 206.

CROWN CASES RESERVED.

Where the assizes are held before two Judges, and the one of them who tries a criminal case, after reserving a point for the consideration of the Court of Criminal Appeal, dies before the case is stated, the other Judge may state and sign the case. *Regina v. Featherstone*, 23 Law J. Rep. (N.S.) M.C. 127; 1 Dears. C.C.R. 369.

CURTESY.

There is no estate by the curtesy issuing out of an estate *pur auter vic.* *Stead v. Platt*, 18 Beav. 50.

CUSTOM AND PRESCRIPTION.

There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected. *Dyce v. Hay*, 1 Macq. H.L. Cas. 305.

Semble—that where a claim in the nature of a servitude or easement is incapable of judicial controul and restriction, it cannot be sustained by prescription. *Ibid.*

It does not follow that rights sustainable by grant are necessarily sustainable by prescription. *Ibid.*

The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. *Ibid.*

Where new inventions come into use they may have the benefit of servitudes and easements; the law accommodating its practical operation to the varying circumstances of mankind. *Ibid.*

Special order for the payment of costs. *Ibid.*

Trespass for breaking and entering certain closes of the plaintiff and taking sand therefrom. Pleas, setting up a right by prescription for thirty and sixty years respectively, for the surveyors of the parish for the time being to take the sand, &c. from the waste land within the parish for the purpose of repairing the highways:—Held, bad. *Padwick v. Knight*, 22 Law J. Rep. (N.S.) Exch. 198; 7 Exch. Rep. 854.

Similar pleas, setting up an immemorial right of all persons residing in the parish whose office or duty it was to repair the highways:—Held, bad. *Ibid.*

Similar pleas, averring that the waste land was between high and low water mark:—Held, bad. *Ibid.*

A right claimed by the inhabitants of a township to enter upon the land of a private person and take water from a well therein for domestic purposes is an easement and not a profit *à prendre*, and may, therefore, properly be claimed by custom. *Race v. Ward*, 24 Law J. Rep. (N.S.) Q.B. 153; 4 E. & B. 702. And see *Bland v. Lipscombe*, 24 Law J. Rep. (N.S.) Q.B. 155, n.; 4 E. & B. 712, n.

CUSTOM OF LONDON.

The widow of a freeman of London is barred of her customary part by an ante-nuptial settlement, whereby the parents of the husband and wife make a provision for her after the death of her husband, of which she takes the benefit. *Hutchinson v. Newark*, 17 Beav. 393.

The same rule applies, though the wife be an infant on the marriage and the husband becomes a freeman afterwards. *Ibid.*

CUSTOMS.

[See REVENUE.]

DAMAGES.

[The decisions affecting damages, except as to purely general principles, will be found under title ACTION, and the various titles of Tort and Contract.]

(A) FOR WHAT RECOVERABLE.

- (a) *In general.*
- (b) *Loss of Time and Profits.*
- (c) *Mental Suffering.*
- (d) *Legal and actual Injury.*

(B) SUBSTANTIAL OR NOMINAL.

(C) CRITERION AND MEASURE OF.

(D) DUTY OF JUDGE TO DIRECT JURY AS TO.

[See CARRIER (E)—PRACTICE, New Trial.]

(E) PLEADING.

- (a) *Plea in Reduction of Damages.*
- (b) *Plea to the Damages only.*

(A) FOR WHAT RECOVERABLE.

(a) *In general.*

The plaintiffs, who had agreed to supply the defendants with a quantity of railway chairs, had contracted with other parties for the supply of some of the chairs at a price rather above the average price to be paid to them by the defendants, and were obliged to pay 500*l.* to get off their sub-contract; and they had also entered into arrangements with iron-founders for the supply of iron, and had built a large foundry for the manufacture of the chairs:—Held, that these matters were properly taken into consideration in assessing the damages. *Cort v. the Ambergate Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 460; 17 Q.B. Rep. 127.

(b) *Loss of Time and Profits.*

The damages recoverable for a "railway accident" are confined to compensation for bodily pain and suffering, and the amount of the medical attendant's bill; and damages for loss of time and profits are not recoverable. *Theobald v. the Railway Passengers Assurance Co.*, 23 Law J. Rep. (N.S.) Exch. 249; 10 Exch. Rep. 45.

(c) *Mental Suffering.*

In an action by the personal representative of a deceased person to recover damages for his death under 9 & 10 Vict. c. 93. the jury, in assessing the damages, are confined to injuries of which a pecuniary estimate can be made, and cannot take into their consideration the mental suffering occasioned to the survivors by his death. *Blake v. the Midland Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 233; 18 Q.B. Rep. 93.

(d) *Legal and actual Injury.*

[See *Embrey v. Owen*, title WATER AND WATER-COURSE.]

No action lies for commencing and prosecuting an action maliciously and without reasonable or probable cause in the name of a third party, without an allegation shewing that legal damage has been sustained. *Cotterell v. Jones*, 21 Law J. Rep. (N.S.) C.P. 2; 11 Com. B. Rep. 713.

(B) SUBSTANTIAL OR NOMINAL.

Trespass to the plaintiff's close. The plaintiff proved by parol that he was in possession of the close at the time of the trespass (the 16th of July) under a written agreement from W, which was not produced. The defendant produced a lease of the same close from W, made and taking effect upon the 16th of July:—Held, that in order to entitle the plaintiff to more than nominal damages, he was bound to shew the duration of his interest, which he could only do by the written instrument. *Twyman v. Knowles*, 22 Law J. Rep. (N.S.) C.P. 143; 13 Com. B. Rep. 222.

In an action against bankers for refusing to pay a trader's cheques, they having at the time of refusal sufficient assets of the trader, the latter may recover substantial damages without proof of actual damage. *Robin v. Steward*, 23 Law J. Rep. (N.S.) C.P. 148; 14 Com. B. Rep. 595.

(C) CRITERION AND MEASURE OF.

Where, by a contract for delivery of goods, payment is to be made by bills which are dishonoured before the goods are delivered, the parties are then placed in the same position as if the bills had never been given, or the contract had been to pay in ready money, and the vendee can recover only the difference between the contract price and market price of the goods. *Valpy v. Oakley*, 20 Law J. Rep. (N.S.) Q.B. 380; 16 Q.B. Rep. 941.

Defendants having converted a vessel before she was finished, and having finished her, the plaintiffs were held entitled to recover, as damages in trover, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor, as special damage, the value of freight which the plaintiffs might have earned with her if R had completed her, and delivered her to them. And, *per Jervis, C.J.*, *semble*, that a proper way to estimate the value of the vessel at the time of the conversion would be to ascertain her value at the place where she was built, when completed according to the original contract, and to deduct therefrom the amount which it would have been necessary to lay out after the conversion in order to complete her according to the contract. *Read v. Fairbanks*, 22 Law J. Rep. (N.S.) C.P. 206; 13 Com. B. Rep. 692.

In an action by the plaintiffs for the non-fulfilment of a contract by the defendants to finish certain machinery within a reasonable time, it was averred, as special damage, that the plaintiffs had thereby been prevented from fulfilling a contract with third parties and lost the profits thereon:—Held, that the jury, although not bound to assess the damages at the amount of such profits, might do so if satisfied by reasonable evidence that the plaintiffs would have obtained such profits but for the breach of contract by the defendants. *Waters v. Towers*, 22 Law J. Rep. (N.S.) Exch. 186; 8 Exch. Rep. 401. [And see *Hadley v. Baxendale*, title CARRIER (E).]

Held, also, that such damages were equally recoverable although the contract which would have produced the profits could not have been enforced at law, because not in compliance with the Statute of Frauds, and although it was made by the three plaintiffs with two of the plaintiffs carrying on a separate business. *Ibid*.

Where A brought an action against B for not re-delivering certain mining shares lent by A to B, which were to be re-delivered on a certain day, and B pleaded his discharge under the Insolvent Act, it was admitted that the proper measure of damages was the price of the shares at the time of the trial. *Owen v. Routh*, 23 Law J. Rep. (N.S.) C.P. 105; 14 Com. B. Rep. 327.

The defendant became the lessee of premises, which at the time of taking them were old and in bad repair, under a demise containing a covenant to repair. The premises were destroyed by fire. The cost of reinstating them would amount to 1,635*l.*, but when so reinstated they would be more valuable by 600*l.* than they were at the time of the fire:—Held, that the defendant was liable to pay the sum of 1,035*l.* only as damages for the non-repair, that being the amount of the plaintiffs' loss. *Yates v. Dunster*, 24 Law J. Rep. (N.S.) Exch. 226; 11 Exch. Rep. 15.

(D) DUTY OF JUDGE TO DIRECT JURY AS TO.

[See PRACTICE, New Trial.]

(E) PLEADINGS.

(a) *Plea in Reduction of Damages.*

A breach by the plaintiff of the contract sued upon, since action brought, cannot be pleaded or given in evidence in reduction of damages, to avoid circuity of action. *Bartlett v. Holmes*, 22 Law J. Rep. (N.S.) C.P. 182; 13 Com. B. Rep. 630.

(b) *Plea to the Damages only.*

A declaration stated that, by a deed between B, of the first part, the defendants of the second part, and the plaintiffs of the third part; after reciting that B had been appointed collector of the poor-rate of the parish of D, and that he had been required to find security for the faithful discharge of his duties, and that the defendants had consented to give such security, the defendants as surety did covenant with the plaintiffs that B should at all times, while he continued in his said office, faithfully account for all sums which he should receive; and the defendants further covenanted, "that a certificate under the hand of the auditor of the district stating the amount of loss, should be conclusive evidence against the defendants of the truth of the certificate," and that the policy had become forfeited thereby to the amount of the loss stated in such certificate, and should form a valid and binding charge and claim against the defendants, without any further or other proofs being given by the plaintiffs in any action of the amount of such loss; or that the same had been occasioned through the fault of B; the declaration then averred "that, after the making of the deed, B received divers monies which he did not account for, and that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises to the amount of 800*l.*, and alleged as a breach the nonpayment of that sum by the plaintiffs. Plea to the declaration, so far as related to the auditor having certified, that for thirteen years before making the deed, B was collector, and during that time had not accounted for divers sums which he received, and by reason thereof was, at the time of making the deed, in arrear, and that the loss certified

was the amount of loss occasioned as well by such arrears as by the non-accounting in the declaration mentioned, without this, that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises in the declaration mentioned to the amount of 800*l.*:—Held, on special demurrer, that the plea was bad, as being a plea to the damage only. *The Guardians of the Poor of Romford Union v. The British Guarantee Association*, 7 Exch. Rep. 792.

DEATH.

The retainer of an attorney is determined by the death of his client. *Whitehead v. Lord*, 21 Law J. Rep. (n.s.) Exch. 239; 7 Exch. Rep. 691.

Ejectment, in 1849, by reversioner for premises demised, in 1801, for three lives, and twenty-one years. Two of the *cestuis que vie* had died before 1828. No witness was called who had ever known the third; and, except the mention of him in the lease (which described him as aged ten years), there was no proof that he had ever existed. No evidence of search for him was given:—Held, that, to raise the presumption of his death, there should have been evidence that he had not been heard of by those persons who would naturally have heard of him had he been alive, or that search had been ineffectually made to find such a person; and that the mere fact that no witness called had heard of him was not sufficient. *Doe d. France v. Andrews*, 15 Q.B. Rep. 756.

Held, also, that an entry in the parish book, kept at the parish church, of a burial in the work-house cemetery within the parish, was evidence of the death of the person named, though it appeared that the incumbent sanctioned the entries in the book on the faith of statements made by others, and not from his personal knowledge of the burials. *Ibid.*

DEBENTURES.

[As to stamps on, see 16 & 17 Vict. c. 59. Contract for sale of, see *Toppin v. Lomas*, FRAUDS, STATUTE OF. And see ACTION—MORTGAGE.]

The plaintiff advanced money to the defendant on the collateral security of certain debentures in the following form, varying only in the number:—"No. 5252. On the 15th of July 1850. The Governor and Company of Copper Miners in England promise to pay to *H. J. Enthoven or order*, at &c., the sum of 500*l.* and further to pay to the holder of the warrants annexed on presentment thereof, as they shall fall due, interest on the said sum of 500*l.* at the rate of 5*l.* per cent. per annum." The documents were dated on the 15th of July 1845. They were signed by the secretary and were under the common seal of the company, which had been incorporated. When sealed by the company there was a blank for the name of the payee, which the defendant at the time of transferring them to the plaintiff, filled up with the words "*Enthoven or order*" and indorsed them. To each debenture were affixed several warrants which, differing only in date, ran thus:—"The Governor and Company of Copper Miners in England. Warrant for 12*l.* 10*s.* for one half-year's interest on

debenture No. 5252, due the 15th of July 1849. *W I, Secretary.*" There was a separate warrant annexed for each half-yearly payment of interest that would fall due on the debenture. When payment of interest was demanded the warrant for the instalment then due was detached and presented separately to the company's bankers. Subsequently, the interest not being paid, the plaintiff sued the defendant to recover his money. The declaration contained special counts on the debentures, and a count for money lent. On the trial the debentures with some of the warrants annexed and also a separate warrant were put in evidence. The debentures were all stamped with a 12*s.* 6*d.* promissory note stamp. The separated warrant had no stamp. Held, that the debentures were not properly stamped, and were void instruments by reason of the blank left for the name of the payee, but were admissible in evidence to shew that they were worthless securities in support of the count for money lent. *Enthoven v. Hoyle* (in error), 21 Law J. Rep. (n.s.) C.P. 100; 13 Com. B. Rep. 373.

Held, further, that the separated warrant was not a promissory note and did not require any stamp. *Ibid.*

Trustees were empowered under a local act to purchase land, &c. for the purpose of making public docks, and to raise funds by borrowing money on the security of the rates and tolls to be levied under the act, and of any property vested in the trustees by virtue of the act, and the mortgages executed for this object were to be pursuant to a certain form, and to be registered. In the course of the execution of the works a large quantity of tools, machinery, and materials were purchased by the trustees for the purposes of the works, which they subsequently mortgaged to the contractor by two deeds which were not in the form given by the statute or registered. Subsequently these materials, tools, and machinery were seized under an execution against the company:—Held, that the mortgage was valid, and the materials, &c. were not liable to be seized. *M'Cormick v. Parry*, 21 Law J. Rep. (n.s.) Exch. 143; 7 Exch. Rep. 355.

The Herne Bay Pier Act (6 & 7 Will. 4. c. cxii.) by section 9, enables the company to borrow money on bond, under their common seal, and the money is to be made payable in such manner, at such time, and at such rate of interest, as they shall think proper; and the rents and profits of the undertaking are to be a security for the money so borrowed, with interest, and all bondholders shall be equally entitled to a claim or lien on the said rents and profits in proportion to the sums thereby secured, and without any preference by reason of the priority of date of any such securities, or any other account whatever:—Held, that this clause did not prevent a creditor, to whom the company had given a bond under their common seal, conditioned for the payment of the principal money at a fixed day, and interest in the mean time, from suing the company for the penalty of that bond; the clause at the end of the section only applying to prevent a creditor recovering under his judgment in preference to others. *Bolckow v. the Herne Bay Pier Co.*, 22 Law J. Rep. (n.s.) Q.B. 33; 1 E. & B. 75.

A railway company which, by their acts of parliament were empowered to borrow money on mort-

gage, borrowed money of H. By the mortgage deed, which was in the appointed form, the company, in consideration of the sum lent, assigned to H the undertaking, and all the estate, &c. of the company therein, to hold to H until the sum, with interest, was satisfied; and added the words, "the principal sum to be paid on the 1st of January 1851." The company did not pay it when due. By the local act applicable to the case, the stat. 7 & 8 Vict. c. lxxxv., it is provided in section 49, that the company may fix the period for the repayment of the principal sum and interest; and in such case they are to cause the period to be inserted in the mortgage deed, on the expiration of which period, it is enacted, that the principal and interest shall be paid to the party entitled to the mortgage. Section 52. states, "that if the principal and interest be not paid within six months after the same has become payable, and after demand thereof in writing, the mortgagee may sue for the same, or if his debt amount to 5,000*l.* he may alone, and if not of that amount, he may, in conjunction with other creditors whose debts with his amount to 10,000*l.*, require the appointment of a receiver:—Held, first, that the mortgage deed on its face imported a covenant by the company to pay the money. Secondly, that where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument, which on its face imports a covenant for repayment, if money be so borrowed and so secured, and not duly repaid, an action may be maintained against the company on a breach of the covenant, although there are no specific statutory provisions enabling the company to bind themselves by such a covenant, and giving a right of action against them; consequently, that H might maintain an action against the company on the mortgage deed, although he had not made any demand in writing. And further, that section 52. of the local act, in accordance with section 53. of the Companies Clauses Consolidation Act, the stat. 8 & 9 Vict. c. 16, did not give a right of action for the principal money, but only recognized it as already existing, and provided that when there had been a default in payment for six months and a demand in writing, the lender might either sue or have a receiver appointed. *The Eastern Union Rail. Co. v. Hart* (in error), 22 Law J. Rep. (n.s.) Exch. 20; 8 Exch. Rep. 116.

DEBT, ACTION OF.

[See *Tabacco-pipe Makers Co. v. Loder*, title LIMITATIONS, STATUTE OF—Plea of *nil debet*, see Reg. Gen. Trin. term, 1853, r. 11, 22 Law J. Rep. (n.s.) li; 1 E. & B. App. lxxx.]

A declaration in debt stated that whilst the defendant was assignee of a term of years, to wit, on the 25th of March 1849, parcel of the rent for three quarters of a year then elapsed, became in arrear, and unpaid. Plea, except as to 7*l.* 10*s.* paid into court, never indebted. The defendant became assignee in May 1850, and the rent was paid (including the sum paid into court) up to the 29th of September 1851, when the defendant ceased to be assignee:—Held, that the time when the rent be-

came due, as stated in the declaration, was material, and, therefore, there was a good defence under the plea of never indebted, and that a plea of payment of *all* rent due from the defendant was unnecessary. *Johnson v. Gibson*, 22 Law J. Rep. (n.s.) Q.B. 168; 1 E. & B. 415.

In an action of debt the plaintiff, in his particulars, stated, "This action is brought to recover the sum of 1*s.* damages, for the detention of the debt for which this action is brought, together with the costs of suit; the debt, 88*l.* 9*s.*, having been paid by the defendant to the plaintiff after action brought." The plaintiff having proved, at the trial, a debt of 69*l.*, the verdict was held to have been properly entered for that sum, debt, and 1*s.* damages. *Nosotti v. Page*, 20 Law J. Rep. (n.s.) C.P. 81; 10 Com. B. Rep. 643; 2 L. M. & P. P.C. 8.

DEBTOR AND CREDITOR.

[See BANKRUPTCY—INSOLVENT.]

(A) OF THE CREDITOR.

- (a) *Rights in general.*
- (b) *Suspension of Right to sue.*
- (c) *Substitution of Separate for Joint Liability.*

(B) ASSIGNMENT OF DEBTS.

(C) DISCHARGE OF DEBTS.

(D) COMPOSITION DEEDS.

- (a) *When and how far binding.*
- (b) *What passes under.*
- (c) *What Creditors entitled to the Benefit of.*
- (d) *Order of Payment of Debts.*
- (e) *Judgment Creditor.*
- (f) *Favouring particular Creditors, and special Provisions.*

(E) PROCEEDINGS UNDER THE ARRANGEMENT ACT, 7 & 8 VICT. c. 70.

(A) OF THE CREDITOR.

(a) *Rights in general.*

A creditor of an intestate purchasing some of his effects from his administrators is not entitled to retain the sums due to himself out of the monies payable by him. *Lambrde v. Older*, 23 Law J. Rep. (n.s.) Chanc. 18; 17 Beav. 542.

A creditors' suit was instituted by A against the representatives of B. The bill alleged that B had been a confidential clerk of A; that B had fraudulently appropriated money belonging to A, and concealed the fraud by false entries in A's books, and that the fraud had not been discovered until B's death. The bill sought for payment to A of the sums so appropriated. A demurrer on the ground that the alleged acts, being felonious, were not the subject of a civil remedy, was overruled. *Wickham v. Gattrell*, 23 Law J. Rep. (n.s.) Chanc. 733; 2 Sm. & G. 353.

The balance of monies arising from a policy of assurance, effected by a tradesman in his own name on the life of a debtor, the premiums being charged to the debtor, cannot be retained after the debt, premiums and costs have been satisfied. *Morland v. Isaacs*, 24 Law J. Rep. (n.s.) Chanc. 753; 20 Beav. 389.

A being indebted to B upon bonds, disputes arose between them as to what was due, and by an order in a suit referring it to arbitration, and an award made under that order, the debt of A was fixed at 8,000*l.*, which was ordered to be paid in two sums on days certain, and if payment was not made, the securities were to be sold and payment made out of the proceeds. The 8,000*l.* and the surplus were to be paid to A; no mention was made of interest. The securities were not, by reason of various transactions, realized for a very long time:—Held, that the produce of the securities was not as against subsequent incumbrancers of A chargeable with more than the principal sum of 8,000*l.* *Collett v. Newnham*, 1 Drew. 447.

A debtor at the request and expense of his creditor, insured his life for 400*l.*, being less than he then owed the creditor, in a benefit insurance society, and nominated his creditor as the person to receive the amount. The debt was reduced to 314*l.* The debtor died, and the creditor received the 400*l.*:—Held, that the debtor's administrator was not entitled to recover the balance beyond the 314*l.* from the creditor. A claim for this purpose was dismissed, and (on an undertaking by the defendant not to enforce his debt against the debtor's estate) with costs. *Brown v. Freeman*, 4 De Gex & Sm. 444.

A being indebted to B made and executed an indenture between himself and C, to which B was no party, and thereby, after reciting that A stated that he was indebted to B in a certain specified sum, A conveyed and assigned all his real and personal property to C, upon trust to sell, and out of the proceeds to pay the debt, and to pay the surplus to A, and the deed contained a covenant for further assurance:—Held, that the debt to B was not converted into a specialty. *Stone v. Van Heythuysen*, Kay, 721.

Whether that would have been the effect if B had been a party to the deed, or if C had executed it as B's agent—*quære*. *Ibid*.

(b) *Suspension of Right to sue.*

[See *Belshaw v. Bush*, title ACCORD AND SATISFACTION (C).]

The rule that when a creditor is appointed executor by his debtor, his right of action is suspended, because he is presumed to have retained the amount of his debt, and is the person both to pay and receive, applies only where the executor has received assets. *Lowe v. Peskett*, 24 Law J. Rep. (N.S.) C.P. 196; 16 Com. B. Rep. 507.

Semble—Per *Jervis, C.J.* and *Crowder, J.*, that it applies only where he has had legal assets, and not equitable alone. *Ibid*.

The rule does not apply where the debt arises on a negotiable instrument, which has been legally transferred by the executor. *Ibid*.

(c) *Substitution of Separate for Joint Liability.*

[See *Lyth v. Ault*, title ASSUMPSIT, (B) (c).]

(B) ASSIGNMENT OF DEBTS.

[See *Thorne v. Smith*, title BILLS AND NOTES (J).]

Declaration for wages and on an account stated. Plea, that the debts in the declaration mentioned were contracted by the defendants jointly with C B

and others; that C B resided in the State of California and within the jurisdiction of the district court of the fourth judicial district of the said State; that the law of the said State was, that a creditor might assign to another a debt due to such creditor, and that the person to whom such debt was assigned might in his own name sue the debtor and recover the debt; that the said Court had jurisdiction to hear and determine any suit brought by such assignee; that after the accruing of the debt in the declaration mentioned, the plaintiff then being in the said State, did, according to the said law, assign the same to one T G R, then also being in the said State; and that afterwards T G R, in his own name, sued the defendants and the other joint debtors in the said district court for the said debts and other debts, and recovered the debts in the declaration mentioned and the other debts; whereupon and whereby the defendants and their said joint debtors became and still were indebted to T G R in the amount of the debts in the declaration mentioned, and liable to be sued in this country for the same upon and by virtue of the said judgment; and that the said judgment was for one entire sum; and that afterwards the said judgment was partly satisfied by the levy of a sum of money less than the amount of the judgment, and not applicable to any one of the debts recovered more than to any other. Replication, that the law of the said State was, that the assignee of a debt might re-assign or give up and relinquish, to and for the benefit of the creditor by whom the assignment had been made, such debt or so much thereof as, at the time of the re-assignment or giving up and relinquishing, remained unsatisfied or unpaid and unlevied; and that such creditor might in his own name sue the debtor and recover such debt, or so much thereof as should then remain unlevied and unsatisfied and unpaid, and retain the same in like manner as if no such assignment had been made; and that, notwithstanding that, in the mean time such assignee might have sued the debtor and have recovered the same and caused execution to be issued, unless the whole amount thereof should have been levied. The replication then alleged a re-assignment by T G R to and for the benefit of the plaintiff before he had received the said debts or any part thereof, and before the same or any sum applicable thereto had been levied; and that T G R had never received or levied the same or any money applicable thereto; and that by reason thereof the plaintiff became entitled to sue in his own name and recover the said debts:—Held, upon demurrer, that the plea was good, but that the replication was a sufficient answer to the plea, and shewed that the right to maintain the action was re-vested in the plaintiff. *Thompson v. Bell*, 23 Law J. Rep. (N.S.) Q.B. 159; 3 E. & B. 236.

(C) DISCHARGE OF DEBTS.

A testator wrote in his account book, opposite an entry of two debts owing to him by his brother, one being due upon mortgage and the other upon a promissory note, the words "not to be enforced," but he received interest on both debts for several years after the date of the entry and up to the time of his death. The document which contained the words referred to was not propounded as testamentary:—Held, that this memorandum of the testator did not

amount to a discharge of either of the debts. *Peace v. Hains*, 11 Hare, 151.

Semble—The cases in which the Court has held a debtor liberated from his obligation to pay a debt which once existed, and from which he had not been discharged by any testamentary instruments, are—first, where the act or declaration relied on creates an immediate discharge which the debtor might plead as a release or by way of accord and satisfaction at law, or which he might enforce in equity as against the creditor; secondly, where the discharge, though not immediate and absolute, but conditional, becomes perfect by the condition having in the court been performed; thirdly, where the creditor intended to discharge the obligation at his death, and communicated that intention to those who would under his own disposition take or represent his interest upon his death, and relied upon their fulfilment of his intention; and, fourthly, (in strictness belonging to another class of cases) where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one *in loco parentis* or is part of a family arrangement. *Ibid*.

(D) COMPOSITION DEEDS.

(a) *When and how far binding.*

Where a deed of assignment of a debtor's personal property to a trustee, for the benefit of all his creditors who should execute or accede to the deed, was *bonâ fide* made and executed by both the debtor and the trustee, and the property taken possession of under it, and afterwards the trustee, by his agent, communicated the contents of the deed and all that had been done to three of the creditors, each of whom expressed himself satisfied with the arrangement, but neither they nor any others of the creditors signed the deed, or did any act under it,—Held, in an interpleader issue between the trustee and a creditor, at whose suit the property had subsequently been taken in execution, that the deed was valid and binding, and passed the property to the trustee as against such execution creditor, although not one of those to whom the contents of the deed had been made known. *Harland v. Binks*, 20 Law J. Rep. (n.s.) Q.B. 126; 15 Q.B. Rep. 71.

An assignment to a trustee for the benefit of creditors which empowers the trustee to employ the debtor or other person "in winding up his affairs and collecting and getting in his estate and carrying on his trade," is not void as against creditors within 13 Eliz. c. 5, if it appears from the deed that the main object is to wind up the business for the benefit of the creditors, and not to carry on the trade with a view to future profits. *Owen v. Body* distinguished. *James v. Whitbread*, 20 Law J. Rep. (n.s.) C.P. 217; 11 Com. B. Rep. 406.

A deed of assignment in the usual form to trustees, for the benefit of creditors, which empowers the trustees to employ the debtor or other person in winding up his affairs and in collecting and getting in his estate, and in carrying on his trade, if thought expedient, is a valid deed, and does not constitute a partnership between the creditors. *Coate v. Williams*, 21 Law J. Rep. (n.s.) Exch. 116; 7 Exch. Rep. 205.

The plaintiff being entitled to a legacy under a will, filed a bill against the executor for payment,

and obtained a decree for the amount due. The executor had previously conveyed his property to trustees for the benefit of his creditors. The plaintiff, who was no party to that arrangement, not being able to obtain payment under the decree, issued writs of *elegit* and sequestration against the property of the executor, and then filed this bill against the executor and the trustees of the creditors' deed, praying that the deed might be declared a voluntary deed of agency, and that the trustees might be restrained from setting it up against the writs of *elegit* and sequestration, and that the plaintiff might be declared entitled upon the expiration of a year from the first decree being registered, to an equitable charge for the amount decreed to be paid.—Held, that the creditors' deed effectually created a trust for the benefit of the creditors which they had a right to insist upon being performed: and that it was not a mere deed of agency, and was irrevocable as against the creditors. *MacKinnon v. Stewart*, 20 Law J. Rep. (n.s.) Chanc. 49; 1 Sim. N.S. 76.

When a court of equity has occasion to deal with the legal rights of judgment creditors, its province is to aid and not to supply or extend the legal rights. *Smith v. Hurst*, 22 Law J. Rep. (n.s.) Chanc. 289; 10 Hare, 30.

A deed of arrangement between a debtor and one of his creditors, conveying all the property of the debtor to the creditor, and which deed the debtor has power to revoke and alter at any time, and attempts to use as a shield to protect himself against the claims of his other creditors, is fraudulent and void against creditors whose interests are affected by the deed, notwithstanding the deed upon the face of it purports to be for the benefit of all the creditors. Such a deed is in truth a deed for the benefit of the debtor; and if a creditor accepts it, he takes it not for his own benefit, but for the purpose of carrying out the views and objects of the debtor, in fraud of the other creditors. *Ibid*.

The distinction between the exercise of the jurisdiction of the Court in cases of trusts for the benefit of particular persons and the cases of trusts for creditors is, that in the latter cases the Court will examine into the circumstances under which the deed was executed, and carry on its investigation into what may have subsequently occurred. *Ibid*.

A, being entitled to certain property for life, with remainder to his children in case they survived him, joined with his two children in executing a creditors' deed, dated in 1831, whereby, in consideration of an assignment by the father of his life estate to his children, the two children assigned their interests, contingent upon the death of their father in their lifetime, upon trust to pay the debts of both father and son. The son also covenanted to pay 1,000*l.* towards the debts. The debts were admitted by the deed and comprised in schedules, and the creditors covenanted not to sue for their debts during the continuance of the trusts of the deed. The children died in 1839 before the father, who then became absolutely entitled to the reversion of the property, as heir-at-law of the original donor, and he executed a voluntary assignment of it, and died in 1851.—Held, that the voluntary deed was void as against the creditors, and that the specialty creditors comprised in the deed of 1831 were not barred

by the statute. *Ivens v. Elwes*, 24 Law J. Rep. (n.s.) Chanc. 249; 3 Drew. 25.

Held, also, that the simple contract debts were not converted into specialty debts by the terms of the deed of 1831. That the time at which the creditors' right to sue revived, was the death of the surviving child, and that the simple contract creditors were barred by the Statute of Limitations. *Ibid.*

A creditor cannot be said in any sense to have acceded to the provisions of a composition deed unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed. *Forbes v. Limond*, 4 De Gex, M. & G. 298; 1 Sm. & G. 554.

By a composition deed for winding up, under an inspector, the affairs of a partnership in Calcutta, it was among other things provided that four members of the partnership should collect and pay the assets into the hands of the inspector, to be applied by him, after-payment of costs, in payment among the several creditors of the partnership who should have become parties to and have executed or otherwise acceded to the terms of the deed; but if a commission of bankruptcy or an adjudication of insolvency should be awarded, issued or pronounced against the partners, or any of them, in respect of their then debts or liabilities, before any release should be executed, the deed should thenceforth be absolutely void. The plaintiffs, who were indorsees of two bills of exchange drawn by the partnership, remitted the bills from London to their agents at Calcutta, who in April 1848 forwarded them "to the trustees" of the partnership to be registered. The partners acting under the liquidation acknowledged the receipt of the bills, and with respect to one of them wrote:—"We have registered the claim you make on our estate," and with respect to the other—"We have duly noted the claim," returning the bills, which were transmitted back to the plaintiffs in London. In February 1849 the inspector advertised a dividend of 10% per cent., which was shortly afterwards paid on several of the debts of the creditors who had executed the deed. In March 1849 four members of the partnership were on their own petition in India adjudicated insolvent, and thereupon the inspector handed over to their official assignee the balance remaining in his hands. The plaintiffs having received dividends on the bills under the insolvency in India, and from other parties in England liable upon the bills, in 1851 instituted this suit against the inspector for the payment of the 10% per cent. dividend advertised by him:—Held, that the plaintiffs not being precluded from suing any of the parties liable upon the bills could not be considered to have acceded to the composition deed. *Ibid.*

A composition deed contained a release of the debtor, subject to a proviso making the release void on non-payment of any of the instalments covenanted to be paid by the deed:—Held, that as against a creditor who had acceded to the deed, but by means of a secret arrangement had received more than the amount of the whole composition, the release was absolute, although the instalments had not been paid according to the covenant. *Ex parte Oliver, in re Hodgson*, 4 De Gex & Sm. 354.

A debtor conveyed his life interest in certain pro-

perty in trust for creditors, parties to the deed, and the creditors in consideration thereof granted to the debtor licence to reside and attend to his affairs in any place he might think proper, without suit or molestation in his person or his goods, chattels and effects by any such creditors; and that in case of any suit or molestation by any of such creditors contrary to the true intent and meaning of such licence, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar:—Held, that this amounted only to a licence by the creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate, and that neither a suit by creditors against the trustees and the debtor to enforce the trusts of the deed, nor an administration suit by the creditor against the estate of the debtor after his decease for payment of so much of the debt as the trust property was insufficient to pay, was barred by the trust-deed or amounted to an acquittance of the debt. *O'Brien v. Osborne*, 10 Hare, 92.

Held, also, that the existence of the trust-deed and the covenants and licence therein contained prevented the operation of the Statute of Limitations during the life of the debtor, in respect of the debts for the payment of which the trust was created. *Ibid.*

(b) What passes under.

Under an assignment to creditors by a debtor of all his stock in trade, book and other good debts, securities, chattels and effects whatsoever, except the wearing apparel of himself and his family:—Held, that a contingent interest in the residuary estate of a testator, to which the debtor was entitled in the event of his sister dying without a child, passed. *Pope v. Whitcombe*, 3 Russ. 124, observed upon; *Ivison v. Gassiot*, 3 De Gex, M. & G. 958.

(c) What Creditors entitled to the Benefit of.

The usual deed of inspectorship by a debtor was executed, without specifying the amount due, by a creditor firm who had a claim against the debtor for a sum ascertained at the time of executing the deed, and for an unascertained balance for acceptances by the firm in respect of goods then unsold and consigned to them by the debtor on a *del credere* commission, and upon which a large balance was subsequently found due to them on the final taking of the accounts:—Held, that the creditor firm were entitled to a dividend out of the debtor's estate upon the whole amount of their several claims. *Graham v. Ackroyd*, 22 Law J. Rep. (n.s.) Chanc. 1046; 10 Hare, 192.

Observations upon the law of principal and factor under a *del credere* commission. *Ibid.*

Though a creditor who is prevented by accident signing a composition deed within the period specially appointed for that purpose, may obtain equitable relief, yet it will not be extended to one who has delayed making his claim, and has set up a title adverse to the deed. *Watson v. Knight*, 19 Bear. 369.

Debtors on the 11th of June 1847 assigned by deed their property upon trust for their creditors whose names and seals were thereunto affixed. In July the trustees sold, and at the sale the plaintiff stated that he was a creditor, but mentioned no par-

ticulars of his demand, which, in fact, was one requiring investigation. The trustees advertised the 11th of October as the last day for creditors to execute the deed, and stated that creditors who had not signed by that day would be excluded. On a bill filed by the plaintiff in April 1848, after a dividend had been made,—Held, that upon establishing that he was a creditor and executing the deed he was entitled to participate in any future assets, but not to disturb the dividend already made. *Broadbent v. Thornton*, 4 De Gex & Sm. 65.

A debtor assigned all his property to trustees for the benefit of his creditors, with a proviso that in case any creditor should not come in under the deed for six months after its date, he should be peremptorily excluded from the benefit of it:—Held, that a mortgagee of part of the property whose solicitor corresponded with the trustees on the subject of the mortgage, but who did not express any intention to come in under the deed for some years afterwards, was not entitled to the benefit of the trust. *Gould v. Robertson*, 4 De Gex & Sm. 509.

(d) Order of Payment of Debts.

An assignment of property was executed to trustees for the benefit of creditors, who were to be paid equally, and it was stipulated that any securities held by creditors might be realized and applied towards payment of their debts, and as to any deficiency such creditors were to stand *pari passu* with the others, but not to receive more than the principal and interest. A schedule was added containing the debts, calculated with interest up to the date of the deed, but there was no express contract that simple contract debts should carry interest:—Held, upon exceptions to the Master's report, that this deed did not convert the simple contract debts into specialty debts, and no right to interest after the date of the deed was created which did not otherwise exist. *Clowes v. Waters*, 21 Law J. Rep. (n.s.) Chanc. 840.

Held, also, that bond creditors were only entitled to prove for the amount of the penalties in their bonds. *Ibid*.

Specialty creditors whose debt carried interest, and other creditors whose debts did not carry interest, executed a creditors' deed, by which the debtor's property was to be divided between the creditors "rateably and in proportion to the amount of their respective debts." The creditors released their debts:—Held, that the specialty creditors were entitled to a dividend on the amount of interest accruing subsequent to the date of the deed. *Bateman v. Margerison*, 16 Beav. 477.

(e) Judgment Creditor.

The plaintiff, a registered judgment creditor, executed a composition deed made by the debtor, and containing a saving clause in respect of any subscribing creditor's lien or other specific charge for his debt, and containing a proviso that the subscribing creditors were not to be thereby prevented from enforcing any such specific charge or lien upon any estate or effects whatsoever, or from suing any person other than the debtor, his heirs, executors or administrators. The plaintiff afterwards assigned his debt to the trustees of the deed in trust for the subscribing creditors. Upon bill filed by the plaintiff

to obtain the benefit of his charge, under 1 & 2 Vict. c. 110, s. 13,—Held, first, that the deeds were to be construed according to the intention of the parties, and not merely according to the strict legal interpretation of the words, and, therefore, that the plaintiff's charge was not released by his execution of the composition deed; secondly, that his debt was not merged by the assignment of it in trust for the subscribing creditors, and that it retained its priority over subsequent registered debts of creditors not parties to the composition deed; and, lastly, that the suit could be maintained by the plaintiff on behalf of himself and the other creditors, parties to the composition deed, and was properly framed for charging the judgment debt on the debtor's real estates. *Squire v. Ford*, 20 Law J. Rep. (n.s.) Chanc. 308; 9 Hare, 47.

(f) Favouring particular Creditors and Special Provisions.

[See *Smith v. Saltman*, title BANKRUPTCY, (C) (b).]

To an action for goods sold the defendants pleaded a release, to which the plaintiff replied that the release was obtained by fraud of the defendants, and issue was joined on a traverse of the replication. It appeared by the evidence that the defendant, being indebted to several persons, and amongst others to the plaintiff, proposed a composition of 6s. 8d. in the pound, which was agreed to by the majority of the creditors in number; but the plaintiff, who was not present when the 6s. 8d. was agreed to at a meeting of the creditors, refused to concur unless he was paid 13s. 4d. in the pound upon part of the debt, and the other part was paid in full. Upon receiving notes for the amount agreed upon, and the positive assurance of the defendants that no other creditor than himself was preferred, and that no one of them was to have anything beyond the 6s. 8d., he signed a release for his whole debt. The assurance of the defendants that no other creditor was preferred was untrue, as there was no doubt but that they had preferred other persons besides the plaintiff:—Held, by *Wightman, J.*, that it was no answer upon this issue to shew that the plaintiff himself had also contracted for a preference, in fraud, not of the defendants, but of the other creditors, and that the defendants could not set up a counter fraud by them and the plaintiff, by which they colluded to deceive other persons, as an answer to a charge of fraud practised by the defendants upon the plaintiff, which would have the effect of depriving him of part of his original just right. By *Coleridge, J. and Erle, J.*, that the replication was not proved, because the whole stipulation for a preference being a fraud on the part of the plaintiff towards other creditors, no part of it could be legally relied on by him as forming a material inducement for this deed; and that the fact of the plaintiff having obtained a preference for himself not vitiating the release as against himself, the defendant having also given a preference to others, was no fraud upon the plaintiff. *Mallalieu v. Hodgson*, 20 Law J. Rep. (n.s.) Q.B. 339; 16 Q.B. Rep. 689.

To counts upon three several promissory notes, the defendants pleaded that they were indebted to the plaintiff in 989l. 7s., and had accepted four bills of exchange for the amount, drawn by the plaintiff and payable to his order; that the defendants com-

pounded with their creditors, and that the plaintiff agreed to the composition, receiving a preference beyond the other creditors, and executed a release of his debt; that it was his duty to take up the four bills of exchange, but that he neglected to do so, and the owners of the bills threatened to sue the defendants, who in order to induce the plaintiff to take them up, gave him the promissory notes in these counts mentioned, and that there was no other consideration for the giving of the notes. The plaintiff replied *de injuriâ absque tali causâ*:—Held, under the above circumstances, that the plea was proved; that as the fraudulent preference of the plaintiff did not make the composition void as against him, there was no sufficient consideration for the giving the notes, as the plaintiff was bound to protect the defendants from the consequences of liability upon these bills. *Ibid*.

To an action on a bond the defendant pleaded that one J F made the bond, and the defendant also made it as his surety, and that after it was so made the said J F, being unable to meet his debts, entered into a deed with his creditors, of whom the plaintiff was one, by which deed he assigned all his property upon trust, for the benefit of the plaintiff and his other creditors, to certain trustees, and that the plaintiff did by the said deed covenant with the said J F that the plaintiff would not at any time thereafter commence or prosecute any action or other proceedings against the said J F, for or by reason of any debt then due and owing by him to the plaintiff, and thereby the plaintiff gave time to the said J F in respect of the said debt and writing obligatory in respect whereof the defendant was such surety. The plaintiff replied by setting out the deed *in hæc verbis*. The deed contained *inter alia* a proviso that nothing therein contained should prejudice or affect any claim, demand or remedy which the several parties thereto and creditors of the said J F then had or should have by virtue of any mortgage, lien, charge or other incumbrance against any person who might be liable for the payment of any of the debts of the said J F in the character of a surety or otherwise; and it witnessed that in consideration of the assignment thereinbefore made, the several parties thereto and creditors of the said J F covenanted with the said J F that they would not at any time commence or prosecute any action, suit or other proceedings against the said J F for any debt then due from him to them, and that in case of any such action or suit being commenced or prosecuted by them contrary to the terms of the deed, the deed might be pleaded as a general release in bar of any such action or suit. Verification:—Held, on special demurrer to the replication, that it was good, inasmuch as it admitted the effect of the deed as alleged in the plea, but avoided it by the terms of the proviso. *Stevens v. Stevens*, 5 Exch. Rep. 306.

(E) PROCEEDINGS UNDER THE ARRANGEMENT ACT,
7 & 8 VICT. c. 70.

The proposal of a petitioning debtor under the act for facilitating arrangements between debtors and creditors (7 & 8 Vict. c. 70), to set aside a portion of his professional earnings for a certain time, was accepted by resolutions of his creditors at their first meeting convened under the act, and a trustee appointed. The resolutions were confirmed at their

second meeting under the act, except as to the appointment of the trustee, and the proceedings were subsequently duly filed:—Held, on claim filed by the debtor, against his former partner, for an account of their previous partnership, that the effect of the 8th section of the act was not to vest the whole of the debtor's estate and effects in the trustee under the act, but such part only as the debtor proposed to give up, and the creditors had agreed to accept. *Robins v. Hobbs*, 20 Law J. Rep. (n.s.) Chanc. 583; 9 Hare, 122.

Semble—that the creditors at the second meeting, convened under the act, have not power to vary any proposal accepted at the first meeting. *Ibid*.

DEED.

[See BANKRUPT—BILLS OF SALE—DEBTOR AND CREDITOR—DISENTAILING DEED—MORTGAGE.]

(A) EXECUTION.

(B) VALIDITY.

- (a) *As against the Crown.*
- (b) *Evidence to impeach.*
- (c) *Fraudulent Conveyance.*
- (d) *Voluntary Conveyance.*
- (e) *Erasure and Alteration.*
- (f) *Confirmation of voidable Deed.*

(C) CONSTRUCTION AND OPERATION.

- (a) *In general.*
- (b) *Date of Execution.*
- (c) *What Property passes.*
- (d) *Merger.*
- (e) *Recitals.*
- (f) *Habendum.*
- (g) *Schedules.*

(D) REGISTRATION [see title JUDGMENT].

(E) REVOCATION.

(F) SETTING ASIDE AND REFORMING FOR MISTAKE.

(A) EXECUTION.

[See POWER OF ATTORNEY.]

The plaintiff having executed a deed in the name of "J. Janes" his real name, and being described in the body of the deed as J. "James" but with the proper description and address added,—Held, that the property passed to him, and the jury were warranted in so finding. *James v. Whitbread*, 20 Law J. Rep. (n.s.) C.P. 217; 11 Com. B. Rep. 406.

The deed was delivered to T with instructions not to give it up to any one but S and R M together, and it was given up by T to S and R M many years after. P and B were the trustees named in it. At S's death the deed was not found on her premises, but no proper search in the repositories of the trustees was proved:—Held, that the deed was intended to be operative, but that the search was insufficient to let in secondary evidence. *Doe d. Richards v. Lewis*, and *Richards v. Lewis*, 20 Law J. Rep. (n.s.) C.P. 177; 11 Com. B. Rep. 1035.

(B) VALIDITY.

- (a) *As against the Crown.*

[See *Whitaker v. Wisbey*, title ASSIZES.]

(b) *Evidence to impeach.*

[See *Gadsden v. Brown*, title INTERPLEADER—*White v. Morris*, title TRESPASS.]

(c) *Fraudulent Conveyance.*

In an action on a covenant for the payment of an annuity, the defendant, the grantor, is estopped from pleading that the annuity was granted for the fraudulent purpose of multiplying voices. *Phillpotts v. Phillpotts*, 20 Law J. Rep. (N.S.) C.P. 11; 10 Com. B. Rep. 85.

The statutes 7 & 8 Will. 3. c. 25. and 10 Ann. c. 23. are to be construed only as affecting the parliamentary law; the 7 & 8 Will. 3. c. 25. invalidated fraudulent conveyances entered into for splitting votes only so far as to prevent the grantee from having a vote, and did not prevent the estate from passing; and the 10 Ann. c. 23, assuming that an estate passed under conveyances, avoided by the statute 7 & 8 Will. 3. c. 25. so far as the right to vote was concerned, made such conveyances free and absolute, notwithstanding secret trusts and conditions of defeasance, only preventing the grantor from voting, under a penalty. *Ibid.*

(d) *Voluntary Conveyance.*

J T, the grandfather of the plaintiff, under a deed of September 1790, was tenant for life of a moiety of certain estates called C, with remainder to his wife for life, with remainder to his first and other sons successively in tail male, with remainder to his daughters as tenants in common in tail general, with remainder to the settlor in fee. J T had issue, several children; J C T his eldest son, and the father of the plaintiff, becoming of age in 1815. In the same year J T, his wife, and J C T joined in suffering a common recovery, and by indentures of lease and release of the 17th and 18th of March 1815, J T, his wife, and J C T, being parties to the release, after reciting that J T, his wife, and J C T were desirous of declaring the uses of the said recovery, and that J T was desirous of settling his estate in fee to the uses thereafter declared, it was witnessed that for effecting such intent and purpose and for divers other good and valuable considerations, and for a nominal consideration therein expressed, the uses of the said recovery should enure to the use of the said J C T and his heirs during the life of J T, remainder to J T's wife for life, remainder to J C T for life, remainder to his first and other sons in tail male, remainder to J T's younger son E T T for life and to his first and other sons in tail male, remainder to J T's daughter M T for life and to her first and other sons in tail male, with several other remainders to unborn children, and the ultimate remainder to J T in fee. J T was a trader subject to the bankrupt laws, and the said recovery and lease and release were made with the intent on his part to defraud his creditors, but J C T was not in any way privy to such intent. In June 1815, J T was duly declared a bankrupt, and by an indenture of the 11th of July 1816, a conveyance of all his estate was made to the assignees in bankruptcy. In July 1819, at the suit of the assignees, the Court of Chancery directed an issue at law to try the validity of the recovery and the deeds of March 1815, and the jury found that they were fraudulent and void as against

the creditors of J T. A decree to the same effect was subsequently made, and possession ordered to be given to the assignees; and in March 1821 it was further decreed that the deed should be delivered up to be cancelled, which was done. In 1821 the assignees sold the estate to J C T for 30,000*l.*, and a recovery was thereupon suffered, and by indentures of lease and release in 1823, the uses of such recovery were declared. Before 1843, J T and his wife died, and in April 1849 J C T, for a large sum of money, sold and conveyed the estate in question to the defendant in fee:—Held, first, that the recovery and deeds of the 17th and 18th of March 1815 were clearly fraudulent and void within the 13 Eliz. c. 5. as against J T's creditors, and that no interest in J T's estates ever passed to J C T under them. Secondly, that the 4th section of the 13 Eliz. c. 5. had not the effect of making the recovery in 1815, though fraudulent as against the creditors of J T, valid as respected the uses declared in the same deeds by J C T of his own previous estates in remainder; although the recovery was still to be treated as unreversed, and subsisting as a recovery. Thirdly, that the deeds of the 17th and 18th of March 1815 could not be considered as still subsisting and valid as to the uses declared to J C T for life, with remainder to his son, the plaintiff, in tail male; but that all the uses thereby declared were void, and thereupon the recovery by construction of law enured to the use of J T for life, and to J C T in fee. Fourthly, that supposing the deeds were not altogether void, and that J C T became tenant for life under the uses declared by them, with remainder to the plaintiff in tail male, still, as no consideration for his suffering the recovery ever existed, such uses must be considered voluntary. Fifthly, that the sale and conveyance in 1849 to the defendant for valuable consideration was to be considered as making void the uses in the voluntary deed of the 18th of March 1815, under the 27 Eliz. c. 4, and the recovery as thereupon enuring to give J C T a remainder in fee, after the death of J T and his wife, which passed to the defendant, and therefore either on the ground of the deed of the 18th of March 1815 being wholly vitiated by the fraud of J T, or its being voluntary as to the uses declared by J C T, the plaintiff had not any interest in the moiety of the estates in question. *Turleton v. Liddell*, 20 Law J. Rep. (N.S.) Q.B. 507; 17 Q.B. Rep. 390.

A deed executed by S in contemplation of marriage, without the knowledge of the future husband, by which S gave herself an estate for life in certain leaseholds, with remainder to R M, a son by a former marriage, and remainder over to an illegitimate son, is not avoided by the marriage, under the 27 Eliz. c. 4, the husband not taking as a purchaser. *Doe v. Richards v. Lewis*, and *Richards v. Lewis*, 20 Law J. Rep. (N.S.) C.P. 177; 11 Com. B. Rep. 1035.

Quære—whether the deed would have been bad, if it had been found as a fact that it was intended as a fraud upon the marital rights of the husband. *Ibid.*

Held also, that declarations made by S as to the contents of the deed were not admissible as cutting down her title. *Ibid.*

Held also, that a voluntary deed, not actually fraudulent, by which husband and wife settled the wife's chattel interest on R M, is not avoided, under

the 27 Eliz. c. 4, by a mortgage made by the widow surviving her husband,—commenting on *Burrell's case*, 6 Rep. 72. *Ibid*.

The statute 27 Eliz. c. 4. does not apply to the case of a purchase for valuable consideration from the heir or devisee of one who has made a voluntary conveyance of the same property in his lifetime. *Doe d. Newman v. Rusham*, 21 Law J. Rep. (N.S.) Q.B. 139; 17 Q.B. Rep. 723.

The principle upon which voluntary conveyances have been held fraudulent and void as against subsequent purchasers for value is, that by the sale the vendor so entirely repudiates the former conveyance as that, against himself and the purchaser for value, it shall be conclusively taken that the intention to sell existed when he made the voluntary conveyance, and that it was made in order to defeat the subsequent purchaser. *Ibid*.

When the same person executes the voluntary conveyance, and afterwards sells and conveys the property, this principle applies; but *secus* where the seller is a different person from him who executed the voluntary conveyance, for the acts of one man cannot shew the mind and intention of another. *Ibid*.

J N, being seised in fee of certain property, in 1833 executed a voluntary conveyance to the lessor of the plaintiff in fee, and died in 1844, having in the same year devised the property to J S. In 1847, J S sold and conveyed the property to the defendant for 100*l*.—Held, that the conveyance to the lessor of the plaintiff was not fraudulent and void as against the defendant. *Ibid*.

(e) Erasure and Alteration.

The presumption of law is, that an erasure and interlineation in a deed were made at the time of the execution of such deed. Where, therefore, the question of whether or not certain erasures and interlineations in deeds had been made before execution, was left to the jury upon no other evidence than the deeds themselves,—Held, no misdirection. *Doe d. Tatham v. Cattamore*, 20 Law J. Rep. (N.S.) Q.B. 364; 16 Q.B. Rep. 745.

Where a deed is altered in a material part it ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact. *The Agriculturist Cattle Insurance Co. v. Fitzgerald*, 20 Law J. Rep. (N.S.) Q.B. 244; 16 Q.B. Rep. 432.

Where in an action of debt for calls, under 7 & 8 Vict. c. 110. s. 55, it appeared that the deed of settlement of the company had been executed by the defendant as a shareholder, but there was an unexplained erasure of the name of another person who had signed it as a shareholder, it was held that the deed might be given in evidence to prove the fact of the defendant being a shareholder. *Ibid*.

Quere—whether such an erasure could in any mode affect the defendant's liability under the deed. *Ibid*.

(f) Confirmation of Voidable Deed.

To a bill by an heir-at-law, charging that the defendant A was in the possession of the estate of

the ancestor under a conveyance impeachable on the ground of fraud, and praying that the conveyance might be set aside and that any testamentary disposition thereof by way of confirmation might be declared void, A pleaded the will of the ancestor, by which, after reciting that certain members of his family had threatened to impeach the conveyance, he thereby confirmed the same and devised the estate to A in fee. The plea was allowed, affirming the order of the Court below. *Stamp v. Gaby*, 22 Law J. Rep. (N.S.) Chanc. 352; 2 De Gex, M. & G. 623.

Where a testator has a right to set aside a voidable conveyance, this is an equitable estate in him, descendible to his heir, and which he may dispose of by his will. *Ibid*.

Distinction between a confirmation by deed and by testamentary disposition of a conveyance liable to be avoided on the ground of fraud. *Ibid*.

(C) CONSTRUCTION AND OPERATION.

(a) In general.

The plaintiff in ejectment, on a demise of the 12th of October 1850, claimed under the following deed: "In consideration of the love and affection which I have towards my son W S (the lessor of the plaintiff), I have given and granted, and by these presents do give and grant, to the said W S all that, &c., and that the said W S is to take possession of the same at Michaelmas-day next (1850). I have delivered him, the said W S, all the premises absolutely at Michaelmas-day next without further condition":—Held, that supposing such deed to be void as a grant of the freehold *in futuro*, still, the day named having passed, the plaintiff was entitled to recover, the deed amounting to a covenant to stand seised to the use of W S. *Doe d. Starling v. Prince*, 20 Law J. Rep. (N.S.) C.P. 223.

The statute 8 & 9 Vict. c. 106. s. 4, which enacts "that the word 'give' or the word 'grant' in a deed shall not imply a covenant in law,"—Held, inapplicable to the case. *Ibid*.

Ejectment to recover two undivided third parts of an estate called "Horsecroft." J P, being seised in fee of Horsecroft, before his marriage with M C, executed an indenture of settlement in 1770, whereby it was witnessed that in consideration of an intended marriage between himself and M C, and of the conveyance and settlement by M C of the estate, money, &c. thereafter mentioned, and of the benefit arising to J P by the marriage, and for settling a jointure and maintenance for M C and her children, and for settling the free estate called Horsecroft belonging to J P, he, the said J P, granted, sold, &c. to trustees and to their heirs, all that freehold estate and right of J P to the said estate and other the premises intended to be released by M C. It was then further witnessed, that in consideration of the marriage and of the jointure, and for settling the freehold estate, together with the other monies, &c. J P bargained, sold, &c. to the trustees, in trust for M C to the use of the first son of the said J P on the body of the said M C lawfully begotten, and to the heirs male of the said son lawfully begotten. J P had four children—John P, who died unmarried and intestate, and three daughters. The two lessors of the plaintiff are the heirs-at-law of two of the daughters, and the female defendant is the other daughter.

J P, in 1823, made his will as follows:—"Also I give Horsecroft, my estate that I now live in, to my son John P, a lunatic." He then gave the residue of his estate to his daughter, the defendant:—Held, *dissentiente Platt, B.*, that the deed was inoperative; and by the whole Court that the son John P took under the will an estate in fee in Horsecroft. *Doe d. Pottow v. Fricker*, 20 Law J. Rep. (N.S.) Exch. 265; 6 Exch. Rep. 510.

(b) *Date of Execution.*

[See *ante*, (a).]

A mortgage-deed was dated the 27th of October 1827, but not executed until the 23rd of August 1834, and it contained a covenant by the mortgagor admitting the title to be in the mortgagee, his heirs and assigns:—Held, that this was a sufficient acknowledgment of title under the 3 & 4 Will. 4. c. 27. s. 14. to enable the mortgagee to recover within twenty years of the execution of the deed. *Jaymes v. Hughes*, 24 Law J. Rep. (N.S.) Exch. 115; 10 Exch. Rep. 430.

(c) *What Property passes.*

M H and W R, by indenture of February 1805, granted and leased certain premises unto and to the use of J H, his heirs, executors, administrators and assigns for ever, yielding and paying therefore a yearly rent. Proviso for re-entry on non-payment of rent. Covenant by J H for payment of the rent, for repairs, and for insurance:—Held, that, in the absence of proof that the premises were at the date of the instrument in the occupation of tenants, and the expressed intention of the parties precluding the presumption of livery of seisin, the instrument could not operate as a conveyance of the fee subject to a rent-charge, but only to create a tenancy from year to year. *Doe d. Robertson v. Gardener*, 21 Law J. Rep. (N.S.) C.P. 222; 12 Com. B. Rep. 319.

Seemle, that if it had been necessary to presume livery of seisin in order to account for the possession under the instrument, the Court would have made that presumption. *Ibid*.

A conveyance to the plaintiff was of the farm and closes, &c., all which hereditaments and premises were enumerated in a schedule annexed to the deed, and the site thereof shewn in a plan drawn on the deed, with all their rights and appurtenances, and all fixtures, trees, ditches, fences, &c. thereto appertaining. None of the erections in question were specifically mentioned in the schedule, but on the plan there was a mark indicating the spot on which the granary stood. The saddles were stone pillars, mortared to a brick foundation, let into the earth; and the threshing machine was fixed by bolts and screws to posts let into the earth, and could not be removed without disturbing the soil:—Held, that these passed under the conveyance to the plaintiff either as part of the land or as fixtures, and that their removal was an injury to the reversionary estate. *Wiltshire v. Cottrell*, 22 Law J. Rep. (N.S.) Q.B. 177; 1 E. & B. 764.

The plaintiff sold to the defendant two dwelling-houses, a coach-house and stables, and a field, together with all ways usually held, occupied, or enjoyed therewith, with free liberty of ingress, egress, and regress for the defendant, or for cattle and carriages, over the carriage road leading to the said

dwelling-houses and stables. The defendant afterwards made a gate from the field which abutted upon the carriage road into the road at an intermediate part thereof, and drove horses and carriages along the road into the field, and back again:—Held, that he was liable in trespass, the right of way being a right of way to the dwelling-houses, coach-house, and stables only. *Hemming v. Burnet*, 22 Law J. Rep. (N.S.) Exch. 79; 8 Exch. Rep. 187.

E, the tenant of leasehold premises, underlet a portion of them to B for a term of years, reserving a few months' reversion. B covenanted to complete some cottages on the premises by the 25th of June. By an indenture, made on the 30th of July following, which recited that E had entered into several agreements and under-leases affecting the leasehold premises, the particulars of which were known to J, it was witnessed that E did "bargain, sell, assign, transfer and set over the said leasehold premises, with their appurtenances, and all the estate, right, title and interest of him the said E in, to, or out of the said premises and every part thereof, to J, to have and to hold the said premises and every part thereof for the residue of the term of years granted by the indenture of lease under which E held, and all other the estate and interest of the said E therein or thereout, subject nevertheless to the agreement and under-leases hereinbefore referred to." B did not build the cottages by the 25th of June. It did not appear whether E knew of the fact, or elected to treat the default as a breach of covenant and a forfeiture of the lease:—Held, that assuming that the non-completion of the cottages was a breach of covenant, and gave E a right of re-entry before the assignment to J, and that the statute 8 & 9 Vict. c. 106. s. 5. enabled E to assign the right of entry for condition broken, yet that the language of the indenture was not sufficient to transfer that right to J so as to enable him to take advantage of the forfeiture. *Hunt v. Remnant* (in error), 23 Law J. Rep. (N.S.) Exch. 135; 9 Exch. Rep. 635.

(d) *Merger.*

[See *Pine v. Moulton*, title BOND, (A) (b).]

(e) *Recitals.*

[See *Kepp v. Wiggett*, title BOND, (B) (a).]

The plaintiff and the defendant had been in partnership together as paper-makers and iron-merchants, and in the deed of dissolution it was recited that an agreement had been made that the defendant should have all the stock in trade in the business of paper-makers, but the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.*, which was to remain in the paper-mill for a year, and that the plaintiff was to have all the stock in trade in the iron business. The deed also recited, that in pursuance of that arrangement paper of that value had been delivered to the plaintiff, and the same then was in the paper-mill, as the plaintiff acknowledged; and then followed an assignment by the defendant to the plaintiff of all the stock in trade in the iron business, and by the plaintiff to the defendant of all the stock in trade in the paper-making business "except the 898*l.* 4*s.* 11*d.* worth of paper so delivered to the plaintiff as aforesaid." No actual delivery or separation of this portion of the paper took place, but there was evidence of a conversion

of the whole by the defendant:—Held, that the defendant was estopped from saying that there was no delivery to the plaintiff; and that there having been a conversion of the whole, the deed shewed that the plaintiff had sufficient possession to support an action of trover. *Wiles v. Woodward*, 20 Law J. Rep. (N.S.) Exch. 261; 5 Exch. Rep. 557.

Real estate was vested in a trustee in fee for a party for life, with remainder to her children equally:—Held, that the children took life estates only, all words of limitation being omitted. *Holliday v. Overton*, 21 Law J. Rep. (N.S.) Chanc. 769; 15 Beav. 480.

Recitals will not be allowed to cut down the clear effect of the operative part of a deed. *Ibid.*

By articles of agreement under seal, reciting that letters patent had been granted to the defendant for improvements in purifying gas, and that other letters patent had been granted to the plaintiff for an improved mode of manufacturing gas, and that disputes had arisen between the parties as to their respective rights under the letters patent to the use of oxide of iron for the purpose of purifying gas, and that a writ of *scire facias* had been sued out by the plaintiff to repeal the letters patent granted to the defendant, and that another patent for purifying coal gas by oxides of iron had been applied for by the defendant, and that other letters patent had been sued out by the plaintiff; and that, in order to put an end to the aforesaid differences, the parties had entered into that agreement; the defendant covenanted with the plaintiff, and the plaintiff agreed, that the defendant should have the exclusive use of the inventions granted to the plaintiff, so far as the same related to the purification of gas by the hydrated oxides of iron, paying therefore certain royalties; that the plaintiff should have the exclusive use of the inventions granted to the defendant, so far as the same related to the purification of gas by anhydrous oxides of iron, paying therefore certain royalties; that, for the purposes of that agreement, and the determination of the amount of royalties, it should be assumed that the defendants were entitled to the exclusive use of anhydrous oxides, and the plaintiff entitled to the exclusive use of hydrated oxides. The agreement also provided, that, in case of any breach of certain stipulations, the party so doing should pay to the other a certain sum as liquidated damages. In an action to recover that sum, the defendant pleaded that the plaintiff's patents were not valid, that the inventions were not new, and that the plaintiff was not the first inventor:—On demurrer, held, that the pleas were bad, inasmuch as the defendant was estopped by the agreement from disputing the validity of the patents. *Hills v. Laming*, 9 Exch. Rep. 256.

F, a mortgagor, assigned the equity of redemption by a deed, which contained a recital that all the interest had been paid upon the mortgage up to a period within twenty years of the commencement of the action, and a covenant by the assignee to pay the principal and future interest to the mortgagee, and to indemnify the mortgagor in case of default. The mortgagee was no party to the deed, but continued to receive the interest upon the mortgage from the assignee of the equity of redemption:—Held, in an action by the mortgagee against the mortgagor on the covenant, that the recital in the deed was evi-

dence of an acknowledgment by part payment of interest within twenty years. *Forsyth v. Bristowe*, 22 Law J. Rep. (N.S.) Exch. 255; 8 Exch. Rep. 716.

Held, also, that payment of the interest by the assignee of the equity of redemption was a sufficient acknowledgment to take the case out of the statute as against the mortgagor. *Ibid.*

Quære—whether the recital in the deed was an acknowledgment in writing of the debt being due to take the case out of the statute, it not being made to the person entitled thereto. *Ibid.*

A declaration in covenant stated that letters patent had been granted to the defendant for improvements in purifying gas, and that other letters patent had been granted to the plaintiff for an improved mode of manufacturing gas, and that certain parts of the plaintiff's invention intended to be secured had been claimed in the specification; that disputes had arisen between the parties as to their rights under the letters patent to the use of oxides of iron for the purpose of purifying gas; that to put an end to such disputes, the parties covenanted with each other for a mutual right of using the patents on the terms of giving notice of the beginning to use the same. Breach, want of notice. Plea, that the plaintiff's patent was not a good and valid patent in this, that it was not new, and the plaintiff was not the true and first inventor:—Held, that the intention of the deed was to prevent disputes between the parties, and that the defendants were estopped by the deed from denying the validity of the patent, its novelty, and that the plaintiff was the true and first inventor. *Hills v. Laming*, 22 Law J. Rep. (N.S.) Exch. 60; 9 Exch. Rep. 256.

(f) *Habendum.*

The plaintiffs contracted with R to build a ship for them, and made advances from time to time in respect of her; and R gave them, as a security for the advances, a bill of sale of the ship, which stated that he, R, thereby did sell, transfer, &c. to the plaintiffs a certain ship in progress of building (describing her), to have and to hold the ship, &c. to the plaintiffs for ever when she should be completed:—Held, that the present property passed to the plaintiffs by the bill of sale, and that the vesting of it was not postponed by the *habendum* to the time when the vessel should be complete. *Read v. Fairbanks*, 22 Law J. Rep. (N.S.) C.P. 206; 13 Com. B. Rep. 692.

(g) *Schedules.*

[See *Wood v. Rowcliffe*, title *BILLS OF SALE*.]

(D) *REGISTRATION.*

[See title *JUDGMENT*.]

(E) *REVOCATION.*

The declaration alleged, that by a policy of assurance between the plaintiffs and an assurance society, the defendants, in consideration of premiums to be paid by the plaintiffs at stated times, the defendants agreed to pay the plaintiffs, out of the premiums and reserved funds of the society, such sums as should from time to time be awarded to the plaintiffs by the council of the society, in respect of losses which might arise to the plaintiffs from the

sale of goods to debtor traders, and that by rules indorsed on the policy it was provided—Rule 40. "That the assured who during the year had had claims for losses, admitted by the society prior to the premiums for such year falling due, should be entitled to set off such admitted claims against such premiums." Rule 41. "That if the premiums should not be paid within fifteen days after they fell due, the directors might, with the approbation of the council, either cancel and declare the policy void or enforce payment of the premiums." Rule 60. "That if it should appear to be for the mutual benefit of the assured, the directors, at the request of the council, might cancel any policy and give notice to the assured, and the policy should thenceforth be null and void, but the assured should be entitled to every benefit secured by it up to the date of its being so cancelled." General averment, that the plaintiffs had done all things necessary that they should do, and that all things had happened which it was necessary should happen to entitle the plaintiffs to be paid by the defendants a loss incurred during the continuance of the agreement from the sale of goods to one E. Breach, that the defendants had not paid the plaintiffs in respect of the loss. Plea, that a premium payable by the plaintiffs was not paid within fifteen days after it fell due, wherefore the directors, with the approbation of the council, cancelled the policy and declared it void:—Held, first, that the general averment in the declaration sufficiently alleged the existence of a fund sufficient to pay the plaintiffs' claim, and that their claim had been admitted by the council; secondly, that the effect of rule 41. was to empower the directors to make a policy as void as if actually cancelled, and that there was nothing in rules 40. and 60. inconsistent with it, and, therefore, that the plea was a good answer to the action. *Bamberger v. the Commercial Credit Mutual Assurance Co.*, 24 Law J. Rep. (N.S.) C.P. 115; 15 Com. B. Rep. 681.

(F) SETTING ASIDE AND REFORMING FOR MISTAKE.

If a party is misled, and under the idea that he is discharging legal liabilities, enters into contracts, which he would have resisted if correctly informed, they will be set aside. *Lawton v. Campion*, 23 Law J. Rep. (N.S.) Chanc. 505; 18 Beav. 87.

The compromise of a suit, and of collateral claims arising out of demands having no legal existence, are not such considerations as will support a contract as a family arrangement when made on erroneous information. *Ibid.*

C B L, a tenant for life in possession of settled estates, under the impression that portions for the younger children of his brother J L (who was entitled in remainder) were raiseable during the lifetime of C B L, executed a deed compromising the sums alleged to be due from him for interest on the amount of the portions, and securing future payments during his life in respect of the supposed rights. Upon its being decided that the portions were not raiseable until after the death of C B L, and that he was not liable for any interest, a bill was filed to set aside the deed:—Held, that it was executed under a mistaken idea of his liabilities to carry into effect rights supposed to be legally existing, and not as a compromise of any doubtful

claim or to carry into effect any family arrangements. *Ibid.*

Where the recitals and the operative part of a deed are at variance, the latter must be acted on until the deed has been reformed. In a suit to reform the instrument, the Court would be enabled, from the circumstances, to judge which was erroneous. *Hammond v. Hammond*, 19 Beav. 29.

To justify the Court in reforming an executed deed, it must appear that there has been a mistake common to both the contracting parties, and that the agreement has been carried into effect by the deed in a manner contrary to the intention of both. *Murray v. Parker*, 19 Beav. 305.

A, being the holder of several policies of insurance on the life of B, and being unable to keep them up, entered into an agreement with C for the purpose of C keeping them up. The agreement consisted of three instruments, first by letter, by which it was stated that C was to pay the premiums, and to have his advances and interest secured by a deposit of the policies, a bond and an equitable mortgage of certain estates. No time was specified for the repayment of the advances and interest. Secondly, a bond for 6,000*l.*, referring to the letter for repaying the advances and interest at the expiration of six months from the death of B. Thirdly, an agreement, also referring to the letter and to the deposit of the policies to secure the payment of the advances and interest at the expiration of six calendar months from the death of B, by which agreement the advances and interest were secured to be paid at six months after the death of B upon certain estates. A died, living B, leaving a considerable amount of advances and interest unpaid, and having before his death assigned the policies to trustees for his creditors. C now filed this bill, claiming to have all his advances and interest paid, and that the agreement might be varied and made to conform to the letter, and that, if necessary, the policies might be sold:—Held, first, that upon the true construction of the three instruments C had no security on the policies available till after the expiration of six months from the death of B. Secondly, that the agreement could not be rectified, there being nothing to rectify it by except the letter itself, the letter and agreement being incorporated in effect into one instrument, and the letter not specifically pointing out the time when the security was to be available. *Brougham v. Squire*, 1 Drew. 161.

DETINUE.

- (A) WHEN MAINTAINABLE.
- (B) IN WHAT COURT.
- (C) PAYMENT INTO COURT IN.
- (D) PLEADING.
- (E) EXECUTION.

(A) WHEN MAINTAINABLE.

[See *Morgan v. Marquis*, title BANKRUPTCY, (H) (e) (3)—*Chilton v. Carrington*, title CONTRACT, (C) (a).]

A *cestui que trust* cannot maintain detinue for the deed under which he claims, against a bailee of the

trustee. *Foster v. Crabb*, 21 Law J. Rep. (N.S.) C.P. 189; 12 Com. B. Rep. 136.

Where several have interest in a deed, the title to the possession of it is ambulatory; and any of the parties interested having possession may retain it against the other. *Ibid*.

Detinue for documents of the plaintiff. Plea, that they were delivered to the defendant by persons jointly interested in them with the plaintiff; that the said persons never demanded them back; and that the defendant held with their consent. The evidence was, that the plaintiff was a shareholder and pursuer in the B Mining Company; and that he had delivered the documents to the defendant, an accountant, in pursuance of a resolution of the shareholders, in order that the defendant might report on the state of the company's affairs, and that the plaintiff in his own name, and not on behalf of the other shareholders, had demanded them back:—Held, that the plea raised a good defence, and was proved. *Atwood v. Ernest*, 22 Law J. Rep. (N.S.) C.P. 225; 13 Com. B. Rep. 881.

In detinue for goods, if all or any are delivered up after action brought, the plaintiff cannot have judgment to recover the goods so delivered to him, or their value; but may have judgment to recover damages for their detention, if he has sustained any damage; and may have judgment to recover the residue of the goods or their value, and damages for their detention. *Crossfield v. Such*, 22 Law J. Rep. (N.S.) Exch. 65; 8 Exch. Rep. 159.

(B) IN WHAT COURT.

The county courts, under the 9 & 10 Vict. c. 95, and the 13 & 14 Vict. c. 61, have jurisdiction in detinue. *In re Taylor v. Addyman*, 22 Law J. Rep. (N.S.) C.P. 94; 13 Com. B. Rep. 309.

(C) PAYMENT INTO COURT IN.

Semble—per Maule, J., that money may be paid into court in detinue in the county court, under the 9 & 10 Vict. c. 95. s. 82. *In re Taylor v. Addyman*, 22 Law J. Rep. (N.S.) C.P. 94; 13 Com. B. Rep. 309.

Payment into court by way of amends may be made in detinue, that action being a personal one within the 3 & 4 Will. 4. c. 42. s. 21. *Crossfield v. Such*, 22 Law J. Rep. (N.S.) Exch. 65; 8 Exch. Rep. 159.

(D) PLEADING.

To detinue for goods, the defendant pleaded, first, except as to part of the goods, *non detinet*; secondly, as to that part, that the plaintiffs ought not further to maintain their action in respect thereof, because after the commencement of the suit the defendant delivered the same to the plaintiffs, who accepted and received them; thirdly, as to the damages sustained by the detention of those goods, payment into court of 1s., averring no damages *ultra*:—Held, on general demurrer, that the second and third pleas were good. *Crossfield v. Such*, 22 Law J. Rep. (N.S.) Exch. 65; 8 Exch. Rep. 159.

(E) EXECUTION.

Semble—per Jervis, C.J., that the machinery for execution in detinue, (none being provided for by the County Courts Act), should be the same as in

the old county courts. *In re Taylor v. Addyman*, 22 Law J. Rep. (N.S.) C.P. 94; 13 Com. B. Rep. 309.

DEVISE.

- (A) CONSTRUCTION OF, IN GENERAL.
 - (a) *General Limitations of Estates.*
 - (b) *Condition precedent or subsequent.*
 - (c) *Period of Vesting.*
 - (d) *Meaning of Words.*
 - (1) "Issue."
 - (2) "Children."
 - (3) "Posthumous Child."
 - (4) "Survivors."
 - (5) "Male Heir."
 - (6) "Lawful Heir."
 - (7) "Living at Death."
 - (8) "Estate."
 - (9) "Accruing Share and Interest."
 - (10) "By Way of Jointure."
 - (e) *Who take as Devisees.*
- (B) WHAT PROPERTY PASSES BY THE DEVISE.
 - (a) *In general.*
 - (b) *Trust Estate.*
 - (c) *Leaseholds.*
 - (d) *Legal Estate in Mortgage.*
 - (e) *Tithes.*
 - (f) *Money to be laid out on Estate.*
 - (g) *Chose in Action.*
 - (h) *Arrears of Interest.*
 - (i) *After-acquired property.*
- (C) PARTICULAR LIMITATIONS.
 - (a) *Legal or Equitable.*
 - (b) *Trust or Beneficial.*
 - (c) *Joint Tenancy or Tenancy in Common.*
 - (d) *Fee Simple.*
 - (e) *Estate Tail.*
 - (f) *Estate for Life.*
 - (g) *Vested or Contingent Estate.*
 - (h) *Absolute Gift of Personality.*
 - (i) *Estate per Autre Vie.*
 - (j) *Executory Devise.*
- (D) RIGHT OF PRE-EMPTION.
- (E) CHARGES.
- (F) DEVISE FOR PAYMENT OF DEBTS.
- (G) TRUST FOR SALE.
- (H) VOID DEVISE.
 - (a) *Remoteness.*
 - (b) *Lapse.*

(A) CONSTRUCTION OF, IN GENERAL.

(a) *General Limitations of Estates.*

Replevin for an alleged wrongful distress. The defendant avowed justifying the distress in respect of his title to half-a-year's rent-charge. The avowry set out a will by which the testator, amongst other limitations, devised his estates in G to W B for life, with a power of appointment, and in default of appointment, in strict settlement, remainder to T R B and Diana his wife, one of the testator's natural daughters, in the like strict settlement; remainder in the same manner to W L and Sophia his wife, another of the testator's natural daughters; re-

mainder "to the use and behoof of Louisa Wentworth (the other of his natural daughters) or such person as she should first intermarry with, if any, before she attains the age of twenty-one years, by and with the consent and approbation of trustees or the survivor of them and his heirs, and which person should also previously make a competent settlement upon her, to the like approbation of the said trustees, for and during their joint natural lives or the life of the survivor of them, without impeachment of waste, and from and after the determination of that estate then to the use of the trustees and the survivor of them and his heirs, for and during the life of his said daughter Louisa, or such person as she should so first marry (if any) and the life of the longer liver of them, upon trust, to support contingent estates, and after the decease of the longer liver of them, his said daughter Louisa, and of such person as she should so first marry (if any), then to the use and behoof of all and every or any the son and sons of the body of his said daughter Louisa by such first or any after-taken husband, with the like power of appointment, and for all such and the like estates and interests and with the like remainders and limitations as aforesaid in relation as aforesaid, with remainder over in default of such issue." The testator then devised unto "J. Cockshutt and his heirs one other annuity or clear yearly rent-charge of 3,000*l.*, upon trust nevertheless to and for the only proper use and behoof of my said daughter Louisa Wentworth and her assigns until she, his said daughter, should marry (under and with the restriction above mentioned) or for and during the term of her natural life, and when and so soon as she, his said daughter, should marry as aforesaid, then upon such trusts and in the like manner and with the like powers and for such and the like estates and interests, and with the like remainders and limitations, and subject to the same contingencies and annihilations as is and are thereinbefore particularly mentioned, expressed, limited, directed and declared of and concerning and in relation to the aforesaid rent-charge thereinbefore given unto or for the benefit of his said daughter Sophia." The avowry further stated that, on the 23rd of February 1794, Louisa married W S and had issue G B S, their eldest son. That W S died on the 20th of April 1817, leaving G B S him surviving. That Louisa afterwards married J. Clifford, and by an indenture of the 13th of August 1838, in pursuance of the power in the will, she appointed, immediately after her death, the said rent-charge of 3,000*l.* secondly mentioned in the will, to the use of the said G B S and his heirs. That the said G B S afterwards and after he had attained twenty-one, by an indenture of the 14th of August 1838, granted the said rent-charge, with all powers and remedies of distress, to R F B and the defendant and their heirs, for all his estates therein or which he could grant by virtue of the limitations in the will to Louisa's first son or by the appointment expressed in the indenture of the 13th of August 1838. That R F B died on the 10th of January 1841, and the said Louisa on the 21st of December 1846, and that neither she nor the said W S, nor J C, nor any issue of her body, had become possessed of the hereditaments and premises devised by the will other than the said rent-charge, &c. Plea, setting out the first indenture, and alleging in bar that at the time of the

marriage of Louisa with the said W S she was under twenty-one, and that she so married without the consent or approbation of the trustees or either of them, nor was any settlement made by the said W S on her previous to such marriage:—Held, upon demurrer, that the above words, "when and so soon as she his said daughter should marry as aforesaid," were to be taken as referring merely to the fact of marriage before mentioned, and that although the limitations of the rent-charge in favour of Louisa's first husband could not have taken effect, yet those in favour of her sons by him or her after-taken husband would; that a power of appointment became vested in Mrs. Clifford, and therefore that the first avowry was valid, and the plea in bar no answer to it. *Beaumont v. Squire*, 21 Law J. Rep. (n.s.) Q.B. 123; 17 Q.B. Rep. 905.

A testator devised his Maytham Hall estate to trustees upon trust for P M for life, and after his decease for his first son for life, and after his decease for the first son of such first son in tail male; and in default of such issue, in trust for all and every other the son and sons of P M successively, for the like interests and limitations; and in default of issue of the body of P M, or in case of his not leaving any at his decease, upon trust for T M for life, and after his decease for his eldest son, T G M, for life, and after his decease for his first son in tail male; and in default of issue of the body of T G M upon trust for all and every other the son and sons of T M, for the like estates and interests. Proviso, that if P M or T M, their or either of their issue, should become entitled to the Jodrell estates, then the devised estates should go to the next person entitled under the testator's will, as if the person succeeding to the Jodrell estates were dead. T M died in the lifetime of the testator. P M entered into possession of the devised estates and suffered a recovery to the use of himself in fee. T G M succeeded to the Jodrell estates as tenant in tail in possession, and suffered a recovery to the use of himself in fee. Afterwards P M died without having had a son, having disposed of the Maytham Hall estate by will. Upon bill by the eldest son of T G M, claiming the Maytham Hall estate,—Held, that the limitations to the issue of P M subsequent to the life estate of his eldest son were void for remoteness; and that the doctrine of *cy-près* could not be applied, as it would let in classes of persons not intended to be provided for, and postpone classes intended to be provided for; and consequently that P M took only an estate for life. *Montgomery v. Dering*, 22 Law J. Rep. (n.s.) Chanc. 313; 2 De Gex, M. & G. 145; 20 Law J. Rep. (n.s.) Chanc. 153.

Held, also, that the gift over to T M and his issue in default of issue of the body of P M, &c., was valid as an independent clause, such gift over according with the previous valid limitation. *Ibid.*

The cases of *Pitt v. Jackson* and *Nicholl v. Nicholl* observed upon. *Ibid.*

Though a gift over on an event, expressed as a single event, but comprising in sense two branches, will not be construed as made on two events; yet it is otherwise where the testator has expressed two alternative events, one of which may be comprehended in the other. *Ibid.*

Held, also, that the recovery suffered by T G M of the Jodrell estates, to the use of himself in fee,

did not prevent the shifting clause as to the Maytham Hall estate taking effect; and that, consequently, the latter estate passed over to his son the plaintiff. *Ibid.*

A testator devised real estate to trustees, upon trust to pay the rents to his eldest son for life, with remainder for his first son in tail. By a codicil the testator revoked the trust of the rents for life, and in lieu directed the trustees to pay the son an annuity. No mention was made in the codicil of the surplus rents:—Held, affirming a decision of the Master of the Rolls, that there was no resulting trust of the surplus rents in favour of the eldest son, the heir-at-law, and also that the estate tail of his first son was accelerated. *Lainson v. Lainson*, 24 Law J. Rep. (n.s.) Chanc. 46; 5 De Gex, M. & G. 754; 23 Law J. Rep. (n.s.) Chanc. 170; 18 Beav. 1.

(b) *Condition precedent or subsequent.*

A testator, after charging certain fee simple property in L with an annuity, devised subject thereto, "that provided that my said son J D (his heir-at-law) shall when requested by my son D D effectually convey and assure unto him, the said D D, his heirs, and assigns for ever, free from all manner of incumbrances, all that messuage, &c. called C in the parish of T, &c., then I give and devise all and singular the aforesaid messuages, &c. out of which the said annuity or rent-charge is to be issuing as aforesaid unto him, the said J D, his heirs and assigns for ever; but if the said J D shall, when required as aforesaid, refuse to execute such a conveyance unto the said D D and his heirs, then I give and devise the said messuages, &c. so made liable to the payment of the said annuity, unto my said son D D, his heirs and assigns for ever." J D continued seised of both L and C until his death, C being all the time let by him to a tenant from year to year, and at his death he devised all his property to his wife. D D never requested J D to convey C to him; but after his death D D tendered a conveyance for execution to J D's wife, which she refused to execute:—Held, that D D could not maintain an action of ejectment for the recovery of the property in L. *Doe d. Davies v. Davies*, 20 Law J. Rep. (n.s.) Q.B. 408; 16 Q.B. Rep. 951.

An estate was settled to such uses as W D, a feme covert, should by deed or will appoint. W D devised the estate to R D, her husband, with power to sell and dispose of the same, and to raise any sum or sums of money thereon by mortgage or otherwise as he should think proper, but with this proviso:—"Provided, and these presents are upon this express condition, that such part of all and every sum and sums of money as aforesaid raised by the said R D, either by sale or mortgage, as shall be unexpended at my (his) decease shall be charged upon the houses belonging to the said R D, situate at, &c., to be disposed of immediately after the decease of the said R D; that is to say, that that sum shall be paid to my four nieces, share and share alike." And in case the estate should not be mortgaged to its full value, the testatrix devised the reversion to her said four nieces; and in case the estate should not be sold or mortgaged by R D she devised the same to her four nieces, and their heirs as tenants in common. R D mortgaged the estate, and died without having made any charge of the mortgage-money or any part

thereof upon his houses:—Held, that the condition was not a condition precedent, and that the mortgages made by R D were valid. *Watkins v. Williams; Haverd v. Davis*, 21 Law J. Rep. (n.s.) Chanc. 601; 3 Mac. & G. 622.

A contingent gift or interest may be operated on, like a vested interest or estate, by a condition subsequent, and made to cease and become void. *Egerton v. Earl Brownlow*, 23 Law J. Rep. (n.s.) Chanc. 348; 4 H.L. Cas. 1; reversing 20 Law J. Rep. (n.s.) Chanc. 645; 1 Sim. N.S. 464.

The Earl of Bridgewater devised large real estates to trustees to make a settlement in accordance with the limitations contained in his will. One limitation was "to Lord Alford for and during the term of ninety-nine years, if he shall so long live," remainder to trustees during his life to preserve contingent remainders, "remainder to the use of the heirs male of his body, with remainder in default of such issue to the use of C H C, for the term of ninety-nine years, if he shall so long live," remainders to trustees and to the use of the heirs male of C H C similar to those mentioned in the case of Lord Alford, "subject nevertheless as to the several uses and estates so to be limited to Lord Alford and C H C and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained." And the testator declared that in such settlement his estates were "not to be limited successively to the use of the first and other sons of Lord Alford or of C H C in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the said Lord Alford and C H C respectively." And he provided "that if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater, to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void; * * and my real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will as if the said Lord Alford were actually dead without issue male." Lord Alford came into possession of the estates, but died without having acquired the title of Duke or Marquis of Bridgewater, leaving an heir male, the appellant in this case:—Held, reversing the decision of the Court below and against the opinions of nine out of eleven Judges, that the contingent interest thus created in favour of Lord Alford's heirs male was not affected by the proviso, which was a condition subsequent, and was void as being against public policy; and, therefore, that the eldest son of the late Lord Alford was entitled to the estates as heir male, under the limitation. *Ibid.*

A testator devised lands, after the several deceases of F S S and M his wife, "unto all the children of the said F and M already or hereafter to be born of their bodies, whether male or female, for and during their joint lives and the life of the survivor, but all the sons to take the name and arms of J W in addition to their own name," with remainder to trustees during the lives of all the said children, to

preserve contingent remainders, in trust, nevertheless, to permit and suffer all the said children to receive and take the rents, issues, and profits thereof in equal shares during their lives, and from and after their several deceases "unto and equally between all their issue, male and female," and for want of such issue, over:—Held, first, that the name and arms clause was not a condition precedent; secondly, that the words "already born or hereafter to be born" included only children living at the death of the testator, to the exclusion of such as had died between the date of the will and his death; thirdly, upon the general intention of the will, that the word "issue" must be construed as a word of limitation and not of purchase, and, consequently, the words creating a tenancy in common between the issue must be rejected, and the children of F S S and M his wife took estates tail, with cross-remainders in tail. *Woodhouse v. Herrick*, 24 Law J. Rep. (N.S.) Chanc. 649; 1 Kay & J. 352.

(c) Period of Vesting.

A testator gave all the residue of his real and personal estate to trustees, upon trust to convert and invest his personal estate, and to pay the interest, income and rents to A for life, and declared that they should, as soon as conveniently might be after the decease of A, convey, pay, assign, transfer and make over the residuary real estates and the trust monies and premises unto and among all and every the child and children of A, as and when they should severally and respectively attain their ages of twenty-one years, as tenants in common, and their respective heirs, executors and administrators; and, if there should be but one child, then to such child, his or her heirs, executors and administrators. A died, leaving three children, two of whom died in their infancy:—Held, that all three children took vested indefeasible interests in the real and personal estate. *King v. Isaacson*, 22 Law J. Rep. (N.S.) Chanc. 455; 1 Sm. & G. 371.

A testator devised freehold property to trustees, with power to let the same till all his nephews and nieces attained twenty-one, and after the youngest should have attained that age he directed that his estates should be sold, and the proceeds to go equally amongst all his nephews and nieces, except two specially named:—Held, that the nephews of the testator, who died after attaining twenty-one and before the period of sale, took vested interests in the proceeds. *Parker v. Sowerby*, 22 Law J. Rep. (N.S.) Chanc. 942; 1 Drew. 488.

The gift of an estate to T A "to become his property on attaining the age of twenty-five years,"—Held, a vested interest subject to be divested by dying under that age. *Attwater v. Attwater*, 23 Law J. Rep. (N.S.) Chanc. 692; 18 Beav. 330.

Devise of real estate to three daughters for life, and after their decease to three grandchildren, as tenants in common in fee, and in case of either of the grandchildren dying in the lifetime of the daughters, the share of them so dying to be "transferred" to the "survivors," and if only one should be living, then to him or her so surviving. The survivor of the daughters outlived the three grandchildren:—Held, that the survivorship had reference to the death of the last tenant for life, and not to a survivorship between the grandchildren, that the

divesting clause never took effect, and that on the decease of the survivor of the three daughters the heirs of the three grandchildren took as tenants in common in fee. *Littlejohns v. Household*, 21 Beav. 29.

(d) Meaning of Words.

(1) "Issue."

A testator devised freehold and leasehold property to his son John, his heirs and executors, so far as the nature of the property would admit, and in case of his decease without leaving issue, gave the same to his son William and his heirs. He devised other property to his son William and his heirs, with a similar proviso in favour of John. And in the event of the decease of both John and William without leaving issue, he gave both properties to his daughter M:—Held, that the combination of personality and realty in the same gift was not sufficient to vary the settled construction of the words "dying without issue" in the case of realty, and that, therefore, John and William took estates tail in the freeholds respectively devised to them, with cross-remainders in tail in the same. *Bamford v. Chadwick*, or *Lord*, 23 Law J. Rep. (N.S.) C.P. 172; 14 Com. B. Rep. 708.

Devise to trustees "upon trust for the children of her niece during their lives, and after the decease of the survivor then for all and every the lawful issue, male and female, of such of the children of her niece as should be living at her decease as tenants in common, and the heirs of the body of all and every of the issue of the said children, and on the death and failure of heirs of the body of any one or more of the issue of the said children, as well the original as the accrued share of him so dying, and of whom there shall be such, shall be in trust for the survivors or survivor of them as tenants in common, and for the heirs of the body of such surviving issue":—Held, that the rule in *Shelley's case* did not apply, and that the children of the testatrix's niece took estates for life only, with remainder to their "issue" as purchasers. *Parker v. Clark*, 3 Sm. & G. 161.

Superadded words following "issue," or other words having no technically defined meaning, tend more strongly to shew an intention that they should take as purchasers, than when superadded to words having a technically defined meaning—such as the words "heirs" or "heirs of the body." *Ibid*.

(2) "Children."

A life interest in two freehold houses was devised to E D, and "should she marry and have issue then to go to her children; if she have no issue, then to go to F W":—Held, that E D took an estate tail, the word "children" being used synonymously with the word "issue." *Voller v. Carter*, 24 Law J. Rep. (N.S.) Q.B. 56; 4 E. & B. 173.

(3) "Posthumous Child."

Where a testator, in contemplation of immediate death, devised his lands to his wife for life, and remainder in fee to his nephew, with a condition that if his wife should give birth to a posthumous child, such child should take to the exclusion of the nephew, and afterwards, in the testator's lifetime, a child was born,—Held, that such child did not take

by implication under the will. *Doe d. Blakiston v. Haslewood*, 20 Law J. Rep. (N.S.) C.P. 89; 10 Com. B. Rep. 544.

Semble—that *White v. Barber* cannot be supported. *Ibid.*

(4) "Survivors."

[See *post*, (9).]

(5) "Male Heir."

A testator, being entitled to freehold lands held in gavelkind and to other freehold lands, by his will devised all his real estate to A for life, with remainder to his (the testator's) then heir male and his heirs in strict tail male:—Held, that, on the death of A, the testator's then heir-at-law, and not his gavelkind heirs, became, under the will, entitled to the lands held in gavelkind. *Thorp v. Owen*, 23 Law J. Rep. (N.S.) Chanc. 286; 2 Sm. & G. 90.

(6) "Lawful Heir."

A devise to A and "his lawful heirs" creates a fee and not an estate tail. The addition "lawful" in no degree affects the word "heirs," for the qualification of being lawful is implied in the word "heirs." *Mathews v. Gardiner*, 17 Beav. 254.

Devise to testator's daughter and her lawful heirs, but in case she should not happen to have any child, then to his nephew and his heirs:—Held, that the daughter took a fee simple with an executory devise over to the nephew. *Ibid.*

(7) "Living at Death."

M D devised certain estates to his nephew, Sir J E, Bart. for life, and after Sir J E's decease to his second son and his heirs male; and in default to the third son and his heirs male, and so on, with a proviso that if the baronetcy should come to or descend to the second son of Sir J E, the estates should go over to the next in succession. P J, the father of Lady E, by a will made subsequently to that of M D, devised his estates to his daughter, Lady E, for life, then to her eldest son for life and his heirs, and for default, &c. to the second son of Lady E for life and to his heirs ("in case he shall not become or shall not continue seised of the real estates of M D by virtue of his will"), and to the third and every other son of Lady E subject to the like condition, "provided always that if it shall happen that my said daughter shall have no issue male of her body *living at her death*, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited and settled as aforesaid, then and in either of those cases I devise all my said real estates, subject respectively as aforesaid, to all the daughters (if more than one) of the body of my said daughter who shall be living at her death as tenants in common, and their heirs," &c., with cross-remainders amongst them; "and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs." At the time of the death of Lady E there were two sons and several daughters living; both sons afterwards died without issue:—Held, that the daughters of Lady E did not take any estate under the limitations of the will of P J,

for that the words "living at her death" applied to both branches of the proviso, and that the contingency on which the daughters were to become entitled determined at the death of their mother. *Eden v. Wilson*, 4 H.L. Cas. 257.

(8) "Estate."

The word "estate" in a will, will *prima facie* pass real estate, and the burthen of proof lies on those who contend the contrary. *Patterson v. Huddart*, 17 Beav. 210.

A testatrix, after giving pecuniary and specific legacies, and after directing her charity legacies to be paid out of her personal estate, gave and bequeathed all the rest of her estate and effects whatsoever and wheresoever and all her diamonds and other jewels to trustees, their executors and administrators, upon trust to sell and divide:—Held, that the real estate passed to them. *Ibid.*

(9) "Accruing Share and Interest."

Testator devised his estate at S to trustees in fee, upon trust for his daughter A for life for her separate use, and directed that at her death the trustees should stand seised of the said estate, and also "of all accruing share and interest to which his said daughter might become entitled by survivorship under the trusts of his will or otherwise," upon trust for the children of his said daughter and the issue of such as should be dead, their heirs and assigns, as tenants in common; but in default of issue of his said daughter then for such persons as she should appoint; and in default of appointment, in trust for his son W and daughter M, or such of them as should be then living and the issue of such as should be then dead, their heirs and assigns for ever; such last-mentioned issue, nevertheless, to take only the share or shares which their deceased parents, if living, would respectively have taken. Subsequently, in the same will, the testator devised his estate called the R estate to the same trustees in fee, upon trust for his daughter M for life, for her separate use, and directed that at her death the said trustees should stand seised of the said R estate, and also "of all accruing shares, &c. &c. to which his said daughter M might become entitled," &c., upon trust for the children of his said daughter M, and the issue of such as should be dead, their heirs and assigns; and in default of such issue then for such persons as she should appoint; and in default of appointment, in trust for his son W and daughter M, or such of them as should be living, or the issue of such as should be dead, their heirs and assigns for ever; such last-mentioned issue, nevertheless, to take only the share or shares which their deceased parents, if living, would respectively have taken:—Held, that the words "accruing share and interest to which his said daughter A might become entitled by survivorship under the will or otherwise," did not apply to the interest which A might take in the R estate in the event of her sister M dying without issue and without having exercised the power of appointment, although there was nothing else in the will to which the said words could apply, and that therefore upon the death of M without issue, without exercising her power of appointment, A became entitled to a moiety of the R estate in fee. *Greenwood v. Sutcliffe*, 23 Law J. Rep. (N.S.) C.P. 98; 14 Com. B. Rep. 226.

(10) "*By way of Jointure.*"

A testator devised to his son R T an annuity or rent-charge of 300*l.* issuing out of land, and by a codicil declared, that in case his son should marry it should be lawful for him to settle an annuity of 300*l.* upon the woman he might happen to marry, *by way of jointure*, to be charged on the premises in like manner with the sum of 300*l.* devised by the will; and in case the said R T should so settle an annuity it should be by way of substitution for the annuity given by the will, and that on such substitution the annuity given by the will should cease. R T having married, by a deed-poll made in exercise of the power given by his father's will, settled and appointed an annuity *by way of jointure* on his wife, declaring the same to be charged on the testator's estate, in like manner as the annuity of 300*l.* was charged by the will:—Held, that this annuity took effect during the life of R T and his wife, and was not postponed till the death of R T; the testator's intention being that in the event of the wife surviving her husband she should receive the annuity by way of jointure and in bar of dower. *Jamieson v. Trevelyan*, 23 Law J. Rep. (N.S.) Exch. 281; 10 Exch. Rep. 269.

(c) *Who take as Devises.*

A testator devised copyhold hereditaments holden of the manor of M to W G for life, with remainder to his eldest or only son and his customary heirs for ever; provided that if W G should leave no son or issue of a son living or *en ventre sa mère* at his death, then the testator devised the same estate to the daughters or only daughter of W G as tenants in common, and their customary heirs for ever; provided also, that if W G should have neither son nor daughter living or *en ventre sa mère* at his death, then over. On the death of the testator, W G was admitted as tenant for life. W G had seven children, one son and six daughters; one of the daughters died in childhood, and the son died shortly afterwards in childhood, and before the births of the four daughters; one of the four younger daughters also died in childhood. On the death of W G his four surviving daughters were admitted each to an undivided fourth share in fee. By the custom of the manor of M the descent was to the youngest son or youngest daughter; and for default of issue of such customary tenant, to the youngest brother or youngest sister, and in default of such brother and sister, to the youngest kinsman or kinswoman of the whole blood of the customary tenant in possession how far soever remote:—Held, first, that the devise was to all the daughters of W G, and not merely to such as should be living at the death of the tenant for life. Secondly, that the youngest daughter of W G was entitled as heir by the custom to the shares of her deceased sisters, although born after their deaths, the inheritance shifting in accordance with the rule at law as often as a nearer heir was born. *Rider v. Wood*, 24 Law J. Rep. (N.S.) Chanc. 737; 1 Kay & J. 644.

If the custom is alleged to be according to the tenure of borough English, the Court will take notice of all the incidents of the custom of borough English; but if the incidents of the custom only are alleged, the Court will not go beyond the allegations. *Ibid.*

A particular custom as to the descent from a cus-

tomary tenant will not apply where the tenant dies before admission, but the descent must be according to the common law. *Ibid.*

Devise by the testator to his eldest son, who had died previously to the date of the will, leaving an heir:—Held, on the construction of the 23rd section of the Wills Act, that the heir of the devise was entitled. *Wisden v. Wisden*, 2 Sm. & G. 396.

Devise and bequest of real and personal estate to trustees upon trust for the testator's daughter for her life (with power of sale on her consent), and after her decease for such person or persons as his daughter should by will appoint, and in default of such appointment a devise and bequest of such real and personal estate to the testator's heirs and assigns *ex parte maternæ*, as if he had died intestate, and power (by a codicil) to sink any part of the personal estate or proceeds of the sale of the real estate in the purchase of an annuity to the daughter:—Held, upon a claim of the daughter against the trustees for the conveyance of the real estate to her, that the heir *ex parte maternæ* was the heir at the death of the testator, and that the daughter was such heir; and the Court directed a conveyance to her accordingly. *Rawlinson v. Wass*, 9 Hare, 673.

Bequest of property (monies to be laid out in land) to L, and afterwards to his eldest lawfully begotten son, &c., remainder to others in succession, with a direction that in case of the decease of an elder son in any of the cases, then the property to go to the second son, and so on according to primogeniture; but in every case a grandson to inherit before a younger son, and before the next named in the entail or any of his sons:—Held, upon the language of the whole will, that the testator did not regard L as the stock or stirps, but looked to the sons of L as the parties from whom the property was to devolve in succession, and that L took an estate for life only. *East v. Twyford*, 9 Hare, 713.

The fact that whenever a limitation occurred in the will in favour of sons it was accompanied by the provision that they should take in order of primogeniture, and that there was no such provision as to grandsons:—Held, that the sons were intended to take by particular description, and the grandsons as a class. *Ibid.*

(B) WHAT PROPERTY PASSES BY THE DEVISE.

(a) *In general.*

A testator purporting to dispose of "all the rest, residue and remainder of his estates wheresoever and whatsoever," devised to his son D H "all those two cottages or tenements, the one occupied by my son, John Hubbard, and the other occupied by my grand-daughter, together with all the appurtenances thereto belonging." At the date of the will and death of the testator a room, originally part of a cottage, (but which had several years before the making of the will been partitioned off from the rest of the building, and had a separate entrance,) was occupied by John Hubbard as a separate dwelling, together with a hovel part of the testator's property. The rest of the building from which the room so occupied by John Hubbard had been taken, was in the separate occupation of the devisee, D H. There was also a room originally part of another cottage, but from which it had been similarly partitioned off, which, at the date of the will and the death of the

testator, was occupied by his grand-daughter as a separate dwelling, together with an adjoining pantry. The rest of the building from which the room so occupied by the grand-daughter had been separated was in the separate occupation of W H, as a distinct dwelling. There was also at the same dates a building occupied as a separate dwelling by J. Weston, which was part of the testator's property. All these five dwellings had originally consisted of two cottages only, which had been subdivided as before stated, and were copyhold, to which the testator had prior to the date of his will, but subsequent to some of the separations before mentioned, been admitted by the description of "all those two customary or copyhold messuages, cottages or tenements." In ejectment by the heir-at-law to recover the portions of the property other than those in the actual occupation of John Hubbard and the grand-daughter,—Held, by *Lord Campbell, C.J., Patteson, J. and Wightman, J.*, that the rooms occupied by John Hubbard and the grand-daughter respectively fulfilled the terms of the devise, and that consequently these rooms only, and not the whole of the cottages, of which they had formerly been part, passed to the devisee. That the maxim *falsa demonstratio non nocet* applies only where the words of the devise, independently of the *falsa demonstratio*, are sufficient of themselves to describe the property intended to pass; and that therefore the words "in the occupation of John Hubbard and of my grand-daughter," could not be rejected. Also, that the question put to a witness who had made the will, "what did the testator say about the two cottages?" was improper, as leading to an answer which would be inadmissible in evidence. Held, by *Erle, J.*, that the whole of the two cottages passed under the devise to D H, and that any declaration of the testator indicating that he spoke of his copyhold property by the description of the two cottages with their appurtenances, would be admissible to explain the latent ambiguity raised by the evidence in the cause, and that if the question was confined to such declaration, it might be properly asked. *Doe d. Hubbard v. Hubbard*, 20 Law J. Rep. (n.s.) Q.B. 61; 15 Q.B. Rep. 227.

A testator devised to J S "all those my three messuages with the gardens, close of land, and *all other my real estate* whatsoever, situate at Little Heath, in the parish of F, now in the occupation of myself, A and B." At the date of the will, and at the death of the testator, he was possessed of three messuages with gardens and a close of land at Little Heath, which were in the occupation of himself, A and B. He had also the reversion in a house and garden, situate at Little Heath, which was in the occupation of C, who was entitled to it for life. Besides these he had no other property in the parish of F:—Held, that the house and garden, in the occupation of C, passed under the general devise to J S. *Doe d. Campton v. Carpenter*, 20 Law J. Rep. (n.s.) Q.B. 70; 16 Q.B. Rep. 181.

Words of description following a general devise, will not be construed as restrictive, where the effect of doing so would be to render the general devise inoperative, and where they may be rejected as a false demonstration. *Ibid.*

A testator, after giving certain legacies and annuities, gave and bequeathed all the rest, residue and

remainder of his estate and effects, whatsoever and wheresoever, and every part thereof, to trustees, upon trust to invest in their names in the public funds, or at interest upon government or real securities, and to pay the interest in manner therein mentioned. The will contained no power of sale. The testator's estate consisted entirely of personalty, except two shares in a chapel, which were realty:—Held, that the real estate passed under the residuary bequest. *Fullerton v. Martin*, 22 Law J. Rep. (n.s.) Chanc. 893.

Under a devise of estates "in Bullen Court, Strand, and Maiden Lane, in the county of Middlesex":—Held, that each locality must be read separately, and that the gift included the two houses in the Strand, adjoining houses in Bullen Court, the whole having been purchased together and held under one title. *Gawmlett v. Carter*, 23 Law J. Rep. (n.s.) Chanc. 219; 17 Beav. 586.

A B having been in possession of a dwelling-house from 1822, without paying any rent for the same, by his will, dated in 1837, devised the same upon trusts for sale, for the benefit of his wife for life, and afterwards for his children. A B died in 1837, and his widow took out letters of administration, with the will annexed, and entered into possession of the house, a portion of which she let in 1850 to C D, the eldest son of A B, as a weekly tenant. The widow died in 1852, and thereupon C D claimed the house as occupant, contending that A B had not at his death a devisable interest in it:—Held, that it must be taken that the widow had been in possession under the will, and that C D was her tenant; and, therefore, that C D could not claim as occupant. *Hawksbee v. Hawksbee*, 23 Law J. Rep. (n.s.) Chanc. 521; 11 Hare, 230.

Real estate will not pass by the words "all estate, effects, and property whatsoever and wheresoever," when the trusts and general context of the will point to personal estate only, and afford no index to shew that real estate was present to the mind of the testator when he made his will. *Coard v. Holderness*, 24 Law J. Rep. (n.s.) Chanc. 388; 20 Beav. 147.

A testatrix proceeded thus:—"And in respect of my real and personal estate" I direct the tenant to be continued, "And as to the rest, residue and remainder of my estate, including monies and securities for money," I direct that it shall be divided, &c.:—Held, that the real estate passed. *Meeds v. Wood*, 19 Beav. 215.

The owner of an estate, after having devised it to an infant, agreed under compulsion to sell a portion of it to a railway company. The owner having died before the completion of the purchase, without having altered his will,—Held, that his executor, and not the devisee, were entitled to the purchase-money and to the compensation for severance; and, secondly, that the railway company was bound to pay the costs of the infant devisee. *In re the Manchester and Southport Rail. Co.*, 19 Beav. 365.

A testator "gave" to his wife for her use and benefit "his leases, monies, goods, furniture, plate, book debts, securities for money and all other property of every description, that he might be possessed of":—Held, that the real estate passed. *Re the Greenwich Hospital Improvement Act*, 20 Beav. 458.

A vendor and a purchaser being in treaty for the sale and purchase of an estate, the vendor wrote to his solicitor stating that the purchaser had agreed to purchase his estate for 60,000*l.*, and requested him to settle an agreement on that basis for them to sign, adding that he had given to the purchaser a copy of this letter not signed as a memorandum. The purchaser subsequently wrote to the vendor's solicitor, inquiring when he would forward to him the draft of the agreement relative to the purchase he had concluded with the vendor for his estate in that county. Prior to the execution of the conveyances the purchaser made his will, by which he devised the subject-matter of the treaty to trustees upon certain trusts:—Held, that at the date of his will the purchaser had a devisable interest in the estate. *Morgan v. Holford*, 1 Sm. & G. 101.

Seemle—a purchaser who had made but not signed a contract, the terms of which are proved and signed by the vendor, has a devisable interest in the subject-matter. *Ibid.*

(b) Trust Estate.

A testator devised his real, copyhold and leasehold estates to trustees, their heirs, executors and administrators, upon certain trusts, and authorized his said trustees and the survivor of them, his heirs, executors and administrators, to sell all or any part of his property. The surviving trustee died, having, by his will, devised his trust estates to two persons in fee, and appointed them his executors. They entered into a contract for a sale of a part of the testator's copyhold property:—Held, on a special case, that the point was too doubtful to force the title on the purchaser. *Wilson v. Bennett*, 20 Law J. Rep. (n.s.) Chanc. 279.

Bequest to A and B, their executors and administrators upon trust. B, the surviving trustee, by his will bequeathed his trust estates to C and D, their heirs, executors, administrators and assigns, on the trusts; and he appointed C, D and E executors of his will:—Held, that C and D took only the legal estate, and that neither C and D by themselves nor C, D and E were capable of executing the trusts. *Re Burt's Estate*, 1 Drew. 319.

A devise to trustees of certain copyhold estate, and all other the real estate of the testatrix, and a declaration of the trusts of the monies to arise from the sale of such copyhold estate, and a general devise of all other her real estate to three persons as tenants in common,—Held, not to pass the legal estate of the testatrix in certain copyholds of which she was merely trustee. *In re Morley's Will*, 10 Hare, 293.

(c) Leaseholds.

A testator, by will, made in 1815, devised "all the rest, residue and remainder of his personal estate, goods and chattels whatsoever and wheresoever," subject to the payment of debts and legacies, to his brother M J D to and for his own use and benefit, and appointed him sole executor. He further devised "all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, &c. at or near W in the county of D, and B in the county of Y, and all his real estates in the said counties and elsewhere, and all his estate and interest therein, to R E D Shafto." M J D pre-deceased the testator, who, in 1841, duly made a codicil appointing another

executor and ratifying and confirming his will, and died in 1844. At the time of his making the will and at his death, the testator was possessed both of freeholds and leasehold estates in the county of D:—Held, that as, under 1 Vict. c. 26. s. 24, the will must be deemed to have been made in 1844, this was a general devise of the testator's lands within 1 Vict. c. 25. s. 26, and that the leaseholds passed by it to R E D Shafto, and that the prior devise of all the personal estate did not shew a contrary intention so as to prevent the operation of the enacting part of the 26th section. *Wilson v. Eden*, 20 Law J. Rep. (n.s.) Exch. 73; 5 Exch. Rep. 752.

A testator gave and devised all his freehold and copyhold messuages, farms, lands, tenements, hereditaments and real estate situate at Market Rasen, to his wife for life, and then to his son, his heirs and assigns for ever. The testator had no property at Market Rasen except a leasehold estate held for 1,000 years:—Held, that the leasehold estate passed under the above clause. *Nelson v. Hopkins*, 21 Law J. Rep. (n.s.) Chanc. 410.

A testator having devised the residue of his personal estate, whatsoever and wheresoever, to A B, devised all his manors, lands, &c. at W, in the county of Durham, and at B in the county of York, and a parcel of land purchased of M L, and all other his real estates in the counties of Durham and York, and elsewhere, and all his estate and interest therein to C and D and their heirs to certain uses:—Held, under the 1 Vict. c. 26. s. 26, that his leaseholds in Durham passed to C and D with the real, and not to A B with the personal estate. *Wilson v. Eden*, 16 Beav. 153.

The case of *Wilson v. Eden*, 11 Beav. 237, reversed. *Ibid.*

(d) Legal Estate in Mortgage.

The following devise, "I leave my wife, R H, to receive all monies upon mortgages," gives the wife the legal estate in the mortgaged premises. *Doe d. Guest v. Bennett*, 20 Law J. Rep. (n.s.) Exch. 323; 6 Exch. Rep. 392.

A devise (since the Wills Act) by mortgagee in fee of (*inter alia*) the residue of his real property and securities, &c., after payment of his debts, &c. to residuary devisees for her own use and benefit, held to comprise the legal estate of mortgaged property of gavelkind tenure. *In re Field's Mortgage*, 21 Law J. Rep. (n.s.) Chanc. 175; 9 Hare, 414.

A testator, a mortgagee in fee of real estate, gave and bequeathed to A all his monies, securities for money, and all his goods, chattels, personal estate and effects whatsoever and wheresoever, to hold to A, his executors, administrators and assigns, he paying thereout all his debts:—Held, that the legal estate in the mortgaged property passed to A. *In re King's Estate*, 21 Law J. Rep. (n.s.) Chanc. 673; 5 De Gex & Sm. 644.

A testator, a mortgagee in fee of real estate, gave and bequeathed to A and B all and singular his household furniture, goods, plate, linen and utensils whatsoever, and all and every other his goods and chattels, stock, stock-in-trade, monies, debts and securities for money, and all and every other his personal estate and effects whatsoever and wheresoever, upon trust to get in his debts and to sell his personal estate, and hold the money arising therefrom upon the trusts therein men-

tioned:—Held, that, under these words, the legal estate in the mortgaged property passed to the trustees. *In the matter of Walker's Estate*, 21 Law J. Rep. (N.S.) Chanc. 674.

A testator being mortgagee in fee of an estate, bequeathed to trustees "all his money in the funds and on securities," upon certain trusts declared by his will.—Held, that the legal estate in the mortgaged property did not pass under these words. *Ex parte Cawley*, 22 Law J. Rep. (N.S.) Chanc. 391.

(c) *Tithes*.

A testator, by his will, gave and devised "all and every my shares, parts, and proportions of and in the tithes yearly arising, growing and renewing within the parish of L, and the titheable places thereof, save and except, &c., to hold the same, with the appurtenances," to his nephew for life, subject to the proviso that, if at any time during his life he received from or by means of any ecclesiastical living or preferment an annual income of 400*l*. the said devise should cease and determine, and the shares, parts and proportions of the said tithes go and be possessed in like manner by a brother of the testator for life, and "then and after the expiration thereof to the several provisions and uses herein expressed and contained of and concerning my real estate." In a subsequent part of the will the testator gave and devised "all my real estate of what nature or kind soever and wheresoever situate, subject to the payment of my just debts, &c. in aid of my personal estate as aforesaid," to several persons successively in strict settlement. He further bequeathed to his wife 500*l*. to be paid within twelve calendar months after his decease, upon condition of her binding herself to receive 500*l*. yearly in lieu of taking possession of the hereditaments settled upon her by way of jointure; and "all the rest and residue of his personal estates and effects of what nature or kind soever" he gave and bequeathed to his niece. The testator made four codicils to his will. By the first three he revoked some of the legacies in the will and gave others, and altered the disposition in his will in so far as to place the name of one of his nephews before that of another, and this for all estates, real and personal, possessed by him in his own right. By the fourth codicil, after providing for the payment of certain annuities, he gave and devised all his real estates of what nature or kind soever, subject to the charge thereafter contained, to the defendant, in strict settlement; and on failure, &c., then he gave and devised all his said real estates in such manner as in that behalf mentioned in his said will, declaring it to be his will that the devises thereinbefore made should take effect in precedence to the devises of his real estates in his said will, and that every person who should become entitled in possession to his real estates by virtue of the devises thereby made should, within twelve calendar months, obtain the proper licence to use the surname of Evans, &c.:—Held, that the gift of the tithes made by the will remained unrevoked, there being nothing to shew that it was the intention of the testator to use the words "real estates" in the fourth codicil in a different sense from that in which they were used in the will. *Williams v. Evans*, 22 Law J. Rep. (N.S.) Q.B. 241; 1 E. & B. 727.

(f) *Money to be laid out on Estate*.

A testator devised real estate in strict settlement, and prohibited the cutting of timber thereon. He also gave a sum of stock to trustees, upon trust to apply the dividends in keeping the buildings, &c. on the estate in repair for a term of years, and to pay the surplus to the persons in possession of the estate under his will, and, at the expiration of the term, to transfer the stock to the person in possession of the estate, if a son or descendant of a son of his, otherwise to the descendants of his brothers and sisters. The estate tail was barred before the expiration of the term, and it was held, that the person in possession of the estate (who was a son or descendant of a son) became entitled to an immediate transfer of the fund. *In the matter of Colson's Trusts*, 23 Law J. Rep. (N.S.) Chanc. 155; Kay, 133.

(g) *Chose in Action*.

The Wills Act (1 Vict. c. 26.) does not enable a testator to bequeath a chose in action so as to pass the right of suing to the legatee. *Bishop v. Curtis*, 21 Law J. Rep. (N.S.) Q.B. 391.

(h) *Arrears of Interest*.

The will of a testator, who at the time of his death was in possession of some household property, which had been mortgaged to him in fee to secure 1,500*l*. and interest, contained the following clauses:—"I give all my interest and claim on household property in N. belonging to the successors of the late [mortgagee], on which I have a mortgage of 1,500*l*," &c. "to the plaintiff, his heirs and assigns for ever," &c. "My widow shall pay my funeral expenses and other just debts, without interfering with the legacies to my family." During the testator's lifetime, certain repairs which had been ordered by him had been done to the mortgaged premises, but had not been paid for by him, but were paid for by his executrix after his death. There were also at the time of his death arrears of interest due on the mortgage:—Held, that, by the will, not only the principal sum of 1,500*l*., but also the unpaid arrears of interest, passed to the plaintiff as legatee. That the plaintiff was not liable to repay to the executrix the sum he had so paid for the repairs of the mortgaged premises. That the executrix was not justified in refusing to give up to the plaintiff the mortgage deed until he had paid to her the amount of the arrears of interest and of the bill for the repairs; and that, assuming that she had assented to the legacy, and that the sums were paid under duress, he was entitled to recover them back. *Gibbon v. Gibbon*, 22 Law J. Rep. (N.S.) C.P. 131; 13 Com. B. Rep. 205.

(i) *After-acquired Property*.

A testator who, at the time of making his will in 1849, was possessed of personal property, after giving several legacies, gave and bequeathed all the residue of his goods, chattels, stock in trade, estate, and effects, of what nature or kind soever, not before given or bequeathed, to A and B, their executors, administrators and assigns, upon trust for sale and payment of the proceeds to his wife and children.

He subsequently acquired real estate:—Held, that under the 7 Will. 4. & 1 Vict. c. 26. s. 24, which provides that every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will, the after-acquired real estate passed under the gift to A and B. *O'Toole v. Browne*, 23 Law J. Rep. (N.S.) Q.B. 282; 3 E. & B. 572.

The Wills Act does not do away with the distinction between real and personal property, and (except where it is otherwise expressly enacted) it leaves the operation of words in a will the same as before it passed. *Ibid*.

Gift, devise and bequest (since the Wills Act) to A, without words of limitation, of all the testator's estate and effects whatsoever and wheresoever, and of what nature or kind soever, to be paid, assigned or transferred to him on attaining twenty-one, and in the mean time the interest, dividends or proceeds thereof, or so much of the principal thereof as should be necessary, to be applied in the discretion of the executors for his maintenance, education and advancement. Appointment of executors and guardians, with power to invest the testator's estate and effects on real or personal security, to change the investments, to reimburse themselves out of his said estate and effects, and to give receipts. In the event of A not attaining twenty-one, gift, devise and bequest to the executors or the survivor of them (without words of limitation) of all the testator's aforesaid estate and effects:—Held, on special case, that the testator's after-acquired real estate (consisting of copyhold hereditaments) passed by the general devise in his will. *Stokes v. Salomons*, 20 Law J. Rep. (N.S.) Chanc. 343; 9 Hare, 75.

A, by his will, dated in 1825, devised all his real estates of or to which he then was, or, at the time of his death, should be seised or entitled, to trustees, to the use of his wife for life, and, after her second marriage, as to one moiety, and after her decease as to the other moiety, to the use of his children as tenants in common in fee. In October 1827 A purchased other real estate at C, and the same was conveyed to him. In the following month he contracted for the purchase of a freehold estate at S, and afterwards executed a codicil, reciting the purchase at C, and the agreement for the purchase at S, and devising the property at C to the trustees upon the trusts of the will, and directing the trustees to complete the purchase at S and to hold the property upon the trusts of the will. In December 1827, after the date of the codicil, the property at S was conveyed to A to uses to bar dower. A died in 1832; his widow married in 1835, and died in 1853. Besides the eldest son, A left three other children, who respectively attained twenty-one in 1840, 1842, and 1851. The estate at S descended to the heir-at-law; but held, upon appeal, affirming the decision below, that upon the construction of the will, A intended to pass his after-acquired real estates, and that the heir was put to his election: and in case of his electing to take under the will, he must account to the youngest child for his share of the back rents since his right accrued; but to the two elder children, from the filing of the special case only. *Schroder v. Schroder*, 24 Law J. Rep. (N.S.) Chanc. 510.

(C) PARTICULAR LIMITATIONS.

(a) Legal or Equitable.

[See *Regina v. Burgate*, title POOR, Settlement, By Estate.]

(b) Trust or Beneficial Estate.

A testator devised "all my estate, both real and personal, to E E, his executors, administrators, and assigns, to and for the several uses, intents and purposes following; that is to say,"—and then, after specifying various objects of his bounty, appointed "the said E E executor of this my last will and testament." The trusts of the will did not exhaust the estate:—Held, affirming a decree of Lord Chancellor Cottenham, that E E did not become entitled, for his own benefit, to the personal estate undisposed of, but was a trustee thereof for the widow and next-of-kin of the testator, according to the Statute of Distributions. (*Dawson v. Clark*, 18 Ves. 247, commented on, and Lord Eldon's opinions adopted). *Elcock v. Mapp*, 3 H.L. Cas. 492.

The rule in such a case is, that where there appears a "plain implication or strong presumption" that the testator, by naming an executor, meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next-of-kin of the surplus undisposed of. *Ibid*.

A testator made his will in these terms:—"I give and bequeath all my property of whatsoever description to my wife for the maintenance of herself and our children," naming them, and making her sole executrix:—Held, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to account. *In re Harris*, 21 Law J. Rep. (N.S.) Exch. 92; 7 Exch. Rep. 344.

A testator devised to trustees a house and premises upon trust to receive the rents and pay the same to his daughter, and after her decease to apply them towards the maintenance and education of his daughter's children then living, during their minority; and upon the youngest living of his daughter's children attaining the age of twenty-one years, he devised as follows:—"I give and devise the said house and premises unto all the children of my said daughter, who shall be then living, in equal shares and proportions, share and share alike." Other houses were also devised to trustees, who had authority to lease the whole, and an estate in fee was devised to one of the daughter's children on his attaining twenty-one years:—Held, that the estate given to the trustees was restricted to the life of the daughter and the minority of all her children; that the devise over was a direct devise to the children, and not in trust for them, and that they took life estates as tenants in common in the house and premises. *Doe d. Kimber v. Cafe*, 21 Law J. Rep. (N.S.) Exch. 219; 7 Exch. Rep. 675.

A testator possessed of lands in England and Upper Canada, by his will made in England, gave the whole to a stranger and his nephew in trust to pay certain legacies, and to pay the residue between his six brothers and sisters, and appointed them executors and trustees of his will. By a codicil made in Canada, the testator gave his property in Canada to two persons resident there, upon trust to sell, and after payment of his debts in Canada to

remit any surplus to his nephew, to whom he gave the rest of his estate in the said province, or in Great Britain or elsewhere, not otherwise given by that codicil or his will, and he revoked every clause in his will variant from that codicil:—Held, that the nephew was entitled to the surplus produce of the Canadian property absolutely, and not as trustee for the purpose expressed in the will. *Schafeld v. Cuhnac*, 4 De Gex & Sm. 533.

A testator devised all his real estates (except the hereditaments thereafter particularly devised), including all estates vested in him upon trust or by way of mortgage, to trustees upon certain trusts. In a subsequent part of his will he devised his farm in A in the possession of T H to T R. He had two farms in A, called respectively S and M, both of which were in the possession of T H, but at different rents. On a question being raised which of these two farms the testator intended to give to T R,—Held, that the devise must be taken to have been made to T R for his personal advantage and not upon trust; and if, therefore, it could be ascertained that one of the farms was subject to a trust, or that the testator supposed or treated it to be so, it must then be inferred that such farm was not the one intended to be devised, but that the other was the one referred to by the testator. *Blundell v. Gladstone*, 3 Mac. & G. 692.

In the present case it was sufficiently established by the evidence that during the lives of the testator and his father the proceeds of the farm, S, had been regularly paid to a Roman Catholic priest, and that the testator had uniformly dealt with it in conformity with a real or supposed trust affecting it for this purpose:—Held, therefore, that he must be taken to have intended to comprise it in the general devise of trust estates, and that consequently the farm M was the one devised to T B. *Ibid.*

(c) *Joint Tenancy or Tenancy in common.*

Testator gave all his landed estates and all allotments of common now inclosed or to be inclosed to his daughters, A, B, and C, “to be jointly and equally enjoyed, or divided in case of the marriage of any of them; and they, or the survivor in case of death, are by this my will fully authorized to dispose of the same by will or assignment, as they shall think proper.” The testator also gave personal property “to be equally divided and shared among them,” and recommended them to remain together. A, B, and C made no disposition of the real estate by deed:—Held, upon appeal, confirming the decree below, that the entirety of the devised estates passed under the will of the last surviving daughter. *Cookson v. Bingham*, 23 Law J. Rep. (N.S.) Chanc. 127; 3 De Gex, M. & G. 668; 17 Beav. 262.

The words of the will created either a joint tenancy in fee in the three daughters, or a joint tenancy for life, with a power of disposition by deed to the three or the two survivors, and a power of disposition by will to the ultimate survivor only. *Ibid.*

(d) *Fee simple.*

John W, the elder, being seised in fee of certain freehold estates, by his will, after appointing M W and others trustees, and directing the payment of his debts out of his personalty, and giving certain bequests to his wife in lieu of dower, and other direc-

tions, devised as follows:—“Eleventhly, I will that my son John having attained twenty-five years of age be let into possession of all my property real and personal which remains, on this express and unalterable condition, that neither he nor his heirs to the third generation shall have power to sell or mortgage any part of the freehold estate now in my own occupation, or in the occupation of S E and F S; but mark, if the trustees do not sell the coal, but mortgage the estate, I empower John or his heirs to sell it, to pay off the mortgage, but not otherwise; and in like manner, I debar him and his heirs from selling or transferring those cottages with cart-house and appurtenances built on the waste now in the occupation of J H, R M, H M, J W and myself, it being my desire that they should be kept in the Westerman's name. Twelfthly, if it should happen that my son John die without leaving lawful issue, it is my will that my daughter Ann have his share, subject to the same restrictions, limitations and exceptions under which he has it. Thirteenthly, now if it should please God to take away both Ann and John under age, or without leaving lawful issue, I give and bequeath to my brother Joseph Westerman and his heirs for ever all those cottages and cart-house built on the waste, occupied by R M and others, with their appurtenances. Fourteenthly, I order all that is left to be immediately sold;” and the will then directed certain payments “out of the monies arising from such sale.” J W the elder was illegitimate, and died in 1826, having had three children, A W, J W, and E W. E W died in March 1826. A W survived her father and died in 1829, an infant and unmarried, leaving J W the younger, who had not attained the age of twenty-one, her heir-at-law. J W, the younger, survived the testator and was his heir-at-law. The said J W the younger attained the age of twenty-five in 1838, and died in April 1842, leaving two children who died infants in 1844 and 1846 respectively, and by his will he devised all his real estates to J H and E D, their heirs and assigns:—Held, first, that the devisees of J W the younger had no estate in the hereditaments devised by J W the elder; secondly, that Joseph Westerman had an estate in fee in remainder, under the 13th clause; and thirdly, that the trustees had the power of sale of the remainder in the other tenements not comprised in the 13th clause, after the death of John. *Mortimer v. Hartley*, 20 Law J. Rep. (N.S.) Exch. 129; 6 Exch. Rep. 47.

Ejectment to recover two undivided third parts of an estate called “Horsecroft.” J P, being seised in fee of Horsecroft, before his marriage with M C, executed an indenture of settlement, in 1770, whereby it was witnessed that in consideration of an intended marriage between himself and M C, and of the conveyance and settlement by M C of the estate, money, &c. thereafter mentioned, and of the benefit arising to J P by the marriage, and for settling a jointure and maintenance for M C and her children, and for settling the free estate called Horsecroft belonging to J P, he, the said J P, granted, sold, &c. to trustees and to their heirs, all that freehold estate and right of J P to the said estate and other the premises intended to be released by M C. It was then further witnessed that in consideration of the marriage and of the jointure, and for settling the freehold

estate, together with the other monies, &c. J P, bargained, sold, &c. to the trustees, in trust for M C, to the use of the first son of the said J P on the body of the said M C lawfully begotten, and to the heirs male of the said son lawfully begotten. J P had four children, John P, who died unmarried and intestate, and three daughters. The two lessors of the plaintiff are the heirs-at-law of two of the daughters, and the female defendant is the other daughter. J P, in 1823, made his will as follows:—"Also I give Horsecroft, my estate that I now live in, to my son John P, a lunatic." He then gave the residue of his estate to his daughter, the defendant:—Held, *dissentiente Platt, B.*, that the deed was inoperative; and by the whole Court, that the son John P. took under the will an estate in fee in Horsecroft. *Doe d. Pottow v. Fricker*, 20 Law J. Rep. (N.S.) Exch. 269; 6 Exch. Rep. 510.

A testator willed and bequeathed freehold and leasehold property to be divided equally among his children in manner following, that is to say, "I will and bequeath to my eldest son A G one-seventh share of my property, to his heirs, executors and administrators." Then followed gifts in similar words of one-seventh to each of his other six children. "And in case any of my sons or daughters die without issue, that their share returns to my sons and daughters equally among them; and in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share, share and share alike." All the seven children of the testator survived him, and one of them afterwards died leaving an eldest son and several other children:—Held, that this latter clause did not operate either by way of executory devise, or to cut down the estate of the parents to an estate for life, but that it referred to a dying of the sons and daughters of the testator in his lifetime, and that consequently the eldest son of the deceased child took the whole of his parent's share in the freeholds as his heir-at-law and in the leaseholds as his administrator. *Gee v. the Mayor, &c. of Manchester*, 21 Law J. Rep. (N.S.) Q.B. 242; 17 Q.B. Rep. 737.

Devise made in 1826 in these terms: "I give and devise unto my wife, Elizabeth, the lands, &c., to hold the same unto her and her assigns, for and during her natural life, and after her decease I give and devise the same to my nephew S J, his heirs and assigns for ever; provided always and my will is, that in case it should happen that my said nephew shall depart this life before he shall have attained the age of twenty-one years, and if after he shall have attained such age of twenty-one years he shall die unmarried, or, having been married, without lawful issue, then I give the same unto my brothers, T J and J J, &c., and their heirs for ever, as tenants in common:—"Held, that the testator's nephew S J did not take an estate tail, but an estate in fee simple in the lands, with an executory devise over to the testator's brothers in the event of S J dying under twenty-one, or after that age dying without leaving lawful issue at the time of his death. *Doe d. Johnson v. Johnson*, 22 Law J. Rep. (N.S.) Exch. 90; 8 Exch. Rep. 81.

Devise made before the passing of the 7 Will. 4. & 1 Vict. c. 26. in these terms: "I give and bequeath to my son J W all that farm or estate I bought of Mr. B of London, containing about twenty

acres, situate at Quinton, in the parish of H, in the county of S, and in the occupation of myself, my son G W and W J:—Held, that J W the son took an estate in fee. *Burton v. White*, 22 Law J. Rep. (N.S.) Exch. 129; 8 Exch. Rep. 720.

A testator, after giving his wife a life interest in the whole of his freehold property, devised it as follows:—"I give to my grandson R P that house and garden now in the tenure of H K; also I give to my granddaughter A P this house which I now live in; also I give to her a ground called W; also I give to my two granddaughters S P and J P a house at T; also I give to the said S P and J P a piece of arable land in B, all to be equally divided; also I give to my grandson R P 600*l.*; also I give to my granddaughter A P 600*l.*; also I give to my granddaughters S P and J P 400*l.* each. In case either of them die without issue, that portion to be divided amongst the survivors:—Held, that the grandchildren took estates either in fee simple or in tail, and not merely life estates. *Butt v. Thomas*, 24 Law J. Rep. (N.S.) Exch. 275; 11 Exch. Rep. 235.

A testator devised an estate to his daughter for life, and after her decease to all and every the children of the body of his daughter lawfully begotten (in case she should leave more than one child), their heirs and assigns for ever, as tenants in common; but in case his daughter should have only one child, then he devised the estate to such one child in fee; but in case his daughter should die without leaving any issue of her body, then he devised the estate to all such children of his body as he should leave or have living at the decease of his daughter, in fee. The testator's daughter had two children, both of whom died during her life:—Held, that the two children of the testator's daughter took absolute and devisable estates in remainder under the will, and their devisees were consequently entitled. *In re Tookey's Trust. In re the Bucks Railway Co.*, 21 Law J. Rep. (N.S.) Chanc. 402.

A testator, by his will dated in 1795, gave certain pecuniary legacies, and then gave all the residue of his effects, real and personal, to A and B, and then gave an annuity for the life of C, and then gave all his lands in the county of Kent and elsewhere, with his personal estate, to three trustees (naming them), their heirs and assigns, in trust for the purposes above mentioned:—Held, that A and B took an equitable estate in fee in the lands in the county of Kent. *Lord Torrington v. Bowman*, 22 Law J. Rep. (N.S.) Chanc. 236.

A testator gave to his wife all his three houses or tenements, gardens, hereditaments and premises, with all the appurtenances thereto belonging, together with all his household goods, &c. of every kind whatsoever for her use and benefit for life; and after her decease he gave all the aforesaid houses, &c. and all property whatever that should be remaining after his wife's decease unto and equally between his children:—Held, that the children took a fee simple, and not a life estate only, in the real property, under the last clause in the will. *Footner v. Cooper*, 23 Law J. Rep. (N.S.) Chanc. 229; 2 Drew. 7.

The 29th section of the Statute of Wills has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one," which additional words

upon the authority of decided cases modify their meaning. *Morris v. Morris*, 17 Beav. 198.

A testator devised an estate in fee to his son, but if he should die under twenty-one over. By a codicil he limited the estate over in the event of the son dying without issue "or" under twenty-one:—Held, that "or" must be read "and," and that the executory devise over took effect only on the happening of both events, and consequently that A on attaining twenty-one had an absolute estate in fee simple. *Ibid.*

A devise to trustees and their heirs,—Held, to confer an estate co-extensive only with the trusts they had to perform. *Ward v. Burbury*, 18 Beav. 190.

Devise of freeholds to trustees and their heirs, upon trust to receive the rents, and pay them to E W, a feme covert, for her separate use, and after her death upon trust, to sell and divide among her children, and in default to apply the rents towards the education of J W until he attained twenty-one; and (continued the testator) "when J W shall so have attained twenty-one, I devise to him and his heirs all my real and personal estate":—Held, on the death of E W without issue, that J W took the legal estate in fee. *Ibid.*

Devise of "my property in houses, &c. at G,"—Held, (independently of the Wills Act) to pass the fee. *Bentley v. Oldfield*, 19 Beav. 225.

A testator, in the first instance (as was held), devised freeholds to his three daughters equally in fee; and he further willed the several shares of his three daughters, as before mentioned, to have the interest for their own use during their natural lives, and afterwards devised equally among their children, and for want of children to go to their husbands, if living:—Held, that the daughters took an estate for life, and in default of children their husbands, if living, took the fee. *Ibid.*

Devise to A for life; remainder to all and every the children of her body, their heirs and assigns, as tenants in common; but in case A should die without leaving any issue of her body, then over. A had two children, both of whom died before her; one died leaving a child who survived A; the other died without issue:—Held, that the word *leaving* meant *having*, and that the two children of A took vested interests as tenants in common in fee. *Ex parte Hooper*, 1 Drew. 264.

Devise by the testator to his three daughters of real estate, with the appurtenances, to hold the same in joint tenancy for their own sole use and benefit in succession, and not subject to the debts or controul of their husbands, the same not to be sold or disposed of, but held in succession by his three daughters, with right of survivorship:—Held, that the daughters took as joint tenants in fee. *Wisden v. Wisden*, 2 Sm. & G. 396.

A testator by his will dated in 1819 devised his freehold estate as follows: "To my daughter Henrietta I bequeath the house I live in, being No. 11," &c., "to my daughter Martha I bequeath my house No. 10," &c., "but it is my will that the same be placed in trust, and that they shall only receive the rent during their life. In case of Henrietta's death without leaving behind her more than one child, then the said house No. 11 shall revert to my son David, son John, and daughter Maria in equal shares; but

if she leaves more than one (be it one, two, or more) they shall all share alike the said property left to their mother; but suppose that none of them live to twenty-one years of age, the said property shall revert to David, John and Martha as before mentioned." Henrietta survived the testator, and died leaving two children, of whom one lived to attain the age of twenty-one years, and the other died under that age:—Held, that the two children of Henrietta took an estate in fee simple in possession in the house No. 11. *Burke v. Annis*, 11 Hare, 232.

(e) *Estate Tail.*

A testator devised estates to trustees and their heirs, to the use of C E for life, to and for her sole and separate use, and independent of any husband whom she might marry, and her receipt (notwithstanding her coverture) to be a good discharge for the rents, &c. thereof, with remainder to the same trustees to preserve contingent remainders, with remainder "to the use of the heirs male of the body of C E lawfully to be begotten who shall live to attain the age of twenty-one years, and to his heirs and assigns for ever, but in default of such heirs male, or there being such he or they should die before he or either of them should attain the age of twenty-one years without lawful issue," then to the use of M E for life, precisely in the same form, and with exactly similar remainders:—Held, that if the trustees took the legal estate at all, they took it through the devise to C E and the heirs male of her body, in order to protect the interests of M E. *Toller v. Attwood*, 20 Law J. Rep. (N.S.) Q.B. 40; 15 Q.B. Rep. 929.

Held, also, that the words "heirs male of the body of C E" must have their technical meaning, and that the words of description "who shall live to attain the age of twenty-one years" must be rejected as inconsistent with the general intention of the testator, and that consequently C E took an estate in tail male. *Ibid.*

Formedon in the descender. The count stated that A, being seised in fee of certain lands, devised them to his son B, the father of the demandant, and the heirs of B's body; that B died within twenty years of suing out the writ, leaving the demandant his heir. Pleas, that A did not devise *modo et formâ*, and that the right, title and cause of action did not first descend and accrue within twenty years before suing out the writ. Issue was joined on these pleas. A third plea stated that more than twenty years before the suit, wit, in January 1798, B discontinued the possession of the tenements and the receipt of profits therefrom. Replication, that in January 1798 B enfeoffed R in fee of the tenements and never afterwards was possessed of the tenements or received the profits. Demurrer. A, by his will, devised real and personal property to his executors and their heirs, to sell by auction to pay debts, &c., and stated that in case it should happen that upon sale of this property the same should be insufficient for the payment of his debts, then he gave and devised all his other lands to the same executors and their heirs, to be by them sold until the debts should be paid, and the residue he directed to be divided equally among all his children; and he added a proviso, that in case the first devised property should

be sufficient to pay all his debts as aforesaid, then he gave and devised to his son B his dwelling-house, &c. for his natural life, and after his death to the issue of his body lawfully begotten, if more than one, equally among them. A died in 1797. B took possession of the house, &c., and in 1798 enfeoffed R in fee of the premises and died in April 1831. The writ of formedon was sued out in March 1853:—Held, that the action was not barred by the statute 3 & 4 Will. 4. c. 27, as the time of limitation ran only from the death of B and not from 1798, when B ceased to receive the profits, as B's right to enter and receive them had not been barred by a neglect to enter, but because he could not enter against his own feoffment. *Rimington v. Cannon* (in error), 22 Law J. Rep. (n.s.) C.P. 153; 12 Com. B. Rep. 18.

Held, further, that the limitation in the will to B for life and the issue of his body, gave B an estate tail; that that limitation was not too remote to be valid, though it depended upon the contingency whether the firstly-devised property was sufficient, and ascertained by a sale to be sufficient, to pay the testator's debts, as it was to be presumed that such sale would be made and sufficiency or insufficiency ascertained within a year after the testator's death. *Ibid.*

Held, also, that as the devise to B was dependent on the condition precedent of the sufficiency of the firstly-devised property to pay the debts, the evidence did not support the allegation in the count of an absolute devise to B and the heirs of his body. *Ibid.*

A testator, by his will, dated in 1789, devised real estate to his wife and granddaughter, during their natural lives; and in case his wife should marry again, he gave the whole of the said real estate to her during her life; and if his granddaughter should die leaving issue, then the testator gave unto her said issue, after the death of his wife and sister, all his freehold and copyhold lands, to be distributed between them, share and share alike, as three gentlemen, learned in the law, or the major part of them, should affix the same; but in case his granddaughter should die leaving no issue, and after the death of his wife, the testator gave the same over. The testator's widow married again, and the granddaughter survived her and the sister of the testator:—Held, that the granddaughter took an estate tail. *Kavanagh v. Morland*, 23 Law J. Rep. (n.s.) Chanc. 41; Kay, 16.

A testatrix devised all her real estate to trustees upon trust for three persons for life, with remainder to their issue in tail, "and for default of such issue then upon trust for the right heirs of her grandfather, deceased, by Mary his second wife, also deceased, for ever":—Held, that the ultimate limitation created an estate in tail special and not a fee simple. *Wright v. Vernon*, 23 Law J. Rep. (n.s.) Chanc. 881; 2 Drew. 439.

A testator devised his real estates to G H A, his eldest son, for ninety-nine years, in case he should so long live, and subject thereto to trustees during the life of his son to support contingent remainders; and from and after the determination of the said estates to the heirs of the body of his said sons, with divers remainders over. By a codicil, after confirming his will, he devised all his freehold and copyhold estates unto four trustees, in trust to convey unto the trustees of his marriage settlement so much

of the said estates as, with the provision in the said settlement, would make up his wife's jointure to 1,200*l.* a year, and in trust for the payment of debts. G H A executed a disentailing deed, and died, leaving a daughter, and having by his will devised the estates to H A:—Held, upon appeal, confirming the decision below, that the rule in *Shelley's case* did not apply as to the limitations of the will, and that the only effect of the codicil was to give the legal estate to the trustees therein named, in trust, after fulfilling the limited purposes of their trust, to transfer the estate in the same course of enjoyment as it would have gone in under the will in the absence of the codicil; and that the plaintiff, as heir of the daughter of G H A, was entitled as tenant in tail. *Coape v. Arnold and Arnold v. Coape*, 24 Law J. Rep. (n.s.) Chanc. 673; 4 De Gex, M. & G. 574: affirming 2 Sm. & G. 311.

Devise of real estates upon trust to pay the rents and profits unto or to the use of R L and his assigns for his life, and from and after his decease unto the first and other sons of R L, and in default of such issue in trust for the first and other daughters of R L, and in default of such issue in trust to pay the rents and profits as therein mentioned, and an ultimate remainder over:—Held, that R L did not take an estate tail in the devised premises, nor an estate for life with remainder to his first and other sons successively in tail, nor an estate for life with remainder to his first son in fee. *Bridger v. Ramsey*, 10 Hare, 320.

(f) Estate for Life.

Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate. *East v. Twynford*, 4 H.L. Cas. 517.

A testator, by a will written on the pages of a small note-book, divided his property into three classes, marked No. 1, No. 2, No. 3. He devised these classes of property to persons designated by letters. The order of "succession" was marked in one page (54) of his will. This page contained the words "The eldest and other sons to inherit before the next letter." The persons designated by the letters were all named in a card, which was referred to in the will, and which card was with the will admitted to probate. K was the testator's wife, to whom was given an estate for life in all the classes of the property. The will required implicit obedience to certain orders of the testator on the part of "the individual first to inherit after K;" and if not, "the property aforesaid set down and particularized in No. 1 to go to M, if not to L, and afterwards to his eldest lawfully begotten son, &c." There were similar expressions with regard to N and O. The card shewed that these two letters were intended for the eldest sons of two nephews, but who were then unborn. The property No. 1 consisted of very large sums in stock, which the executors of the will were to invest in the purchase of real estate; and in page 54 L was named as the person to take No. 1 after the life estate of K. A grandson was "to inherit before the next-named in the entail or any one of his sons." Class No. 2 consisted of a small estate in land, and by page 54, O was, as to that, to succeed to K, and the estate there given to O was expressly a life estate, with remainder to his eldest and other sons in tail

male; and it was there also said "a grandson legitimate shall inherit before a younger son." Class No. 3 consisted of certain estates in Suffolk; the "succession" there was (page 54) "first to K and then to M," and the devise (page 47) was "first to K and then to M, and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. After the decease of K, I repeat, I bequeath all the property aforesaid to M and his heirs male, in the manner aforesaid, as in the case of L, &c., at page 2, and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions."—Held that, reading all the parts of the will together, L only took a life estate in No. 1, with remainder to his eldest and other sons in tail male. *Ibid.*

Held, also, that this was not an executory trust. *Ibid.*

The Court of Exchequer, on an information filed by the Attorney General for legacy duty, had held that L took an estate tail. On a bill to carry into effect the trusts of the will, the Vice Chancellor held that L took a life estate only. The Vice Chancellor's decision was affirmed; but as the testator had himself created the difficulty, the costs were ordered to come out of the estate. *Ibid.*

Meaning of words "son," and "grandson," and "inherit." *Ibid.*

A testator, before the passing of the Wills Act, gave "all that his copyhold estate, called M," to his niece Sally, the wife of H T for life, charged with an annuity to his brother; and after the decease of his said niece, he gave and devised "the same copyhold hereditaments" equally between all her children, share and share alike; but if his said niece should die in the lifetime of her said husband, without leaving any children, then he gave "all and singular his said copyhold hereditaments" to his nephew J S in fee. By a subsequent clause, he devised "all and every his other copyhold messuages," &c. to his niece Ann in fee, charged with an annuity to his wife; and there was a residuary devise of all his real estates not otherwise disposed of to the plaintiff in fee. H T died in the lifetime of Sally, who had no issue by H T, whom she survived, and married again and had issue and survived her second husband; consequently, the gift over to J S failed.—Held, that under the devise to the children of Sally, an estate for life only passed in the copyhold called M, and that the remainder upon that estate passed under the residuary devise to the plaintiff, and not to Ann. *Vick v. Suter*, 23 Law J. Rep. (n.s.) Q.B. 212; 3 E. & B. 219.

A testator devised real property to A for life, and after his decease to the first son of the body of A for life, and after the decease of the last-mentioned first son of A, to the first son of the body of such last-mentioned son, with remainder to the second, third and all other sons of the body of such last-mentioned son for ever, the elder being always preferred to the younger; and in default of all such issue, the estate to go and descend to the testator's own right heirs for ever. At the date of the will A had two sons and two daughters living.—Held, that A's first son took only an estate for life, with remainder in tail to his first and other sons, with an ultimate reversion to

the right heirs of the testator. *Kershaw v. Kershaw*, 23 Law J. Rep. (n.s.) Q.B. 353; 3 E. & B. 845.

A testator devised and bequeathed to his wife, during her life, the interest or rent of his house, together with all his other goods and effects whatsoever; and after the death of his wife he gave and bequeathed the said house, together with all his other goods and effects whatsoever, to his four children, to be equally divided between them.—Held, that the children took an estate for life only in the house. *Harding v. Roberts*, 24 Law J. Rep. (n.s.) Exch. 194; 10 Exch. Rep. 819.

A gift by will (before the Wills Act) to two persons whom the testatrix constituted her sole executors, of all and singular her lands, messuages, and tenements, with all her goods and chattels by them freely to be possessed and enjoyed, the executors to pay a legatee the sum of 20*l.*, passed only a life interest in the real estate of the testatrix. *Bromitt v. Moor*, 22 Law J. Rep. (n.s.) Chanc. 129; 9 Hare, 374.

A testator directed that two of his sons, if they desired it, should have the joint use and occupation of his marsh lands for their lives: this was accompanied by directions that the stock and crops should be valued to and taken by them, and that the lands should be forfeited in the event of improper tillage; but was unaccompanied by any gift over in case they did not use or occupy the lands.—Held, that the two sons took estates for life; that they were not obliged personally to use or occupy the lands, and that no condition to that effect was either expressed or implied. *Rabbeth v. Squire*, 24 Law J. Rep. (n.s.) Chanc. 203; 19 Beav. 70.

A devise to S M for life, remainder to the child and children of her body and the heirs of their respective bodies, and in default of such issue, &c.:—Held, that the children of S M took estates for life, as joint tenants, with several inheritances in tail. *In re the Tiverton Market Act, ex parte Tanner*, 24 Law J. Rep. (n.s.) Chanc. 657; 20 Beav. 374.

A testator seized of property in fee devised it (by description) with all outbuildings, &c., according to the tenour of the testator's deeds, without any super-added words of inheritance. The Statute of Wills being inapplicable,—Held, that the devisees took life estates only. *Sturgis v. Dunn*, 19 Beav. 135.

There were two devises of the same property to children in two different events.—Held, that the terms of the second devise could not by construction be introduced into the first so as to extend the estate thereby given. *Ibid.*

A testator devised freeholds in terms which gave life estates to his children equally, and such children of such children as might be dead, who were to take their parents' share only.—Held, that the life estate of the children were not enlarged by the substituted gift. *Ibid.*

Bequest of leaseholds to A for life, and after her decease to the issue of her body; and in case of her dying leaving no issue, then over.—Held, by the Master of the Rolls, on the authority of *In re Wynne's Trust*, that A took an estate for life only. *Goldney v. Crabb*, 19 Beav. 338.

(g) Vested or Contingent Estate.

On the 8th of February 1788 Richard Bancks, by his will, devised five houses, of which he was seised in

fee, to Elizabeth his wife, for life, and after her death he devised two of these houses to his daughter Ellen, the wife of G. Fleming, for her separate use, with power to dispose of the same at her death amongst her children; and after the death of his wife Elizabeth he devised the other three houses to Ellen Bancks, for her sole use, with power to dispose of the same to and among her lawful issue her surviving, and their heirs for ever, as she should think fit. His will further provided, that if either Ellen Fleming or Ellen Bancks should die without issue living at the time of their respective deaths, the survivor should have that which was thereinbefore given to the deceased party for her own use, and if both should die without issue then surviving, the testator gave all the property in equal shares amongst his brothers, sister and others. The testator died in 1788, and Elizabeth Bancks, his wife, entered into possession of the five dwelling-houses, and enjoyed the same up to her death in 1810. In 1798, Ellen Fleming intermarried with John Ollerton, the defendant, and died in 1848, without issue. On the death of Elizabeth Bancks, the plaintiff and the defendant, in right of his wife, respectively entered into possession of their respective shares of the said hereditaments. By indenture dated the 12th of May 1843, and made between the defendant and his wife Ellen of the first part, J C of the second part, John Lord and William Ackerley of the third part, after reciting the facts, and that the said Ellen Ollerton was the testator's heiress-at-law, and that the said John Ollerton and Ellen his wife were indebted to the said John Lord and William Ackerley for money lent, it was witnessed that the said John Ollerton and Ellen his wife, in consideration of the money so lent, and of 10s. paid to them by J C, the said Ellen Ollerton joining therein, as well to release and convey the said hereditaments firstly and secondly thereafter described, as to release and extinguish every right and title to dower which she might have with or out of the said hereditaments and premises thirdly thereafter described, and to the intent that the then reciting indenture might operate and take effect by force or under the act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties, did grant, bargain and sell, release and convey to the said J C and his heirs—firstly, those two dwelling-houses and premises by the said will devised to the said Ellen Fleming, now Ollerton; and, secondly, all those three dwelling-houses and premises by the said will devised to Ellen Bancks, and all other lands, &c. which the said Ellen Ollerton was entitled to as heiress-at-law of the said testator, subject as to the premises secondly described, to the life estate of the said Ellen Bancks, to the said J C and his heirs, to the use of the said John Lord and William Ackerley, for 1,000 years upon certain trusts, and after that term to such uses as John Ollerton and Ellen his wife should by deed in writing appoint, and in default of any such appointment to the use of the survivor of them as he or she might appoint by deed or direct by will, and in the mean time to the use of John Ollerton and Ellen his wife during their joint lives, and the survivor of them, their heirs and assigns; and it was in the said indenture declared that the said term of 1,000 years was so limited to the said John Lord and William Ackerley for the purpose of securing the repayment of the said loan

with interest. Ellen Ollerton died without having joined with her husband in making any appointment under this settlement:—Held, that the circumstance of the remainder devolving on Ellen Ollerton as heiress-at-law, at the same time that her life estate took effect under the will by the death of the testator, did not operate as a merger of the life estate so as to bar the contingent remainder. But held also, that the above deed, if duly executed by Ellen Ollerton, so as to pass her interest in possession and reversion, operated to destroy the contingent remainder; for the union of the two estates was necessary to raise the uses limited by the deed, and the life estate was therefore merged in the reversion in fee. *Bancks v. Ollerton*, 23 Law J. Rep. (n.s.) Exch. 285; 10 Exch. Rep. 168.

Testator devised an estate to his grandson M H for life, with remainder to all the children, both sons and daughters of M H, if more than one, as tenants in common, and their heirs for ever, and for default of such issue to all the children both sons and daughters of the brothers and sister of the testator, as tenants in common, and their heirs for ever. The will then contained a precisely similar limitation of another estate to testator's only other grandson, W H H. Then followed a proviso, "provided always and my will and mind expressly is, that in case either of my said grandsons shall happen to die without issue of their bodies lawfully begotten, my said trustees shall stand seized of the same hereditaments and estates hereinbefore devised for the benefit of such grandson so dying, to, for, and upon the like uses and trusts as they shall stand seized of the hereditaments and estates before devised for the benefit of such survivor." M H, on the death of the testator, took possession of the estates devised to him, and afterwards had issue one only child, E H H, who died an infant in the lifetime of its father. M H died leaving children of the brothers and sister of the testator still living. W H H died without having had children in the lifetime of M H. The principal defendant was the heir-at-law of the infant E H H:—Held, that, under the first limitation in the will, M H took a life estate with a contingent remainder in fee to his child and children unborn, which vested in such child E H H immediately on her birth; that the words in that limitation "for default of such issue" were to be construed as meaning "for default of such children of M H"; that the words in the proviso "in case either of my grandsons shall happen to die without issue of their bodies lawfully begotten," did not vary the effect of the previous limitation as to the meaning of the expression "such issue": but that the whole object and effect of the proviso was to interpose a contingent remainder to each grandson and his children between the life estate of the other, and the devise over to the nephews and nieces of the testator. *Foster v. Hayes* (in error), 24 Law J. Rep. (n.s.) Q.B. 161; 4 E. & B. 717: affirming the judgment below, 22 Law J. Rep. (n.s.) Q.B. 329; 2 E. & B. 27.

A testatrix devised to T for life, and at his death to his second son on his attaining twenty-one, but in default of there being a second son of T, to the second son of C on attaining twenty-one. After her death, T had sons, the second of whom, G, died before he attained twenty-one years. T died intestate:—Held, that G did not take in fee with an executory devise over, but took a contingent remainder, and that the

contingency of G's attaining twenty-one years not having happened at the death of T, the limitation over failed, and the heir-at-law was entitled. Confirming *Festing v. Allen* and *Doe d. Rew v. Lucraft*. *Alexander v. Alexander*, 24 Law J. Rep. (N.S.) C.P. 150; 16 Com. B. Rep. 59.

A testatrix devised a farm in trust for E K for life, and "declared that if E K should marry" then she gave the farm to J W for life, &c. E K did not marry:—Held, that the gift to J W, &c. was vested independent of E K's marrying again. *Meeds v. Wood*, 19 Beav. 215.

Estate H and S were devised to trustees upon trust for R W and the heirs of his body, but in case he should die under the age of twenty-one and without issue, as to estate H for A W and the heirs of her body, but in case she should die under the age of twenty-one and without issue, upon such and the same trusts as were thereafter declared concerning estate S; and if R W should die under the age of twenty-one and without issue, as to estate S for the testator's son and daughter-in-law for their lives "and subject to the trusts hereinbefore thereof declared." Estate S was ultimately devised to other persons, R W and A W both attained twenty-one, but died without issue:—Held, approving the decision in *Doe d. Jessop*, 12 East, 288, as opposed to that in *Brownswold v. Edwards*, 2 Ves. 242, that the double contingency not having happened there was an intestacy as to estate H, but that the ultimate devise as to estate S took effect. *Pearson v. Rutter*, 3 De Gex, M. & G. 398.

(h) *Absolute Gift of Personality.*

A testatrix, by a will made before 1838, devised a house and lands to her granddaughter M A, and bequeathed to her 200*l.* due on a bond; and the will then proceeded: "but in the event of M A dying without having any lawful issue" the house and lands, and the said 200*l.*, to revert to other grandchildren:—Held, that M A took an estate tail and not an estate for life in the realty, and the absolute property in the personality. *Cole v. Goble*, 22 Law J. Rep. (N.S.) C.P. 148; 13 Com. B. Rep. 445.

(i) *Estate per autre vie.*

M, being seised in fee, devised to her daughter E, to hold to E, "her heirs, executors, administrators and assigns, for and during the natural lives of" E, E's husband, and their daughter, and of the survivor; and, in case the three "should all depart this life before the expiration of thirty-one years, to be computed from the day of my decease, then to hold" "unto the executors, administrators and assigns" of E, "for and during the said term of thirty-one years, to be computed from the day of my decease." "And I do hereby give, devise and bequeath the reversion of the foregoing said messuages," &c. "to my grandson" W O S, second son of J T S, "and to the heirs male of the said" W O S, remainder to the third, fourth, &c. sons of J T S successively in tail male, and, in default of such issue, to the eldest son of J T S in fee:—Held, that E having died before the other two lives expired, her heir took the land, as special occupant. *Carpenter v. Dunsmuir*, 3 E. & B. 918.

(j) *Executory Devise.*

Devise to E for life, contingent remainder to her

unborn children, as tenants in common in fee; devise over to her brother and sisters for life, in equal shares, with contingent remainders in fee to their respective children as to such shares. Then followed a limitation, "and further, in case of the death of my said son or of either of my said two daughters without leaving a child, if a son that shall live to attain the age of twenty-three years, or if a daughter who shall live to attain the age of twenty-one years," gift over in favour of the children of the surviving brother and sisters. E died without children. Afterwards A, one of her sisters, died without having had issue; and on the death of the latter, the lessor of the plaintiff, a child of the brother of E, claimed a share of the property of E which had come to A under the limitation over:—Held, that the lessor of the plaintiff was not entitled to recover, as the event on which the limitation over was to depend was too remote; that, although the event of A's not leaving a child who should live to attain twenty-three included in it the event which had happened, of A's not having any child at all, the Court could not separate the compound event into two, and hold the limitation good as a limitation over in case of A's not having any children. *Challis v. Doe d. Evers* (in error), 21 Law J. Rep. (N.S.) Q.B. 227; 18 Q.B. Rep. 231: reversing *Doe d. Evers v. Challis*, 20 Law J. Rep. (N.S.) Q.B. 113.

A testator gave the residue of his property, both real and personal, to his son Matthew, his heirs, executors, administrators and assigns, with a proviso that in case his son Matthew should die without leaving any lawful issue of his body, such part of his residuary estate as might be in the nature of freehold should, at his death, be divided into equal parts, one half part whereof he gave to his son Charles and the other half to his daughter Frances:—Held, that the testator's son Matthew took an estate in fee in the freeholds, with an executory devise over to take effect in the event of his dying without issue living at the time of his death. *Ex parte Davies, in re the Wilts, Somerset and Weymouth Rail. Co.*, 21 Law J. Rep. (N.S.) Chanc. 135; 2 Sim. N.S. 114.

A testator, by his will, after giving certain legacies and annuities, devised and bequeathed real and personal estate to his wife and his son, J V, during their lives, and after the death of his wife to his said son, J V, and to his heirs and assigns for ever; and from and after the decease of his, the testator's, wife and of his said son, J V, without issue, he gave and devised all the residue of his worldly property, both real and personal, to be equally divided amongst the then surviving legatees, share and share alike:—Held, that J V took a fee simple, subject to an executory devise over in case he should die without issue in the lifetime of any of the legatees. *Greenwood v. Verdon*, 24 Law J. Rep. (N.S.) Chanc. 65; 1 Kay & J. 74.

A testator, by his will, devised real estate to W S, and to his heirs and assigns for ever, but in case the said W S should die without child or children lawfully begotten, he devised the same to the children of H G, their heirs and assigns for ever, on the decease of W S:—Held, that this was a devise in fee to W S, with an executory devise over in case he should die without child or children. *Parker v. Birks*, 24 Law J. Rep. (N.S.) Chanc. 117; 1 Kay & J. 156.

(D) RIGHT OF PRE-EMPTION.

A testator gave to his son the option of purchasing an estate at what to his trustees should seem "a fair and reasonable value." The trustees had a valuation made, which amounted to 1,500*l.* The valuation made at the instance of the parties interested in the produce exceeded that by one-third:—Held, that the trustees having fixed what they considered a "fair and reasonable value," having authority to do so, it was incumbent on the plaintiff to shew that it was fraudulent in order to prevent the son's purchasing at 1,500*l.* *Edmonds v. Millett*, 20 Beav. 54.

(E) CHARGES.

[See *East v. Twyford*, ante, (C) (f).]

E H, by will, after charging all his real and personal estate with the payment of his debts, funeral and testamentary expenses, and of a certain legacy, gave and devised the rents and profits of all his messuages, tenements, farms and lands, except his Bala houses, to A H his wife; and by the same will he gave her the whole of his personal estate, and appointed her sole executrix:—Held, that the Bala houses passed to the heir-at-law of E H, subject in equity to the charge of debts, and that A H had no power to dispose of them for the purpose of paying the debts. *Doe d. Jones v. Hughes*, 20 Law J. Rep. (N.S.) Exch. 148; 6 Exch. Rep. 223.

A testator, by his will, gave to his daughter A, so long as she should continue unmarried, all his copyhold estates situate at P, and also all his live and dead stock, furniture, monies and securities for money, after payment of his just debts, funeral expenses, and the costs of proving his will; and declared that, if A should be married after his death, or die unmarried, the whole of the estates, with the live and dead stock, furniture and goods whatsoever, should be sold, and the proceeds arising therefrom be divided between B, C and D:—Held, that the testator had charged his copyhold estates with the payment of his debts. *Mooros v. Whittle*, 22 Law J. Rep. (N.S.) Chanc. 207.

A testator devised his real estates to a devisee in fee, charged with certain annuities or annual rent-charges to two annuitants:—Held, on special case, that the annuitants took the annuities for life; that the 28th section of the Wills Act (1 Vict. c. 26.) only applies to estates vested in, or in the power of, the testator, and not to estates or interests created *de novo* by his will; and that a purchaser could not maintain an objection to the vendor's title, or refuse to execute the contract for purchase, upon the ground that the annuities were given in fee and not for lives. *Nicholls v. Hawkes*, 22 Law J. Rep. (N.S.) Chanc. 255; 10 Hare, 342.

A testator devised real estate upon trust to raise portions, and, subject thereto, to his eldest son in fee. The latter, on marriage, covenanted to pay the portions, and to convey the estate, discharged therefrom, to the use of himself for life, remainder to the use of his wife for life, with the ultimate reversion to the use of himself in fee. He died in the lifetime of his wife, intestate, and without issue, and without having paid off all the portions:—Held, on special case, that the personal estate of the testator was not primarily liable to exonerate the real estate from pay-

ment of the unpaid portions: and also that his widow and administratrix, on payment by her, was entitled, as against the owner of the reversion in the real estate expectant on her decease, to have the legacies kept on foot as subsidiary charges upon the real estate. *Barham v. Clarendon*, 22 Law J. Rep. (N.S.) Chanc. 1057; 10 Hare, 126.

A testator, by his will, directed that his debts should be paid by his executrix, and then, after specific devises of freehold and copyhold property to A B, and freehold and leasehold property to his wife for life, and afterwards to A B, gave all the rest and residue of his real and personal estate to his wife, whom he appointed sole executrix. Upon the personal estate proving insufficient for the satisfaction of the debts, it was held, that the deficiency was to be paid, first, out of the residuary real estate, and then out of the property specifically devised to the executrix, before resorting to the other property specifically devised. *Harris v. Watkins*, 23 Law J. Rep. (N.S.) Chanc. 540; Kay, 438.

A testator gave certain real estate to A B, subject to a charge of 7,000*l.*, which he directed his executors to raise by mortgage or sale, the same to be appropriated as follows, namely, 1,000*l.* to the mother of A B, 1,000*l.* to his sister, 1,000*l.* to the children of his uncle, and the remaining 4,000*l.* for the payment of a debt. The sister died during the testator's lifetime:—Held, that the above devise was not a devise minus the 7,000*l.*, but was a devise subject to a charge of that sum; and, in consequence of the death of the sister, the legacy of 1,000*l.* fell into the devise and belonged to A B. *Sutcliffe v. Cole*, 24 Law J. Rep. (N.S.) Chanc. 486; 3 Drew. 135.

A testator (subject and charged with the payment of his annuities) devised his real estate to trustees, as to part for his wife for life; and then, in the first place, out of the rents to pay the annuities, and subject to the life estate of his wife, and the annuities, to A for life, &c. &c.:—Held, that the real estates were liable to be sold for payment of the arrears of the annuities. *Picard v. Mitchell*, 14 Beav. 103.

A testator devised his E estate, subject to debts, &c. to his wife for life, with remainders over; and he devised his C estate, subject to his debts, &c. to his wife absolutely. He afterwards mortgaged his E estate:—Held, on a deficiency of the personal estate, that the estates E and C ought to contribute rateably towards payment of the mortgage. *Middleton v. Middleton*, 15 Beav. 450.

A testator by his will made a general devise of his real estate to his nephews charged with his debts and legacies. By a codicil he devised a freehold house to A B, it being his wish that she should reside therein if she should think fit:—Held, that the house was exempt from the charge of debts and legacies. *Wheeler v. Claydon*, 16 Beav. 169.

A testator gave his real and personal estate to trustees for the maintenance of his four children until they attained twenty-one; as they arrived at that age respectively he directed it to be divided as follows: a legacy of 100*l.* to his son, and his property at G (freehold) between his daughters:—Held, on a deficiency of personal estate, that the legacy was not charged on the real estate. *Bentley v. Oldfield*, 19 Beav. 225.

A testator gave his real and personal estate to trustees, and directed them to pay the income to his

wife for life, and after her death to sell his real estate, and out of the money to arise therefrom in the first place to pay to A, B and C the following sums (specifying them), and upon trust to invest "the remainder of the money to arise from such sale," and stand possessed thereof and of his personal estate in trust to pay certain annuities, and he gave the residue to the plaintiff:—Held, by the Master of the Rolls, that the bequests to A, B and C were payable solely out of the real estate, but the decree was varied by the Lords Justices. *Fream v. Dowling*, 20 Beav. 624.

A testator directed monies required for the purposes of his will to be raised by mortgage of part of his real estate; the Master found that the money could be more advantageously raised by a sale of part of the estate, but the Court declined to direct a sale. *Drake v. Whitmore*, 5 De Gex & Sm. 619.

A testator in possession of lands devised the same to his widow for life, remainder to another tenant for life, with remainders over, and he gave to the plaintiff 200*l.*, which he charged on specified land, part of his lands devised, payable after the widow's death. The widow was possessed for her life, and on her death a stranger entered into and kept possession of the lands of the testator; the plaintiff by his bill, to which the tenants for life and in remainder and the stranger were defendants, asked that the 200*l.* legacy might be raised out of the specified land. The tenant for life disclaimed, the stranger alleged a title paramount to that of the testator, and objected that he ought not to be a party:—Held, that the stranger could not be sued in this Court by any person claiming under the will, and he was dismissed with costs; and the Court declared the plaintiff entitled to his legacy, appointed a receiver, and ordered that the plaintiff should be at liberty to bring such action as he should be advised for the recovery of the specified land in the names of the tenants for life and in remainder, upon an indemnity. *Daniel v. Davies*, 5 De Gex & Sm. 611.

(F) DEVISE FOR PAYMENT OF DEBTS.

A testator directed his debts to be paid out of a fund after provided; he directed his real estate to be sold, and out of the produce his debts and funeral expenses to be paid, the residue to be held by the trustees upon certain trusts; he afterwards gave certain legacies and annuities; and he then bequeathed his personal estate, "after and subject to the payment of his debts, funeral expenses, legacies and annuities," to the party chiefly interested under those trusts, absolutely:—Held, that the personal estate was the primary fund for the payment of the debts. *Paterson v. Scott*, 21 Law J. Rep. (n.s.) Chanc. 346; 1 De Gex, M. & G. 531.

Held, also, that the doctrine of marshalling was applicable in favour of legatees and annuitants, who were, therefore, decreed to stand in the place of the specialty and simple contract creditors as against the real estate devised in trust for sale, and payment of debts. *Ibid.*

Real estate devised, subject to payment of debts, to one for life, with remainder to three persons as tenants in common, where one of the shares in remainder lapsed:—Held, that the lapsed share was applicable for payment of debts in the same order

as the devised estates, and not till after real estates which descended as having been purchased after the will. *Wood v. Ordish*, 3 Sm. & G. 125.

A testator bequeathed legacies to A, B and C, payable out of his personal estate, and he devised his real estates, subject to the payment of his debts, to D and E. The personal estate being exhausted in payment of debts, the legatees were held entitled on the principle of marshalling to have recourse for payment to the real estate, to the prejudice of the devisees. *Surtees v. Parkin*, 19 Beav. 406.

The testator, after directing payment of his debts, devised his real estate to his executors upon trust to sell, and he directed that the produce should be deemed part of his personal estate, and that the rents until the sale should be deemed part of the annual income of his personal estate, and that the same monies and rents should be subject to the disposition thereafter made of his personal estate and the income thereof; and he bequeathed his personal estate to his trustees to invest it in consols, upon trust to pay certain legacies:—Held, that the real and personal estate were blended, and applicable, *pari passu*, in payment of the debts and legacies. *Simmons v. Rose*, 21 Beav. 37.

A testator, after directing that all his just debts should be paid by his executors, devised to his eldest son certain houses, subject, nevertheless, to his paying off the mortgage thereon, and then having devised to his other sons other houses which he had incumbered, and to his daughters certain houses which were free from incumbrances, empowered his executors to receive all rents due to his estate, and to pay his debts, and to use such means as should be necessary for recovering all money due to his estate, and also to grant possession to his devisees and to reimburse themselves:—Held, not a general charge of debts on the whole of the real estate. *Wisden v. Wisden*, 2 Sm. & G. 396.

A testator directed his real estate to be sold "immediately or so soon as conveniently might be," and applied in aid of his personal estate, in payment of his debts; but until the settlement should be made as after directed, the rents were to be applied in keeping down the mortgages, and the residue to be paid to the persons entitled under the settlement. He then directed the unsold hereditaments to be settled on A for life, with remainder over. The testator was greatly indebted on bonds, and his personal estate was largely deficient. More than a year elapsed before the sale of the real estates:—Held, that the interest on all the debts for the first year was payable out of the corpus of the real estate, but that the tenant for life was bound to keep down the subsequent interest. *Graisley v. Chesterfield*, 13 Beav. 288.

Testator, being possessed of real and personal estate, directed the latter to be invested in government securities, the interest whereof, with all the rents and profits from freehold, copyhold, or leasehold property, after payment of all his debts, &c., he gave and devised upon certain trusts:—Held, that this did not evidence a sufficient intention to create a mixed fund, so as to exempt the application of the personal estate in the first instance from the discharge of his debts. *Tidd v. Lister*, 23 Law J. Rep. (n.s.) Chanc. 249; 3 De Gex, M. & G. 857.

Testator devised *inter alia* all his estate, &c. to

trustees on trust out of the rents and profits during the lives of A and B and the survivor to pay debts, legacies and repairs, subject thereto to pay 2,000*l.* a year to A, who was his heir-at-law, and subject thereto to B for life :—Held, that advowsons passed, that the next presentations belonged neither to A nor to B till the trusts for payment of debts, &c. were satisfied, and must be sold for those purposes. *Cooke v. Cholmondeley*, 3 Drew. 1.

A testator, who died in 1833, bequeathed two cottages to his executor in trust to sell and retain a debt due to him from the testator, and hold the surplus for other persons. The executor never proved the will, but retained the property in discharge of his debt. He bequeathed it by his will, and it was enjoyed by the tenant for life thereunder until 1852. A legatee in remainder under the second testator, afterwards instituted a suit to recover the cottages, which was resisted by a person claiming under the will of the first testator. The executor's debt was alleged to be 300*l.* and the value according to one side was 300*l.* and on the other 360*l.*, but the value of the property had greatly increased from local circumstances. The Court, notwithstanding the lapse of time, granted relief by ordering a sale. *Smith v. Bakes*, 20 Beav. 568.

(G) TRUST FOR SALE.

A testator, by his will, appointed A, B and C to be his executors, in trust to dispose of his property in the following way : he then directed that all his debts should be discharged by his executors, and that the residue of his property, real and personal, should be disposed of by them at the time therein mentioned, save and except his estate at M, which he gave to A for life, and at A's death to be disposed of as aforesaid :—Held, that A, B and C had a power of sale of the estate at M : and that it was not necessary for them to shew that there were any of the testator's debts left unpaid. *Mather v. Norton*, 21 Law J. Rep. (N.S.) Chanc. 15.

A testator devised his freehold estates to A, B, C and D, and their heirs, on the usual trusts for sale. He then ordered and directed that A, B, C and D, the executors of that his will, or the survivors or survivor of them, or the executors or administrators of such survivor, should sell his copyhold estates. He then gave all his personal estate to the same persons, and declared the trusts of all the monies to arise from his real and personal estate. A died in the lifetime of the testator. The testator died in 1830. B and C sold the copyhold estates in 1832. In 1851 D executed the usual deed of disclaimer. There was no evidence that D had refused to accept the executorship before the sale in 1832 :—Held, first, that copyholds were within the 21 Hen. 8. c. 4; and, secondly, that, under that act, the sale of the copyholds had been made by B and C. *Peppercorn v. Wayman*, 21 Law J. Rep. (N.S.) Chanc. 827; 5 De Gex & S. 20.

A testator died in 1826, and by his will bequeathed all the residue of his estate to his executors, in trust, at such times as they should think fit, to convert into money, and to invest the proceeds in the public funds, and thereout to pay his just debts, and then to pay an annuity to his wife, to set apart certain legacies to his daughters, and to stand possessed of the remainder for his two sons absolutely; and he declared

the receipts of his trustees should be sufficient discharges to purchasers. The testator's residue consisted in part of two leasehold houses, the title-deeds of which the then trustees, A and H, deposited with the plaintiffs by way of mortgage for a loan which they alleged was required for the purposes of the will. A died in 1846, and H paid interest on the loan up to 1847, and then absconded, having misappropriated the money. On bill by the lenders for relief as equitable mortgagees,—Held, reversing the decree of the Court below, that the mortgage could not be sustained as a due execution of the trust. *Stroughill v. Anstey*, 22 Law J. Rep. (N.S.) Chanc. 130; 1 De Gex, M. & G. 635.

Where the legal estate is given to trustees upon trust, by sale, to raise a particular charge, and subject thereto the estate is given over, the trustees may be justified in raising the charge by mortgage; but where the trusts are for conversion out and out, and to apply the proceeds in payment of debts, and then for specified purposes, a mortgage is not a due execution of the trusts. *Ibid.*

Where, by will, there is a charge made on an estate, and by force of the charge an implied trust to raise money generally, and the estate is devised subject to the charge, there the charge may be raised either by mortgage or sale. *Ibid.*

If an executor or devisee sell, after a considerable lapse of time or under circumstances raising a fair presumption that the sale is not made with an intention to execute the trust, but for his own purposes, the purchaser will not be safe in abstaining from inquiring into the propriety of the sale. *Ibid.*

The rule that, where there is a charge of, or a trust for raising debts and legacies, the purchaser is not bound to see to the application of the purchase-money is founded upon this,—that the testator, by creating such charge or trust, has shewn that he intends to intrust his trustees with the power of receiving the money, because there may be debts; and by implication he declares that the purchaser shall be absolved. *Ibid.*

A direction by a testator that his trustees shall stand seised and possessed of his real and personal estate upon trust to raise and pay an annuity, and, subject thereto, to raise out of his real and personal estate a sufficient sum to make up, with what his daughter A had received on her marriage, an amount equal to the property his other children would be entitled to under his will, and a devise of all his real estate, and the residue of his personal estate to his other six children as tenants in common; and until a sale of all his real and personal estate should be made, and in order that no such sale should be required to ascertain the amount of the share of his daughter A, he authorized his trustees, if they should think fit, to cause a valuation to be made of his real and personal estate, and according to its amount, after deducting debts, &c., to fix the share of his daughter A, which should be accepted by her, with a further direction that she should not be entitled to any interest on her share until each of his other children had received interest on a sum equal to the amount previously advanced to her, and that no valuation should be required to be made until each of the other children had received such equal sum, and a clause declaring that the receipts of the trustees shall be sufficient discharges for any money pay-

able to them under his will, and that the person paying it shall not be liable to ascertain the necessity or regularity of any mortgage, sale or disposition under the trusts of the will:—Held, that the trustees had a power of sale of the whole real estate of the testator, which it was at their discretion to exercise in case they did not think fit to proceed by way of valuation. *Bird v. Fox*, 11 Hare, 40.

A devise of real and personal estate to trustees, with a direction for sale with all convenient speed and within five years, and to apply the proceeds in payment of debts and legacies, and invest the residue upon trusts for the widow and children of the testator:—Held, to empower the trustees to sell after the five years had elapsed. *Pearce v. Gardner*, 10 Hare, 287.

(H) VOID DEVISE.

(a) Remoteness.

A testator devised freehold and leasehold estates to trustees, upon trust to pay the rents to A for life, and, after her death, to pay the rents for the benefit of A's son Robert, and all and every the other son and sons of A, until he and they should attain their ages of twenty-five years; and, on his and their attaining that age, in trust for the heirs, executors and administrators of Robert and all the other son and sons of A as should attain twenty-five; but, in case they should all happen to die under twenty-five, then over:—Held, that the devise to Robert and the other sons and son of A gave them an immediate vested interest, and was not void for remoteness. *James v. Wynford*, 22 Law J. Rep. (N.S.) Chanc. 450; 1 Sm. & G. 40.

A testator gave freehold and leasehold estates to trustees upon trust for A for life, and directed them, after the death of A, to pay the rents, or so much thereof as should be necessary, for the maintenance of A's son Robert, and all other sons of A until he or they should attain twenty-five; and, on his or their attaining twenty-five, upon trust for him and them for their lives, as tenants in common, and, after their decease, in trust for the eldest son of Robert and the eldest of all the sons of A and the heirs of his and their bodies; and for want and in default of such issue, over:—Held, that the devise and bequest of the freehold and leasehold estates took effect in favour of Robert and such other sons, and was not void for remoteness; and that there was an estate tail given to the eldest son of Robert and the eldest of the sons of A. *Ibid.*

A testator gave and devised to trustees all his freehold, leasehold and personal property, upon trust to sell, and the money arising from such sale was to be invested for the benefit of his three daughters; the interest thereof to be paid to each of them for their lives, and on the decease of each of them one half of the fund or share to be paid to the children of each daughter so dying, at the age of twenty-one, and the other half to such grandchildren for life only, and afterwards to their children at twenty-one:—Held, that the gift to the children of grandchildren was void for remoteness; that the daughters did not take an absolute interest, and that the undisposed of portion of the real property went to the testator's heir. *Whitehead v. Rennett*, 22 Law J. Rep. (N.S.) Chanc. 1020.

W T, by his will, devised real estate to trustees,

upon trust to receive the rents during the lives and life of the survivor of all the children which his daughter M G had or should have, and to apply the same in support of his daughter and her children in equal shares; and whenever any of her children should attain twenty-one during the minority of her youngest living child, the share of such child in the rents was to be paid to him or her; and when the youngest grandchild should have attained twenty-one the savings of the rents were to be paid amongst his grandchildren then living equally (with benefit of survivorship among his daughter and the survivors and survivor of the grandchildren); but in case any grandchild died, leaving issue, such issue was to take the parent's share; and in case his daughter should be living, on the youngest grandchild attaining twenty-one, to pay her an annuity of 100*l.* for her life; and to pay the rents from that time among his grandchildren, and the issue of those dying equally, and to the survivors and survivor of them until the decease of the longest liver of his grandchildren, such issue to take only the parent's share; and after the decease of such surviving grandchild, upon trust to convey estate S unto the then eldest living grandson of his daughter. The residue of his real estate was then to be sold and the proceeds divided among all his great-grandchildren (except the eldest) equally. The testator died in 1797. His daughter had six children living at his death; two of whom died, unmarried, in 1800 and in 1807 respectively, and one, the eldest son, died in 1837, leaving issue. The testator's daughter died in 1801. Upon a suit instituted by J G, the youngest grandchild,—Held, upon appeal, substantially confirming the decree below, that the testator contemplated that all the children of M G to be born at any time until an existing child should attain twenty-one, were to have the benefit of the trust; that the testator's grandchildren took life estates only as tenants in common; and that the trusts substituting the issue for the parents after the youngest child attained twenty-one, were void for remoteness; that the trusts of the estate after the death of the last survivor of the children of M G, were also void for remoteness, and that the trusts of the produce of the residue of the real estate were also void for remoteness. *Gooch v. Gooch*, 22 Law J. Rep. (N.S.) Chanc. 1089; 3 De G. M. & G. 366; 21 Law J. Rep. (N.S.) Chanc. 238; 14 Beav. 565.

A decree directing the trusts of a will to be carried into execution, does not imply that all the trusts are valid. *Ibid.*

Devise of real estate to A for life, and after his decease to all his children, share and share alike, and all their children and their heirs; but in default of issue of A, to B and C and their children, the mothers and children and their heirs to share the rents equally, as had been directed with regard to the children of A:—Held, that the gift to B and C was not too remote, and that they and their children living at the death of the testator took as tenants in common in fee. *Cormack v. Copous*, 17 Beav. 397.

Limitations of a term to trustees, upon trust to raise portions for the children of A surviving A and B, "to vest in and to be paid and payable to" them at their ages of twenty-four years, with maintenance, &c. in meanwhile, out of the expectant or presumptive shares, and a gift over on the death of all before their shares should become vested:—Held, void for

remoteness. *In re Blakemore's Settlement*, 20 Beav. 214.

A testator devised lands upon trust to pay the rents and profits to a tenant for life, and after her decease, and until her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children; and on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead:—Held, that the trust for maintenance was separable from the rest, and was not bad for remoteness, whether the trust for sale was so or not. *Gooding v. Read*, 4 De Gex, M. & G. 510.

A testator bequeathed to his executors and trustees all his personal estate (except such goods as were by his will especially bequeathed), and also except his leasehold estates, which he declared it to be his intention to exonerate from the payment of his debts and legacies, upon trust, in the first place, to pay his debts, funeral and testamentary expenses and legacies; and in case there should be any residue of his personal estate (except as aforesaid), he gave the same to his son R. And after giving certain specific legacies, the testator devised all his freehold hereditaments to the same trustees, upon trust for his said son R for life, with remainder to his grandson W for life, with divers remainders over in tail. And the testator gave all his leasehold estates to the same trustees, in trust, to permit the clear rents thereof to be received, taken and enjoyed by the person for the time being entitled to the freeholds, until such person should by good assurance become seised of the freeholds in fee simple in possession, and then in trust to convey and assign the leaseholds to him:—Held, that the limitations of the leaseholds beyond the life estates of R and W were void for remoteness, and that the interests thus improperly attempted to be given did not belong exclusively to W as the last tenant for life, nor did it pass by the residuary bequest to R, because the exception of the leaseholds out of the residuary gift was not simply for the purpose of making a separate bequest of them, but also to exonerate them from payment of the debts and legacies; and therefore held, that beyond W's life estate, the leaseholds were undisposed of by the will, and belonged to the next-of-kin of the testator. *Wainman v. Field*, Kay, 507.

(b) *Lapse.*

A testator gave his residuary real and personal estate to his wife, her heirs, executors, administrators and assigns, but if she should die intestate then to his nephew and M E. The wife having died in the lifetime of her husband:—Held, that the gift over lapsed and could not take effect. *Hughes v. Ellis*, 24 Law J. Rep. (N.S.) Chanc. 351; 20 Beav. 193.

If a specific devise of lands fails, it will fall into and pass by a general devise of all real estates not before devised. *Green v. Dunn*, 24 Law J. Rep. (N.S.) Chanc. 577; 20 Beav. 6.

DISENTAILING DEED.

The execution of a disentailing deed by a married woman may be acknowledged by her at any time, the acknowledgment not being limited by the six months required for the enrolment of the deed by the 3 & 4 Will. 4. c. 74. *In re the London Dock Act*, 1853, 24 Law J. Rep. (N.S.) Chanc. 606; 20 Beav. 490.

By a disentailing deed under the Fines and Recoveries Act, 3 & 4 Will. 4. c. 74, after reciting that A was tenant for life, with remainder to B in tail of the two estates therein comprised, and that A being called upon to pay a debt of 1,200*l.*, had applied to C, who had agreed to advance that sum in consideration of B joining in the deed, which he had also agreed to do; in order to defeat all estates tail of B, and to convey the inheritance in fee therein, A and B jointly conveyed the two estates, and all the interest of A and B therein to C for 500 years, to secure the repayment of 1,200*l.* and interest, with remainder to A for life, remainder to B in fee. In fact A was tenant in tail, not tenant for life, of one of the two estates:—Held, that the conveyance being for valuable consideration as to both B and C, the tenant in tail under A's entail could not be heard to say that such entail was not barred by the deed, the intention to convey the whole fee simple in the property so entailed being sufficiently expressed, and the operative words of the disentailing deed being large enough to bar such entail. *Evans v. Jones*, Kay, 29.

A settlement by which real estates were limited to the use of A for life, with remainder to her son in tail, contained a power of sale and exchange, to be exercised during the life of the tenant for life with her consent, signified by writing under her hand and seal. By a disentailing deed to which the tenant for life was a party, the tenant in tail, with the consent of his mother, the tenant for life, testified by her executing that deed, conveyed the settled estates subject to her life estate therein, and also other hereditaments of which he was tenant in tail in possession, to uses to bar dower in his own favour. This deed contained no recital of any contract, but in the operative part its object was stated to be in order to defeat the estate or estates tail of the tenant in tail in the hereditaments therein comprised, and all other estates, powers, rights and interests limited to take effect after the determination or in defeasance of such estate or estates tail, and to limit the fee simple in such hereditaments, as to such parts thereof as were vested in the tenant for life, subject to her life estate therein, to the uses thereafter expressed:—Held, that the concurrence of the tenant for life in the disentailing deed did not bar her power of assenting to a subsequent exercise of the power of sale and exchange, because this was a power to raise a use paramount to the estate tail, and there was nothing in the frame of the deed from which a contract could be implied that the tenant for life would not consent afterwards to the exercise of the power of sale and exchange. *Hill v. Pritchard*, Kay, 394.

DISEASES PREVENTION.

[See 18 & 19 Vict. c. 121.]

DISTRESS.

[Right of company to distrain engine improperly on their railway, see COMPANY. And see REPLEVIN.]

- (A) WHO MAY DISTRAIN.
- (B) WHAT GOODS ARE DISTRAINABLE, AND FOR WHAT THEY MAY BE DISTRAINED.
- (C) GOODS FRAUDULENTLY REMOVED.
- (D) SUSPENSION OF RIGHT TO DISTRAIN.
- (E) WHEN THE DISTRESS OPERATES AS A DISCHARGE.
- (F) NOTICE AND ABANDONMENT OF DISTRESS.
- (G) WRONGFUL AND EXCESSIVE DISTRESS.
- (H) POUND BREACH.

(A) WHO MAY DISTRAIN.

[See *Fairhurst v. the Liverpool Adelphi Loan Association*, title *BARON AND FEME* (A) (e).]

A being tenant from year to year to six joint tenants of part of a cotton-mill and factory, four of the six executed an assignment of the whole of the factory to F, subject to the interest of A, who afterwards became the tenant of F. When the assignment to F was executed there was 111*l.* arrears of rent due from A:—Held, that after the assignment to F all right to distrain for such arrears of rent was gone. *Staveley v. Alcock*, 20 Law J. Rep. (n.s.) Q.B. 320; 16 Q.B. Rep. 636.

Trespass to goods. Plea, that by an indenture, made in 1847, between Q and the defendant, it was agreed between Q and the defendant, who was, during all the time thereafter mentioned, possessed of certain premises for a certain term then to come and unexpired therein, that Q should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.*, for which rent it should be lawful for the defendant to distrain as landlords may for rents reserved on leases for years; that Q held the premises under the said indenture and agreement; that three years and a quarter's arrears of rent became due, during the time Q held the premises as such tenant, and the defendant was possessed of them as aforesaid; and that the defendant distrained the goods for rent. The plaintiff set out the indenture on over, from which it appeared that Q having become, in 1847, the lessee of the premises, under M, for twenty-one years, wanting one day, and having borrowed money from the defendant, demised the premises to the defendant by way of mortgage, at a peppercorn rent, and that the defendant redemised the same to Q at a yearly rent of 150*l.*, with power of distress:—Held, on demurrer, that the plea was bad, in not shewing such an interest in the premises on the part of the defendant as entitled him to distrain. *Pinkhorn v. Sonster*, 22 Law J. Rep. (n.s.) Exch. 18; 8 Exch. Rep. 138.

A mortgagor in possession is, *presumptione juris*, authorized to distrain as the bailiff of the mortgagee. *Trent v. Hunt*, 22 Law J. Rep. (n.s.) Exch. 318; 9 Exch. Rep. 14.

A mortgagor in possession distrained for rent accruing due after the mortgage, but the notice of distress described the rent as due to himself:—Held, in replevin, that he could make cognizance as the bailiff of the mortgagee. *Ibid.*

(B) WHAT GOODS ARE DISTRAINABLE AND FOR WHAT THEY MAY BE DISTRAINED.

The defendant being the landlord of certain premises occupied by the plaintiff, seized as a distress for rent certain cotton spinning machines, which were fixed by screws, some into the wooden floor and some into lead which had been poured in a melted state into holes in the stone for the purpose of receiving the screws. The machines having been replevied by a replevin issued out of the Honour Court of Pontefract, the defendant entered and seized them a second time:—Held, that the machines never became part of the freehold, and were distrainable. *Hellawell v. Eastwood*, 20 Law J. Rep. (n.s.) Exch. 154; 6 Exch. Rep. 295.

A, by a contract in writing, demised to B, at a yearly rent of 145*l.* from the 14th of May 1851, certain premises, including a cottage occupied by C at the rental of 5*l.* a year. B took possession of all the premises included in the demise except the cottage, as C refused either to go out or to attorn to B. Before the day fixed for the first half-yearly payment of rent, A and B verbally agreed that A should receive from C some arrears of rent, and that A should pay B 70*l.* on the 14th of November 1851, and 70*l.* on the 14th of May 1852:—Held, that this was a new demise, and that A was entitled to distrain for the 70*l.* due on the 14th of November. *Watson v. Ward*, or *Waud*, 22 Law J. Rep. (n.s.) Exch. 161; 8 Exch. Rep. 335.

The defendant let premises to a tenant, from the 15th of June 1815 for five years, at a yearly rent of 100*l.*, to become due and payable in advance (if demanded) by equal quarterly payments, on the 15th of September, December, March and June respectively in every year: "Provided always, that if the yearly rent hereinbefore reserved, or any part thereof, shall be in arrear and unpaid for twenty-one days next after any of the days hereinbefore appointed for payment thereof in advance, being first lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded," then the lessor should have power to re-enter, &c. No rent was demanded until August 1852, when upon its not being paid the defendant distrained:—*Semble*—that the construction of this demise was, that the rent was payable in advance, but was not to be actually paid until demanded, and, therefore, that the defendant was entitled to distrain. *Williams v. Holmes*, 22 Law J. Rep. (n.s.) Exch. 283; 8 Exch. Rep. 861.

Goods are privileged from distress during the time they are on the premises of an auctioneer, for the purposes of sale by auction. *Williams v. Holmes*, 22 Law J. Rep. (n.s.) Exch. 283; 8 Exch. Rep. 861.

(C) GOODS FRAUDULENTLY REMOVED.

Trespass for breaking and entering the plaintiff's house and seizing his goods. Plea, that one Thomas held a house as tenant to P, that the rent was in arrear, that the said goods being the goods of Thomas were fraudulently and clandestinely carried off by him from his house to prevent a distress, and were with the plaintiff's consent placed in the plaintiff's house, whereupon the defendant as bailiff of P seized the goods as a distress. Replication, that the goods were not the goods of Thomas, nor were they fraudulently

and clandestinely carried off by him, &c.:—Held, on special demurrer for duplicity, that the replication was good. *Thomas v. Watkins*, 21 Law J. Rep. (n.s.) Exch. 215; 7 Exch. Rep. 630.

Where by a demise rent was reserved due quarterly, the 25th of December being one of the quarterly days of payment, and the tenant on that day, and while the quarter's rent was unpaid, fraudulently removed his goods off the demised premises for the purpose of preventing a distress,—Held, (*dissentiente Crompton, J.*) that the 11 Geo. 2. c. 19. s. 1. enabled the landlord to follow and distrain the goods within thirty days after their removal. *Dibble v. Bowater*, 22 Law J. Rep. (n.s.) Q.B. 396; 2 E. & B. 564.

A declaration in trespass alleged that the defendants broke and entered a close of the plaintiff called the stable, and broke the doors and seized and carried away his goods therein. Plea, under the 11 Geo. 2. c. 19. s. 1, that at the time when, &c., one O was tenant of certain premises to the defendant at a certain rent, and that half a year's rent was then due to the defendant from O and unpaid, and that within thirty days before the said time when, &c. O fraudulently and clandestinely conveyed from the premises held by him as such tenant, the said goods, being the goods of the said O, in order to prevent the defendant from distraining them for the rent; and that because the said goods still remained in the said close, and were then locked up to prevent them from being seized as a distress for the rent, the defendant, whilst the rent remained due, and within thirty days after the goods had so been conveyed and locked up, entered the said close in order to seize the goods as a distress for the rent, and did at the time when, &c., and within thirty days after the goods had been so conveyed as aforesaid, seize them as a distress for the rent; and that because on that occasion the goods were put and kept in the close, locked up so as to prevent them from being seized as a distress for the rent, and so that the defendant could not without breaking open and entering the said close seize the said goods, the defendant was obliged and did, in order to seize the said goods, first calling in to his assistance the constable of the place where the said close and goods were, according to the form of the statute, and with his aid and assistance, in the day time, break open and enter the said close in order to seize the said goods for the arrears of rent, according to the statute; and that the defendant in so doing did no unnecessary damage, &c.:—Held, first, that although it was stated in the plea that the goods were the tenant's at the time of the removal, the plea admitted them to be the plaintiff's at the time of the seizure, as averred in the declaration, and, therefore, that the plea was not bad in form, as amounting to an argumentative traverse that at the time of the trespass the goods were the property of the plaintiff; secondly, that the plea afforded a good *prima facie* defence to the action within the 11 Geo. 2. c. 19. s. 1. *Williams v. Roberts*, 22 Law J. Rep. (n.s.) Exch. 61; 7 Exch. Rep. 618.

A plea framed under this statute need not shew that the goods have not been made the subject of a *bona fide* sale to persons not privy to the fraudulent removal as provided by the 2nd section; that fact ought to be stated in the replication. *Ibid.*

Held, also, that the plea need not state that the party upon whose land the goods are seized is privy

to the fraud; and a previous request is unnecessary, in order to give the landlord the right to break into the premises for the purpose of seizing the goods. *Ibid.*

(D) SUSPENSION OF RIGHT TO DISTRAIN.

A tenant being indebted to his landlord for rent, the agent of the landlord, without his authority or knowledge, took a bill of exchange from the tenant for the amount of the rent and paid over the amount of the rent to the landlord in his settlement of account. The bill was afterwards dishonoured whilst in the hands of a third party, and the rent was not paid by the tenant, whereupon the landlord distrained:—Held, to be a question for the jury, whether the bill was discounted for, or the money lent to, the tenant by the agent, or whether it was an advance by the agent to the landlord; and that if the bill was discounted for or the money so lent to the tenant the landlord was not entitled to distrain; otherwise he was entitled. *Parrott v. Anderson*, 21 Law J. Rep. (n.s.) Exch. 291; 7 Exch. Rep. 93.

So in another case where on the rent becoming due the agent for both tenant and landlord paid the amount of rent to the landlord without any authority from either party, and the tenant afterwards failed to pay the rent, and the landlord distrained. (See *Ibid.* note (3) page 292.)

(E) WHEN THE DISTRESS OPERATES AS A DISCHARGE.

Half a year's rent being due from a tenant, who had committed an act of bankruptcy, his landlord put in a distress and was about to sell, but in consequence of a notice from the petitioning creditor, stating that he was proceeding against the tenant in bankruptcy, and requiring the auctioneer not to sell, and threatening to hold him accountable if he did, the landlord withdrew the distress without obtaining payment. At that time no adjudication of bankruptcy had been made, nor had any assignee been appointed:—Held, that the landlord was not justified in afterwards distraining a second time on the same goods to satisfy his claim for the same arrears of rent. *Bagge v. Mawby*, 22 Law J. Rep. (n.s.) Exch. 236; 8 Exch. Rep. 641.

(F) NOTICE, AND ABANDONMENT OF DISTRESS.

A notice of distress stated "that by virtue of an authority to me given, &c. I have seized the goods, chattels, and effects specified in the schedule hereunto annexed for the sum of 170*l.* due," &c. The schedule specified certain goods, and concluded thus: "and all other goods, chattels and effects that may be found in and about the said premises, that may be required in order to satisfy the above rent, together with the expenses":—Held, that this notice did not justify the seizure of any goods besides those specified in the schedule. *Kerby v. Harding*, 20 Law J. Rep. (n.s.) Exch. 163; 6 Exch. Rep. 234.

A distrained for rent due from his tenant B, a livery stable-keeper, and took a pony and carriage belonging to one of B's customers. While the broker was in possession, the owner, who was ignorant of the distress, was allowed to take his pony and carriage out as usual, the broker believing that he would bring them back:—Held, that this was not an abandonment of the distress, and that the owner having

brought them back they were still subject to the distress. *Ibid.*

(G) WRONGFUL AND EXCESSIVE DISTRESS.

[See title ACTION (A) (j).]

Under a warrant of distress for arrears of rent, a landlord has no power at common law to break open the outer door of any building. *Brown v. Glenn*, 20 Law J. Rep. (N.S.) Q.B. 205; 16 Q.B. Rep. 254.

Distraining for a greater amount of rent than is due is not *per se* actionable. An allegation in a declaration by a tenant against his landlord, that the defendant wrongfully seized and took divers goods and chattels of the plaintiff as a distress for certain arrears of rent then pretended by the defendant to be due and in arrear to the defendant, and that the defendant afterwards wrongfully sold the said goods and chattels as such distress for the said alleged arrears of rent and the costs of such distress, will not, even to support the declaration, and after pleading over, be held to mean that the defendant sold the goods for a sum equal to the alleged arrears and costs, but only that he sold them for the purpose of satisfying such arrears and costs. *Tancred v. Leyland*, 20 Law J. Rep. (N.S.) Q.B. 316; 16 Q.B. Rep. 669.

A landlord who has distrained his tenant's hay made on the premises and has sold it, subject to a condition that it shall be consumed by the purchaser on the premises, by reason whereof it produces less than the usual price, is liable to the tenant in an action for not selling for the best price, notwithstanding that the latter was under covenant to consume such hay on the premises. *Ridgway v. Stafford*, 20 Law J. Rep. (N.S.) Exch. 226; 6 Exch. Rep. 404.

A landlord, in order to distrain, may open the outer door in the ordinary way in which other persons using the building are accustomed to open it. Therefore, where the door of a stable was kept closed by a padlock attached to a moveable staple, and the owner and other persons usually opened the door by pulling out the staple,—Held, that a distress made upon goods in the stable after an entry in this mode was legal. *Ryan v. Shilcock*, 21 Law J. Rep. (N.S.) Exch. 55; 7 Exch. Rep. 72.

Quære—whether a distress is void where the outer door is improperly broken. *Ibid.*

(H) POUND BREACH.

The plaintiff levied a distress for rent in arrear, and impounded the goods on the premises. While his bailiff was removing them, defendant, a sheriff's officer, came into the house and said that he had a *fi. fa.* against the plaintiff, and that he would not allow the goods to be removed. Plaintiff's tenant thereupon ejected plaintiff's bailiff, and brought back the goods which had been removed:—Held, that these facts did not shew a pound breach or rescue by defendant. *Story v. Finnis*, 2 L. M. & P. P.C. 198.

DIVORCE.

Neglect, silence, shunning the wife's company, and declarations by the husband that he will never cohabit with her, do not constitute that "cruelty and maltreatment" in respect of which the law will grant to the wife a divorce *à mensâ et thoro*. *Paterson v. Paterson*, 3 H.L. Cas. 308.

Where, in a case of this sort, the Court of Session had pronounced for a divorce, the Lords reversed the interlocutor. *Ibid.*

Actual personal violence, or the immediate menace of it, is not the only ground of maltreatment in respect of which such a divorce will be granted. *Ibid.*

Quære, whether constant revilings and accusations of all sorts of crimes made, and falsely made, before friends and servants, would constitute a ground for such a divorce. *Ibid.*

The general principle of the law as to divorce *à mensâ et thoro* is the same in England and Scotland. But it seems that a special principle exists in the law of Scotland, which permits a divorce for a wilful desertion continued for four years. *Ibid.*

In a suit for a divorce *à mensâ et thoro* the wife obtained judgment in the court below, with costs. That judgment was reversed by the Lords, on the ground that the remedy sought was not the proper one; but the interlocutor was allowed to stand so far as it gave the wife the costs in the court below. The wife, however, was not allowed the costs of the appeal. *Ibid.*

Where a husband, after a long absence, did not rejoin his wife till the 24th of November 1849, and where she, nevertheless, produced to him a full-grown child on the 18th of May, 1850,—Held, that he could not have been the father, and that she was guilty of adultery. Bill passed, with a clause bastardizing the child. *Heathcote's Divorce Bill*, 1 Macq. H.L. Cas. 277.

Strict proof of non-access required in such a case. *Ibid.*

The log and muster-books of a ship, returned every quarter to the Admiralty, mentioned the name of an officer as with the ship at a certain place for a given period of time,—Held, that this was not sufficient evidence of his having been there for the time specified. *Ibid.*

Where a wife, after a long absence, did not rejoin her husband till the 22nd of December 1847, and where she, nevertheless, produced to him a full-grown child on the 5th of July 1848; the evidence of adultery (independently of non-access) being complete,—Bill passed; but a clause proposing to bastardize the child rejected. *M'Lean's Divorce*, 1 Macq. H.L. Cas. 278.

Upon a suit in Doctors Commons by the husband against the wife for restitution of conjugal rights, she puts in a responsive allegation, charging him with adultery, praying sentence of divorce *à mensâ et thoro*. Such sentence accordingly pronounced by the Court of Arches. She then institutes proceedings in the Court of Session in Scotland for divorce *à vinculo*. Plea in bar that she has already obtained redress. This plea repelled by the Court below, and leave to appeal not given. Appeal taken nevertheless. Objected to as incompetent, under the 6 Geo. 4. c. 120. s. 5. Right of appeal allowed. *Geils v. Geils*, 1 Macq. H.L. Cas. 36.

A domiciled Scotchman marries a domiciled Englishwoman in England. This is a Scotch marriage. The wife's domicile merges in that of her husband. *Warrender v. Warrender* pronounced unassailable. *Ibid.*

The parties return to Scotland. Afterwards the wife leaves her husband, and comes back to England. He sues her in Doctors Commons for restitution of

conjugal rights. Her defence, coupled with a prayer for divorce *à mensâ et thoro*. Sentence accordingly. She then sues her husband in Scotland for divorce *à vinculo matrimonii*.—Held, that she was not barred. *Ibid*.

Whether the wife's domicile was or was not severed by the divorce in Doctors Commons—*quære*. *Ibid*.

But the adultery having been committed in Scotland, and the husband's domicile continuing there, *semble*, that the Scotch Court had jurisdiction. *M'Carthy v. De Caix* and *Lolly's case* commented upon. Conflict of laws not to be rectified by judicial authority. A sentence of divorce *à mensâ et thoro*, which is ancillary to divorce *à vinculo matrimonii* in England, ought not to be an impediment to that remedy in Scotland. With a view to divorce *à vinculo matrimonii* in Scotland, it is immaterial whether the previous sentence of divorce *à mensâ et thoro* has been obtained in England or in Scotland. *Allison v. Catley* commented upon. *Ibid*.

A wife commits adultery at a time when the husband, ignorant of her misconduct, is living with her in harmony and affection. Whether, continuing still ignorant of her guilt, his subsequent inattention and unkindness to her will bar his bill for divorce brought on the discovery of her guilt—*quære*. Refusal of the House to allow the petitioner to be examined, and his bill, under the circumstances, rejected. 30l. ordered to be paid to the wife for the conduct of her defence. *Llewellyn's Divorce Bill*, 1 Macq. H.L. Cas. 280.

A charge of incest, pleaded, in effect, to be falsely made, coupled with substantial acts of violence, is pleadable in a suit for divorce by reason of cruelty. *Gale v. Gale*, 2 Rob. Ec. Rep. 42l.

DOMICIL.

[See DIVORCE—LEGACY; Legacy Duty.]

A company may have two domicils, and places of business may, for the purposes of founding jurisdiction, be treated as places of domicile, and service there is sufficient. *Carron Company v. Maclaren*, 5 H.L. Cas. 416.

A wife obtained a sentence of divorce by reason of her husband's adultery. Subsequently, in a suit of nullity of marriage promoted by the husband, and brought by letters of request to the Court of Arches, it was in substance pleaded that the husband was resident within the jurisdiction of the commissary, who signed the letters of request, and that, by reason thereof, the wife was subject to the jurisdiction of the Court.—Held, that the ordinary presumption, that a wife is legally domiciled where the husband is, fails when there has been a sentence of divorce. *Williams v. Dormer*, 2 Rob. Ec. Rep. 505.

American subjects, born and domiciled in the State of Pennsylvania, contracted a marriage in that State, in the year 1831, being, at the time, members of the Protestant Episcopal Church in America. Afterwards, the husband was appointed rector of a church in the State of Mississippi, where he resided with his wife till 1835. At that time the wife became a convert to the Roman Catholic faith. In 1836, both parties went to Rome, where they abjured the Protestant faith, and were formally admitted mem-

bers of the Roman Catholic Church. They afterwards, in 1838, returned to America, and resided in the State of Louisiana. In 1843, they again went to Rome, and upon the rescript and allowance of the Pope, on the joint petition of the husband and wife, the husband and wife (with his concurrence) took the vows of perpetual chastity and religious professions, the husband ultimately taking orders; and the wife entered into a religious house as a nun, taking the vows of poverty and obedience, whereupon they separated and lived apart. In 1846, they came to England; the husband became private chaplain in a Catholic family, and the wife the superiress of a religious community. In 1848, the husband recanted the Roman Catholic faith, and again became a Protestant, when he applied to his wife to return to matrimonial cohabitation. She refused; and thereupon he instituted a suit for restitution of conjugal rights, to which the wife pleaded, as a bar, that the rescript of the Pope, and the acts of the parties at Rome, had the force and effect of a judicial sentence of separation *à mensâ et thoro*. The Judge of the Arches Court rejected the allegation, on the ground that the facts pleaded would not, even if proved, constitute a bar to the husband's right to a sentence for restoration of conjugal rights. Upon appeal to the Judicial Committee, the allegation was admitted, and directed to be reformed, by pleading the law of Pennsylvania as applicable to the circumstances, in case the suit had been brought to adjudication there, and also the domicile of the husband at the time of the transactions at Rome. *Connelly v. Connelly*, 7 Moore, P.C.C. 438.

A testator whose *domicilium originis* was Ireland, where he inherited considerable estates, abandoned such, and by a long residence in England acquired an English domicile. In the year 1836, he sold his house and furniture, and broke up his establishment in England, and went to reside in France, where he bought and furnished a house in which he resided permanently (cohabiting with a French woman) to the period of his death, in 1849; with the exception only of occasional visits of short duration to England for purposes of business relating to his estates in Ireland and his property in the English funds:—Held, under such circumstances, that the testator's domicile was French, and was not affected by his having expressed an intention to return to England, in an event which never happened, or of his having, on one occasion when in England, executed a will according to the English form and law, or from the circumstance that the bulk of his property at his death was in the English funds. *Anderson v. Lanenville*, 9 Moore, P.C.C. 325.

J B G was born and educated in Scotland, of Scotch parents. In 1780 he went to the East Indies, where he remained as a surgeon in the East India Company's service until 1804, when he came to England on leave of absence, but never returned to India, and in 1809 he retired from the company's service upon a pension and on the pay of his rank. For two years after leaving India he resided near London, but he made donations to various institutions in Scotland. At the end of 1806 he went to Edinburgh, and embarked in the business of a banker; he purchased a house there, and married, and caused his mother to return from abroad to Scotland. In 1815 his affairs became

embarrassed. In 1817 he came to London, and continued to reside in England until 1828, occupying furnished lodgings; he caused his residence and furniture in Edinburgh to be sold and his books to be sent to London, and occupied himself in the sale of various oriental works, of which he was the author, and in lecturing on Hindostanee and the Eastern languages, chiefly under the auspices of the East India Company. Between 1817 and the time of the death of the testator, he also projected various undertakings, of which he was to be the director, and resided in London; he paid three short visits to Scotland, and in 1825 he went to Belgium, and continued to visit the Continent. In 1833 he returned to England, but in 1834 he again visited France, and remained for longer periods than at first, and in 1837 he took a lease of some premises in Paris for a term of years, in which he resided, occasionally visiting England, and in which he died on the 8th of January 1841, having executed a will according to the laws of England, in which he described himself as of Edinburgh. Upon exceptions to the Master's report, finding that the testator's domicile was in England,—Held, that in 1817 the testator was domiciled in Scotland; that he subsequently became domiciled in England, and was so in 1827; and that it was not changed at the time of his death; and the exceptions were overruled. *Whicker v. Hume* and *Hume v. Gilchrist*, 20 Law J. Rep. (n.s.) Chanc. 369; 13 Beav. 366.

A Scotchman, a surgeon, came to England and was appointed hospital mate in the Haslar Hospital. He subsequently was appointed an assistant surgeon, and afterwards surgeon on board various ships of the Royal Navy. He was then for several years employed under the Admiralty on board various convict ships, and also upon other medical duties. During this time he twice, while on half-pay, revisited Scotland and remained there up to the time of obtaining employment, but he ultimately, while on duty, died at Malta:—Held, though he removed all his goods from Scotland, and also his sister and only relation, and never afterwards returned, that he had not lost his domicile of origin. *Brown v. Smith*, 21 Law J. Rep. (n.s.) Chanc. 356; 15 Beav. 444.

A man cannot, at least with reference to the law of succession to personal estate, have two domicils. *Forbes v. Forbes*, 23 Law J. Rep. (n.s.) Chanc. 724; Kay, 341.

Every legitimate child acquires, by birth, the domicile of his father. *Ibid.*

The domicile of an infant cannot be changed by his own act. *Ibid.*

A new domicile cannot be acquired except by intention and act. *Ibid.*

The intention of abandoning a domicile and actual abandonment of residence will not displace the domicile, unless another be acquired. *Ibid.*

By an engagement to serve and actual service in India under a commission in the Indian army, a person who had, by origin, a Scotch domicile, acquired an Indian or Anglo-Indian domicile in the place of his domicile by origin, and that although he had real estate in Scotland. *Ibid.*

A Scotchman who had acquired an Anglo-Indian domicile by service in the Indian army, returned to Great Britain in 1822. Having an estate in Scotland, he built a house there and resided there during

the summer months from 1823 to 1841, his wife accompanying him on two occasions. In 1823, he took a lease of a house in London, which lease was renewed in 1850. In this house, his wife and an establishment of servants resided. From 1841 to 1851, when he died, he did not visit Scotland, on account of ill health, as was alleged:—Held, that the fact of his wife and the establishment of servants suitable for their joint residence being in England, shewed his intention, after the abandonment of the Anglo-Indian domicile, to acquire an English domicile. *Ibid.*

A foreign ambassador held under the circumstances to have acquired an English domicile. *Heath v. Samson*, 14 Beav. 441.

In 1819 a Sardinian came to England, and became attached to the Sardinian embassy. In 1821 he was dismissed, but he continued to reside ten years in England. He was then for three years *chargé-d'affaires* in London, and for three years minister in Holland. In 1837 he was appointed envoy extraordinary and minister plenipotentiary to England, and retained this office until his death in 1846:—Held, upon the evidence of his declaration and acts that he was domiciled in England. *Ibid.*

DONATIO MORTIS CAUSA.

A lent B 500*l.* in October 1843, on which occasion B wrote and signed the following document: "Received of A 500*l.*, to bear interest at 4*l.* per cent.," and gave it to A. In June 1845 A, being dangerously ill, gave the document to her servant, with an expression to the effect that she wished the debt to be cancelled. Ten days after this delivery A died:—Held, that this was a *donatio mortis causa* in favour of B. *Moore v. Darton*, 20 Law J. Rep. (n.s.) Chanc. 626; 4 De Gex & Sm. 517.

Gifts of this nature have not been abolished by the last Wills Act. *Ibid.*

A lent B 100*l.* in October 1843, on which occasion B wrote and signed the following document: "Received of A, for the use of C, 100*l.* to be paid to her at A's death, but the interest at 4*l.* per cent. to be paid to A." Underneath was written, "I approve the above," which was signed by A. This document was given to A. The money was not paid to A in her lifetime. In June 1845 A died:—Held, that B was a trustee for C of 100*l.* at the death of A. *Ibid.*

A testator, upon his death-bed, gave a cheque of 1,000*l.* to his wife, and, at his request, she changed it for the cheque of another person of the same amount. The testator's cheque was paid in his lifetime, and, after his decease, the widow obtained the 1,000*l.* upon another cheque given to her for that for which she had parted with her husband's cheque:—Held, that the gift to the wife was complete, and that the 1,000*l.* did not form part of the husband's estate. *Bouts v. Ellis*, 22 Law J. Rep. (n.s.) Chanc. 716; 4 De Gex, M. & G. 249; 17 Beav. 121.

A father, having lent his son a sum of money, took a deposit of the title deeds of an estate, together with a bond. The son afterwards borrowed the deeds from his father and mortgaged the property to another person unknown to the father, who, during an illness from which he never recovered, gave his

son the bond, at the same time using these words:—"Take this, but do not wrong your children, and do not mortgage your property":—Held, that this constituted a valid *donatio mortis causa* for the benefit of the son alone. *Meredith v. Watson*, 23 Law J. Rep. (N.S.) Chanc. 221.

A being indebted to B in 200*l.*, appointed him executor of his will. When on his death-bed, A gave to B a cheque for 900*l.* with the following memorandum thereon: "C, 200*l.*, B, 200*l.*, executorship fund 500*l.*" At the same time, A gave to B verbal instructions to keep 200*l.* in discharge of the debt, to hold 200*l.* for C, and to treat the remaining 500*l.* as part of his estate. The cheque was cashed and the money placed to B's account at his bankers before A's death:—Held, that the 200*l.* was a gift *inter vivos* in favour of C, and not a *donatio mortis causa*. *Tate v. Leithead*, 23 Law J. Rep. (N.S.) Chanc. 736; Kay, 658.

DOWER.

- (A) ELECTION.
- (B) WHEN BARRED.
- (C) PRIORITY.
- (D) PROCEEDINGS FOR.

(A) ELECTION.

A testator, by his will, gave all his freehold and leasehold messuages, tenements, &c., to trustees for all his estate and interest therein, on trust, to sell and apply the proceeds in manner thereafter declared; he then gave certain legacies out of his personal estate; and the residue thereof, together with the proceeds to be derived from the sale of his freehold and leasehold estate, he directed to be divided into four parts; one-fourth he gave to his wife and the other three-fourths to certain other relations. Amongst other legacies, sums of money were given in unequal amounts to his wife and the other devisees. The testator, after the date of his will, had devised parts of his estates for terms of years, with an option to the lessees to purchase, and had permitted one lessee to erect buildings, which had been done, and the estate was thereby greatly improved:—Held, that the widow of the testator was not to be put to her election, but was entitled to dower, as well as to the benefits given her by the will, and that she would take her dower according to the existing value of the estate, since the acts by which the value of the property had been altered were not her acts. *Gibson v. Gibson*, 22 Law J. Rep. (N.S.) Chanc. 346; 1 Drew. 42.

A testator seised of real estates, of which his wife was dowable, devised and bequeathed all his real and personal estate to trustees upon trust, out of the income, to pay his widow 20*l.* a year, and gave his trustees a power of leasing over his real estate. The provision made for the widow was small, as compared with the whole income:—Held, that the widow was not put to her election between her dower and the provisions contained in the will, but was entitled to both. *Warbutter v. Warbutter*, 23 Law J. Rep. (N.S.) Chanc. 467; 2 Sm. & G. 163.

Where a testator, seised of real estate of which

his wife is dowable, makes a provision for his wife by will, and gives a power of leasing his real estate to trustees, such power is a strong circumstance in favour of his intention to put his wife to her election between such provision and her dower; but is not conclusive on the question, and, notwithstanding such power, she may be entitled to both. *Ibid.*

A testator bequeathed all his personal property to his wife, and he gave her an annuity out of a particular freehold estate, devised to J P in fee. He then devised all other his freehold estates to trustees, with power to let the same, and to cut timber for repairs, until all his nephews and nieces attained twenty-one; and after the happening of that event, he directed the estates to be sold, and the proceeds to be divided equally among all his nephews and nieces:—Held, affirming the decision below, that the widow was bound to elect between the benefits given her by the will and her claim to dower. *Parker v. Sowerby*, 23 Law J. Rep. (N.S.) Chanc. 623; 4 De Gex, M. & G. 321; affirming 22 Law J. Rep. (N.S.) Chanc. 942; 1 Drew. 488.

To raise a case of election, it is not necessary that it should be apparent on the face of the will that the wife's right to dower was present to the testator's mind; it is sufficient that the disposition of the property is inconsistent with the right to dower. *Ibid.*

A testator gave annuities to his widow, charged on land, certain freehold parts of which he had no power to devise, and as to certain copyhold parts of which it was contended that they did not pass by his will. He declared that such annuities were in satisfaction of "all dower and thirds at the common law or otherwise, which she would or might have been entitled to in default of his will":—Held, that the widow was put to her election as well as to the freehold lands which he had no power to devise, as to the free bench out of the copyhold. *Nottley v. Palmer*, 2 Drew. 93.

(B) WHEN BARRED.

In the deed of settlement, made on the marriage of E S, an adult female, it was recited, that "for providing a competent jointure and provision of maintenance for the lady in case she should survive her husband," the father of T D, the intended husband, had paid to T D 3,000*l.*, and the father of the lady had paid to T D 851*l.* and had covenanted to pay him a further sum of 500*l.*; and that it had been agreed that T D should give a bond to the trustees of the settlement, conditioned for the payment of 2,000*l.* within six months after the marriage; and it was declared that the trustees should hold the 2,000*l.* upon trusts for the benefit of the husband and wife for their respective lives in succession, &c. T D gave the bond accordingly, and died, leaving E S surviving him, having paid 500*l.* only in discharge of the bond. After the marriage, T D acquired real estate which he sold during the coverture. Upon bill by the wife against the purchaser, claiming dower:—Held, upon appeal, that the settlement, being expressed to be "for providing a competent jointure," must be understood to be in bar of dower; and, reversing the decision below, that the partial non-payment of the money secured by the bond, did not entitle the widow to claim against the purchaser of the husband's real estates her dower *pro tanto*. *Dyke v. Rendall*, 21 Law J. Rep. (N.S.) Chanc. 905; 2 De Gex, M. & G. 209.

Equitable bar of dower depends altogether upon contract; and has no analogy to legal bar of dower under the Statute of Uses. *Ibid*.

The observations of Sir A. Hart, in *Power v. Sheil* (1 Moll. 811), disapproved of. *Ibid*.

A conveyance of real estate prior to the 3 & 4 Will. 4. c. 105. to a married man to uses to bar dower, with a declaration that it was "to the intent that the present or any future wife should not be entitled to dower," will not as against the heir-at-law deprive a second wife married after the passing of the act of her dower. *Fry v. Noble*, 24 Law J. Rep. (n.s.) Chanc. 591; 20 Beav. 598.

An equitable right to dower entitles a widow to costs, if it is disputed by a party to whom the estate had been sold by the heir-at-law. *Ibid*.

(C) PRIORITY.

By Sir John Romilly's Act freeholds and copyholds of a deceased are now assets for the payment of his debts, and by the Dower Act all debts to which the land of a deceased are subject are "valid and effectual as against the right of his widow to dower:"—Held, nevertheless, that the widow's right to dower or free bench has still priority over mere creditors of a deceased. *Spyer v. Hyatt*, 20 Beav. 621.

A widow dowerable out of her husband's lands, having elected to take an annuity given by the will in lieu of her dower, the testator's estate being insufficient to pay the legacies in full:—Held, entitled to priority over the other legatees. *Stahlschmidt v. Lett*, 1 Sm. & G. 421.

(D) PROCEEDINGS FOR.

On a plea of *tout temps priet* to a declaration in dower under the Statute of Merton, replication of a demand and refusal to render dower before the writ sued out, rejoinder traversing the demand, and issue thereon found for the demandant, the demandant is entitled to damages from the death of her husband, and not from the date of the demand only. *Watson v. Watson*, 20 Law J. Rep. (n.s.) C.P. 25; 10 Com. B. Rep. 3.

Dower may be demanded by another person on behalf of the widow; and a demand in the presence of witnesses is not necessary. *Ibid*.

EASEMENT.

[See CUSTOM AND PRESCRIPTION—LIGHT—NUISANCE—WATER AND WATERCOURSE—WAY.]

(A) WHAT IS AN EASEMENT.

(B) HOW THE RIGHT MAY BE ACQUIRED.

(C) PLEADING AND EVIDENCE.

(A) WHAT IS AN EASEMENT.

A water company which has laid pipes in a land tax division under a statutory power in that behalf, but which is the owner of no land within the division, is not assessable there to the land tax; the right in question being in the nature of an easement, and not "land" or "hereditament." *The Governor and Company of Chelsea Waterworks v. Bowley*, 20 Law J. Rep. (n.s.) Q.B. 520; 17 Q.B. Rep. 358.

The 8th section of the Prescription Act, 2 & 3

Will. 4. c. 71, only applies to the computation of the period of forty years' enjoyment, which, under the 2nd section, confers an absolute and indefeasible right to an easement. Where, therefore, a right of way was claimed under the 2nd section of the act in respect of twenty years' user as of right, and it appeared that, during a portion of that period, the servient tenement had been under leases for terms of years, and no resistance had been made either after or during the leases, to the user of the way,—Held, that the time during which the servient tenement had been on lease, was not, under the 8th section, to be excluded in the computation of the period of twenty years. *Palk v. Shinner*, 22 Law J. Rep. (n.s.) Q.B. 27; 18 Q.B. Rep. 568.

Where the owner of land builds houses upon it, adjoining each other so as to require mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support, and such right is not affected by subsequent subdivision of the property. *Richards v. Rose*, 23 Law J. Rep. (n.s.) Exch. 3; 9 Exch. Rep. 218.

Therefore, where B, the owner in fee, demised land to P on a building lease, and P erected two houses adjoining each other, and subsequently under-leased to W, who mortgaged the two houses, and the assignee of the mortgagee under a power of sale sold one house to the plaintiff, and subsequently sold the other to the defendant, it was held that the plaintiff was entitled to maintain an action against the defendant for excavating under his own house and removing his own soil, whereby the plaintiff's house was deprived of support and sank. *Ibid*.

A right claimed by the inhabitants of a township to enter upon the land of a private person and take water from a well therein for domestic purposes is an easement and not a profit *à prendre*, and may, therefore, properly be claimed by custom. *Race v. Ward*, 24 Law J. Rep. (n.s.) Q.B. 153; 4 E. & B. 702.

(B) HOW THE RIGHT MAY BE ACQUIRED.

Where, to an action of trespass, a claim of right acquired by thirty years' user without interruption is set up extending over a space larger than, but including, the *locus in quo*, and an interruption acquiesced in for a year is shewn to have existed as to the *locus in quo*, but as to no other part of the space over which the right is claimed, the right under 2 & 3 Will. 4. c. 71. is disproved as between the parties to the action, and affords no justification of the trespass complained of. *Davies v. Williams*, 20 Law J. Rep. (n.s.) Q.B. 330; 16 Q.B. Rep. 546.

An interruption of a right acquired by user within the meaning of 2 & 3 Will. 4. c. 71. s. 4. may be caused by the act of a stranger, and not the owner of the servient tenement. *Ibid*.

Although under 2 & 3 Will. 4. c. 71. s. 4. no interruption will prevent a right from being acquired by twenty years' user unless it has been acquiesced in for a whole year, yet an interruption for a shorter period may have the effect of shewing that the enjoyment never was as of right, and thereby of preventing a right being acquired under section 1. of the same act. *Eaton v. the Swansea Water Co.*, 20 Law J. Rep. (n.s.) Q.B. 482; 17 Q.B. Rep. 267.

In trespass *qu. cl. fr.*, pleas of a user of the *locus in quo* as a road for a full period of twenty years,

and forty years, preceding the commencement of the suit under 2 & 3 Will. 4. c. 71, are not supported by proof of an user for twenty and forty years up to within fourteen months before the commencement of the suit. *Lowe v. Carpenter*, 20 Law J. Rep. (N.S.) Exch. 374; 6 Exch. Rep. 825.

Semble—that to furnish proof of a right by user under that statute there ought to be an user at least once a year. *Ibid*.

Whether mere non-user of a right amounts to an abandonment of the right, will depend upon the circumstances which caused the non-user. Therefore, where the use of an immemorial right of way to a close was discontinued because the occupiers had a more convenient access to it over another close in their occupation,—Held, that the non-user afforded no evidence of an intention to abandon the right. *Ward v. Ward*, 21 Law J. Rep. (N.S.) Exch. 334; 7 Exch. Rep. 838.

By a deed between A owner of Greenacre and B owner of Blackacre, it was agreed that A should have, during the first ten days of every month, for the purpose of irrigation, all the water of a stream which flowed through Greenacre into Blackacre, and that at all other times the water should be under the controul and at the disposal of B, his heirs and assigns, and be allowed to flow in a free and uninterrupted course towards and into Blackacre, through a channel therein particularly described; and that the owner of Greenacre should cleanse and repair the said channel, with liberty to B, his heirs, &c. to do so on his default:—Held, that this deed operated as a grant to B of an easement of the watercourse therein described, at all times except the first ten days of each month, and that he thereby acquired a right in respect of that channel, and that an alteration of this channel was an injury to his right in respect of which B might maintain an action, although no actual damage had occurred. *Northam v. Hurley*, 22 Law J. Rep. (N.S.) Q.B. 183; 1 E. & B. 665.

Held, also, that a declaration describing the right as an easement to which the plaintiff was entitled by reason of his possession of Blackacre, without referring to the deed, was sufficient. *Ibid*.

(C) PLEADING AND EVIDENCE.

Under a canal act mill-owners within a specified distance of the canal were entitled to use the water for the purpose of condensing the steam used for working their engines. In an action against such a mill-owner, the declaration charged that he abstracted more water than was sufficient to supply the engine with cold water for the purpose of condensing the steam, and that he applied the water to other and different purposes than condensing steam. The plea alleged an user by the defendant, as occupier of the mill in the declaration mentioned, of the water as of right and without interruption for twenty years for other purposes than condensing steam, to wit, for the purposes of supplying the boiler of the engine and of generating steam for working the engine, and of supplying a certain cistern, to wit, a cistern on the roof of a certain engine-house. The replication traversed the user as alleged in the plea. The evidence was, that the defendant was the occupier of two mills, adjoining to each other and occupied together, each having a separate steam-

engine. The "old mill" was erected in 1823, since which time the defendant had used the water from the canal for twenty years for the purposes mentioned in the plea in respect of the "old mill." The "new mill" was built in 1829, and the water had been used as alleged in the plea for less than twenty years in respect of that mill. There was no cistern on the roof of any engine-house, but there were various cisterns in and about the engine-house in the old mill through which the water passed. The jury found that the two buildings formed one mill, and that there had been a twenty years' user as of right by the defendant:—Held, that the issue was divisible, and that the defendant was entitled to have the verdict entered for him, except as to the supplying a cistern on the roof of the engine-house, as to which the plaintiff was entitled to enter a verdict with nominal damages. *The Proprietors of the Rochdale Canal v. Radcliffe*, 21 Law J. Rep. (N.S.) Q.B. 297; 18 Q.B. Rep. 287.

Held, also, (upon motion for judgment *non obstante veredicto*) that the plea was bad, as the canal company had no right to grant the water for other purposes than for condensing steam, and that no such right could consequently be inferred from a twenty years' user by the defendant. *Ibid*.

Upon the trial of an issue whether the plaintiff had acquired a right to a watercourse by a twenty years' user as of right without interruption, evidence was offered that during the twenty years the defendants (a water company), who claimed to be entitled to divert the water, had penned it back from the plaintiff's land and had laid an information under their local act against the plaintiff's servant, who had removed the obstruction and who was convicted and fined a shilling, which the plaintiff paid:—Held, that this evidence was properly admissible as negating an enjoyment by the plaintiff as of right. *Eaton v. the Swansea Waterworks Co.*, 20 Law J. Rep. (N.S.) Q.B. 482; 17 Q.B. Rep. 267.

EAST INDIA COMPANY.

[See Stats. 16 & 17 Vict. c. 95; 17 & 18 Vict. c. 77. and 18 & 19 Vict. c. 93.]

There is no legal obligation upon the East India Company to pay to the commander-in-chief of the Queen's or of the native forces in India the arrears of pay due to him, as such commander-in-chief, and a mandamus to pay such arrears cannot be granted. *Ex parte Napier*, 21 Law J. Rep. (N.S.) Q.B. 332; 18 Q.B. Rep. 692.

The English Statute of Limitations, 21 Jac. 1. c. 16, extends to India, and applies to Hindoos and Mahomedans as well as Europeans, in civil actions in the supreme court. *Ruckmaboye v. Mottickund*, 8 Moore, P.C.C. 4; 5 Moore's Ind. App. 234.

ECCLESIASTICAL COURT.

[Defamation Suits, see 18 & 19 Vict. c. 41. s. 2. and see EXERCUTION—PRACTICE.]

The 54 Geo. 3. c. 68. s. 9, prohibits a proctor from permitting or suffering "his name to be in any

manner used in any suit, the prosecution or defence of which shall appertain to the office of a proctor, or in obtaining probates of will, letters of administration, or marriage licences" for the benefit of any other person. The 10th section enacts, "that in case any person shall, in his own name, or in the name of any other person, make, do, act, exercise, or perform any act, matter, or thing whatsoever, in any way appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, function, or practice of a proctor, without being admitted and enrolled, he shall forfeit 50l.":—Held, that, construing these two sections together, the acts intended by the latter section to be prohibited were those which were legally incident to the office of a proctor; not those which, though usually performed by him, were not of right incident to his office. And, therefore, that a registrar of an ecclesiastical court, who, in cases where there was no testamentary contest, had prepared the documents and done the acts necessary for obtaining letters testamentary and probates of wills, and other similar matters, had not thereby subjected himself to the penalty imposed by the 10th section. *Stephenson v. Higginson*, 3 H.L. Cas. 638.

On the trial of an action brought on this statute, evidence from certain ecclesiastical courts was tendered, to shew that it was customary for the registrar to do these acts, and to receive fees on account of doing them:—Held, that such evidence was properly admitted. *Ibid*.

ECCLESIASTICAL LAW.

[See BURIAL—CLERGY—CHURCH—CHURCH-
WARDENS AND OVERSEERS.]

EJECTMENT.

[See the Common Law Procedure Act, 15 & 16 Vict. c. 76. ss. 168—221. Also, Reg. Gen. Hil. term, 1853, rr. 112, 113, and 114, 22 Law J. Rep. (N.S.) xvi.]

(A) WHEN MAINTAINABLE.

(a) Lessor's Title.

(1) In general.

(2) Must be a Legal Title.

(3) Tenants in Common.

(4) Assigns.

(b) Notice to quit and Demand of Possession.

(c) Satisfied Terms.

(B) PRACTICE AND PROCEDURE.

(a) Appearance and Defence.

(b) Service.

(c) Particulars of Premises.

(d) Lease or Agreement under 1 Geo. 4. c. 87.

(e) Judgment.

(f) Execution—Writ of Restitution.

(C) MESNE PROFITS.

(D) PLEADING.

(E) COSTS.

(A) WHEN MAINTAINABLE.

(a) Lessor's Title.

(1) In general.

The plaintiff applied to the defendant for a lease of certain premises, intending at the time he applied to use them as a brothel. The defendant, relying upon the innocent, though false, misrepresentation of a third party, to whom he was referred by the plaintiff, that the plaintiff was a respectable man, and on the plaintiff's own fraudulent representation that he intended to carry on the trade of a perfumer, granted him a lease. The plaintiff accordingly entered into possession and used the premises as a brothel, whereupon the defendant forcibly evicted him. The plaintiff having brought ejectment to recover possession,—Held, that he was entitled to recover, for that the fraudulent misrepresentations were as to matters collateral to the lease, and did not avoid it. *Feret v. Hill*, 23 Law J. Rep. (N.S.) C.P. 185; 15 Com. B. Rep. 207.

Land of L having been delivered to H upon *elegit*, H brought ejectment against L. It appeared at the trial that the *elegit* had issued upon a judgment entered up under a warrant of attorney given (before stat. 17 & 18 Vict. c. 90.) by L to H, to secure (as appeared by the defeazance) sums to become payable on bills of exchange having less than twelve months to run, which were given upon a loan at usurious interest. It being objected that, so far as regarded the land, the proviso in stat. 2 & 3 Vict. c. 37. s. 1. took the facts out of the protection of the act, as being a security upon land, and therefore the execution was bad as being founded on an usurious contract:—Held, that, supposing the judgment or execution bad (as to which, *quære*), the objection could not be taken in this action, but that the proper course would have been to move to set the judgment or execution aside. *Hughes v. Lumley*, 4 E. & B. 274.

(2) Must be a Legal Title.

[See *Doe d. Patrick v. Beaufort*, title CANAL AND CANAL COMPANY, (A).]

Where a railway company have complied with the provisions of section 85. and have entered upon and taken land within the prescribed period for exercising their compulsory powers, their continuance in possession after the prescribed period, without having the compensation assessed and the land conveyed to them, is not unlawful, and an ejectment cannot be maintained against them under such circumstances. *Doe d. Armistead v. the North Staffordshire Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 249; 16 Q.B. Rep. 526.

A railway company by their special act were empowered to purchase land, and enter upon and use the same for the purposes of the railway. But they were not, "except by consent of the owner or occupier," to enter upon any such lands, until they should have paid, or deposited in the Bank of England, the purchase-money or compensation agreed or awarded to be paid for all interest in the same. The company, with the consent of the owner (the plaintiff), entered in 1847 upon certain lands required for the purposes of the railway; the amount of compensation having been by an agreement between them referred to an arbitrator, who in 1849 awarded a certain sum

as compensation. No tender of a conveyance nor payment of the sum awarded had been made, and after the award, a demand of possession was served upon the company:—Held, that an action of ejectment could not be maintained against the company; the plaintiff's only right being to enforce the payment of compensation under the award. *Doe d. Hudson v. the Leeds and Bradford Rail. Co.*, 20 Law J. Rep. (n.s.) Q.B. 486; 16 Q.B. Rep. 796.

(3) *Tenants in Common.*

Where in an action of ejectment by tenants in common, it appeared that other parties, whose numbers were not ascertained, were also jointly interested with the lessors of the plaintiff in the premises, —Held, *dissentiente Platt, B.*, that the lessors of the plaintiff were not entitled to a general verdict, but that the jury were bound to say to what portion of the premises the lessors of the plaintiff were entitled. *Doe d. Hellyer v. King*, 20 Law J. Rep. (n.s.) Exch. 301; 6 Exch. Rep. 791.

(4) *Assigns.*

A lease, granted under a power contained in a settlement, recited the title of the lessor, and shewed that he had only an equitable interest. A right of re-entry for a breach of the covenants in the lease was reserved to the lessor and his assigns:—Held, first, that the lessee was not estopped from disputing the title of the lessor so disclosed in the lease; and, secondly, that "assigns" meant assigns of the settlor; and that although the right of re-entry could not be well reserved to the lessor, yet that the owners of the reversion under the settlement for the time being were entitled to take advantage of it as "assigns." *Greenaway v. Hart*, 23 Law J. Rep. (n.s.) C.P. 115; 14 Com. B. Rep. 340.

(b) *Notice to quit and Demand of Possession.*

A mortgage contained a power of sale, and then a proviso and covenant by the mortgagee that no sale should take place, nor any means of obtaining possession of the premises be taken, until the expiration of twelve calendar months after notice in writing of such intention had been given to the mortgagor. It also contained a covenant by the mortgagee for quiet enjoyment by the mortgagor as tenant at will to the mortgagee, on payment of a yearly rent, in lieu of and as interest upon the mortgage money. The mortgagor remained in possession of the premises, but no livery of seisin was made to the mortgagor. Prior to the commencement of the action, there was a demand of possession, but no notice to quit was ever given to the mortgagor:—Held, that the effect of the deed was to create a tenancy at will only; and that a demand of possession without any notice to quit was sufficient to entitle the mortgagee or his assignee to maintain ejectment. *Doe d. Dixie v. Davies*, 21 Law J. Rep. (n.s.) Exch. 60; 7 Exch. Rep. 89.

(c) *Satisfied Terms.*

By deed of settlement of 1813 freehold premises were limited to TSC for life, with remainder to such of his children as he should appoint; in 1844 TSC duly exercised the power of appointment in favour of his eldest son, the plaintiff. In 1840 TSC, assuming and covenanting that he was seised in fee, sold

the premises to D (through whom the defendant claimed) and two terms for a thousand years (originally created for mortgage purposes), which in 1773, being then satisfied, had been assigned in trust to attend the inheritance, were at the same time, in 1844, duly assigned to a trustee for D, and D had no notice of the settlement of 1813. In 1778 the premises had been settled in strict settlement on the marriage of the plaintiff's grandfather, but neither in that settlement nor in the settlement of 1813 was any notice taken of the outstanding terms:—Held, first, that if a jury might, on the authority of *Doe d. Putland v. Hilder*, presume that the terms had been surrendered, the Court could not make such presumption. *Cottrell v. Hughes*, 24 Law J. Rep. (n.s.) C.P. 107; 15 Com. B. Rep. 532.

Secondly, that as the terms would have afforded the defendant protection against the settlement of 1813, if they had continued to subsist, they were within the exception in the 8 & 9 Vict. c. 112, s. 1, and must be considered as still subsisting. *Ibid.*

Semble—That the Court would not now act on the authority of *Doe d. Putland v. Hilder*. *Ibid.*

(B) PRACTICE AND PROCEDURE.

(a) *Appearance and Defence.*

Upon an application under section 127. of the Common Law Procedure Act, 1852, to be allowed to appear and defend an ejectment in respect of a part of the premises sought to be recovered, the Court will not consider nice questions as to the applicant's right of possession. It is enough if a *prima facie* case be shewn by affidavit, stating that the applicant is in possession by himself or his tenant. *Croft v. Lumley*, 24 Law J. Rep. (n.s.) Q.B. 73; 4 E. & B. 608.

Where, therefore, in an ejectment to recover the Opera House in the Haymarket, it was stated upon affidavit that some of the boxes had been let to the applicant for a term of years, with free and uninterrupted ingress, egress and regress, and the full use of the same by tickets of admission during the nights of public performance (except balls and masquerades), and all profits and advantages and appurtenances belonging to the said boxes; with a covenant for quiet enjoyment; and further, that after the execution of the lease, the applicant entered into possession of the boxes and fitted them up, and had ever since continued and still was in possession of the same, with all the rights, privileges and appurtenances thereto belonging, and that the applicant was advised that it was material for the protection of his interests that he should be permitted to defend,—Held, that enough appeared to entitle the applicant to be allowed to appear and defend the action. *Ibid.*

But where the applicant was a tenant by *elegit*, who had recovered the premises by ejectment against the defendant, but had never been put into actual possession, the Court declined to permit him to come in and defend. *Ibid.*

Under the Common Law Procedure Act, 1852, s. 172, which provides that any other person not named as a defendant in a writ of ejectment, shall by leave of the Court or a Judge, be allowed to appear and defend on filing an affidavit shewing that he is in possession of the land either by himself or his tenant, a landlord who is in possession by his tenant

is entitled to appear as a matter of right, and the condition of giving security for costs cannot be imposed, although he be resident abroad—per *Pollock, C.B., Platt, B., and Martin, B.; Parke, B. dubitante. Butler v. Meredith*, 24 Law J. Rep. (N.S.) Exch. 239; 11 Exch. Rep. 85.

(b) *Service.*

Where a declaration in ejectment has been served previously to the passing of the Common Law Procedure Act, 15 & 16 Vict. c. 76, proceedings are to be continued according to the old form. *Doe d. Smith v. Roe*, 22 Law J. Rep. (N.S.) Exch. 17; 8 Exch. Rep. 127.

Service upon one of two joint tenants, the notice being addressed to that one only, is not sufficient. *Doe d. Braby v. Roe*, 10 Com. B. Rep. 663.

Quære, whether the affidavit (required by the 112th rule of Hilary Term, 1853), of service of the writ of ejectment under the 170th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, should shew (as under the old practice) that the nature and object of the service were explained to the party served. *Edwards v. Griffith*, 15 Com. B. Rep. 397.

At all events, an irregularity in that respect is waived by a subsequent attornment. *Ibid.*

(c) *Particulars of Premises.*

The Court will only under special circumstances grant an order for particulars of the premises sought to be recovered in an action of ejectment. *Doe d. Saxton v. Turner*, 11 Com. B. Rep. 896.

(d) *Lease and Agreement under 1 Geo. 4. c. 87.*

The lease or agreement which the landlord must produce in court, under the 1 Geo. 4. c. 87. s. 1, on a motion calling upon the tenant to enter into the undertakings and give the bail prescribed by that section, should be annexed to the affidavits in support of the motion. *Doe d. Foucan v. Roe*, 2 L.M. & P. 322.

(e) *Judgment.*

The Court refused a rule *nisi* for judgment against the casual ejector in a country cause where two terms had been allowed to elapse since service of the declaration, by reason of negotiations pending between the parties as to the settlement of the action; it not being shewn that the tenant had taken advantage of the delay to avoid fresh service. *Doe d. Panton v. Roe*, 21 Law J. Rep. (N.S.) C. P. 160; 12 Com. B. Rep. 267.

A rule for judgment as in case of nonsuit cannot be granted in an action of ejectment, since the Common Law Procedure Act came into operation. *Doe d. Leigh v. Holt*, 21 Law J. Rep. (N.S.) Exch. 335; 8 Exch. Rep. 130.

(f) *Execution—Writ of Restitution.*

If a judgment in ejectment be irregularly obtained, and possession delivered under it, and then the judgment be set aside, the Court will, in the first instance, grant a rule requiring possession to be restored; but if such rule become ineffectual by reason of the party on whom it is to be served having absconded, a writ of restitution will be awarded. *Doe d. Whittington v. Hards*, 20 Law J. Rep. (N.S.) Q.B. 406.

Semble—It is not necessary that a writ of restitution should be founded upon matter of record. *Ibid.*

Writs of *habere facias possessionem* in ejectment are within the 3 & 4 Will. 4. c. 67. s. 2. and are properly made returnable immediately after the execution thereof. *Doe d. Hudson v. Roe*, 21 Law J. Rep. (N.S.) Q.B. 359; 18 Q.B. Rep. 806.

Where a rule of Court ordered possession of lands to be restored to A, B and C, or to D, their tenant, a demand by A alone, without any special authority from B and C, was held sufficient. *Corbett d. Clymer v. Nicholls*, 2 L.M. & P. P.C. 87.

Upon a refusal to comply with that demand, the Court granted an attachment, although the affidavits in support of the rule *nisi* did not negative that possession had been delivered to B and C, or to D. *Ibid.*

Semble—that such omission would be fatal, where the rule is a rule absolute in the first instance. *Ibid.*

(C) MESNE PROFITS.

[See *Matthew v. Osborne*, title COPYHOLD.]

A party having mortgaged his premises to the plaintiff in 1846, and being allowed to remain in possession, let them in 1848 to the defendant. In October 1849, the plaintiff, without having made an entry on the premises, or having been otherwise in possession, brought ejectment against the defendant, who gave his consent to a Judge's order dated the 31st of October. The order directed proceedings to be stayed till the 15th of November then next, the tenant in possession undertaking on that day to give up possession to the plaintiff, and that in default the plaintiff should be at liberty to sign final judgment and issue execution against the tenant for the costs of such judgment, execution, writ of possession, costs of levy, &c. On the 15th of November the plaintiff first entered into possession of the premises and brought an action for mesne profits accrued between November 1848 and the 15th of November 1849:—Held, that the plaintiff not having been in possession of the premises prior to the 15th of November could not maintain the action, his entry on that day not having relation back to his title as mortgagee; and that the Judge's order made no difference in the case. *Litchfield v. Ready*, 20 Law J. Rep. (N.S.) Exch. 15; 5 Exch. Rep. 939.

The doctrine of entry by relation applies to the case of disseisor and disseisee only. *Ibid.*

In an action for the mesne profits of a copyhold, to which the defendant pleads not possessed, the plaintiff may reply, by way of estoppel, a judgment in ejectment in his favour, and if he does not reply it, the judgment is not conclusive evidence of his title. *Matthew v. Osborne*, 22 Law J. Rep. (N.S.) C.P. 241; 13 Com. B. Rep. 919.

Trespass for mesne profits; pleas, first, not possessed; secondly, that before the said times when, &c., W was seised in fee, and demised for twenty-one years to T, who demised to the defendant, who entered by virtue of the demise. Replication, by way of estoppel, as to trespasses since the 26th of October 1853, setting out a writ in ejectment, in which the plaintiff was claimant, and dated the 26th of October 1853, directed to the defendant as the tenant in possession. Averment of judgment thereon by default, and entry by the plaintiff by virtue of the

judgment:—Held, on demurrer, a good replication to both pleas; and that it was not necessary to aver notice of the proceedings in ejectment to the defendant, or that a writ of possession was issued or executed; and that entry by the plaintiff, if necessary, was sufficiently averred. *Wilkinson v. Kirby*, 23 Law J. Rep. (N.S.) C.P. 224; 15 Com. B. Rep. 430.

Held, also, that the estoppel was from the date of the writ, and that the plaintiff's title would be presumed to continue until by rejoinder it was shewn to have determined. *Ibid*.

Semle—that section 75. of the Common Law Procedure Act applies to affirmative pleadings in answer to the action, and not to pleadings by way of denial of the cause of action. *Ibid*.

In ejectment by landlord against tenant under 15 & 16 Vict. c. 76. s. 214, mesne profits may be recovered although not specially claimed in the writ or issue. *Smith v. Tett, or Tett*, 23 Law J. Rep. (N.S.) Exch. 93; 9 Exch. Rep. 307.

(D) PLEADING.

The 83rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which permits equitable defences in "all causes," applies only to causes where there are pleadings, and therefore does not apply to the action of ejectment, in which all pleadings are abolished by the 168th and 178th sections of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). *Neave v. Avery*, 24 Law J. Rep. (N.S.) C.P. 207; 16 Com. B. Rep. 328.

By the 178th section of that act, the issue in ejectment is to be made up by the plaintiff without pleadings; and therefore, where the plaintiff, instead of making up the issue, demurred to an equitable plea which the defendant had pleaded, the Court struck the demurrer out of the paper; leaving the plaintiff to apply for leave to strike out the plea and make up the issue. *Ibid*.

(E) COSTS.

To entitle a plaintiff in ejectment to call upon parties who are strangers to the record to pay the costs, it must be clearly shewn that the defence was conducted by them for their own benefit in the name of a pauper defendant; it is not enough to shew that they are interested as equitable mortgagees of part of the premises, and that they have endeavoured to make terms with the plaintiff after judgment signed. *Anstey v. Edwards*, 16 Com. B. Rep. 212.

After a verdict for the plaintiffs in an action of ejectment against the tenants in possession of the premises, it appeared upon affidavit that the appearance to the action in the names of the tenants in possession had been entered, and the defence of the action conducted by an attorney employed by H and S, who had themselves no interest in the premises, but had conducted the defence solely for the benefit of another person whom they reasonably believed to be the person really entitled to the premises:—Held (*Erle, J.* differing in opinion), that H and S would have been before the passing of the Common Law Procedure Act, 1852, liable to pay the plaintiffs' costs in the action, and that act had made no difference in the former practice, and, therefore, that the plaintiffs were entitled to a rule for the purpose of enforcing the payment of such

costs. And, *per Erle, J.*, that the application was to be considered as against strangers, so far as jurisdiction was concerned, and therefore, that the Court had no power to make the rule absolute for enforcing payment of the costs; the proper proceeding on the part of the plaintiffs for any injury occasioned by the conduct of the defence being (if at all) by action. *Hutchinson v. Greenwood*, 24 Law J. Rep. (N.S.) Q.B. 2; 4 E. & B. 324.

ELEGIT.

[See EJECTMENT—EXECUTION.]

In a suit for enforcing securities it is the duty of the creditor to prove that his security is existing, and he is answerable for his acts, neglects, and omissions; and a creditor, by *elegit*, having taken from a trustee for sale a conveyance in fee of a part of the lands of which he was in possession under extents issued upon two *debits*, his tenancy under them held to be extinguished in the remainder of the estate, and the judgments on which they were issued were held to be satisfied. *Hele v. Lord Bexley*, 22 Law J. Rep. (N.S.) Chanc. 1007; 17 Beav. 14.

If a term in gross exists on an estate, and has not been attendant upon the inheritance, no surrender will be presumed, and such a term is liable to an extent; but the judgments having been satisfied by purchase of part of the estates extended, the tenancy by *elegit* was gone, and the parties entitled may enter. *Ibid*.

Though the *elegits* are satisfied, an outstanding unsatisfied claim will still be considered in taking the accounts under a trust for the benefit of incumbancers. *Ibid*.

EMBEZZLEMENT.

[See Stat. 14 & 15 Vict. c. 100. s. 13.]

(A) THE OFFENCE, IN GENERAL.

(B) RECEIPT BY SERVANT FOR AND ON ACCOUNT OF HIS MASTER.

(C) VENUE.

(D) EVIDENCE.

(A) THE OFFENCE, IN GENERAL.

The prisoner was a carrier, whose only employment was to carry unsewed gloves from a glove manufacturer at A, to glove-sewers who resided at B, to carry back the gloves when sewed, and to receive the money for the work and pay it to the respective glove-sewers, deducting his charge. On some occasions, instead of paying over the money received for certain of the glove-sewers, he denied the receipt of it, and appropriated it to his own use:—Held, that he could not be considered the servant of the persons defrauded, and therefore was not liable to be convicted of embezzlement, for his offence was a mere breach of trust, as he was a bailee of the money. *Regina v. Gibbs*, 24 Law J. Rep. (N.S.) M.C. 62; 1 Dears. C.C. 445.

A master suspecting his shopman of defrauding him gave a friend a marked crown-piece to spend at his shop. The friend went to the shop, bought an

article of the shopman, and paid for it with the marked coin. The shopman kept the coin, and did not account for it, and it was found on him:—Held, that the shopman was guilty of embezzlement, and not of larceny. *Regina v. Gill*, 23 Law J. Rep. (n.s.) M.C. 50; 1 Dears. C.C. 289.

The prisoner, who was clerk to the prosecutor, was indicted in three different counts for embezzling certain monies belonging to his master. The evidence shewed that the prisoner had received at different times several sums of money from the prosecutor, a dealer in skins, for the purpose of purchasing skins. The prisoner obtained the skins on credit, and applied the money to his own use, but debited prosecutor in his day cash book with several sums of money as having been paid for the skins. The jury found the prisoner not guilty of embezzlement, but guilty of larceny:—Held, that the conviction was wrong. *Regina v. Goodenough*, 1 Dears. C.C. 210.

(B) RECEIPT BY SERVANT FOR AND ON ACCOUNT OF HIS MASTER.

W engaged with a railway company to find horses and carmen to deliver the company's coals. He also contracted that he or his carmen should day by day duly account for and deliver to the company's coal manager all monies received from customers in payment of coals. The delivery notes and receipted invoices of the coals were handed to W's carmen by the company's officers. The delivery notes were entered by W in his book, the receipted invoices being given to the customers. The prisoner was a servant of W and was employed by him in the delivery of coals of the company. It was the prisoner's duty to pay over direct to the clerk of the company any money he might receive from customers. Such monies never formed items of account between W and the company. The prisoner appropriated to his own use a sum of money which he had thus received in payment for some of the company's coals delivered by him as servant of W:—Held, by a majority of the Judges, that these facts shewed that such a privity existed between the prisoner and the company as to make the latter the company's agent to receive the money and to pay it over to them; that the money could not be considered as money received on account of W, but on account of the company, consequently that the prisoner could not be indicted as W's servant for embezzling W's money. *Regina v. Beaumont*, 23 Law J. Rep. (n.s.) M.C. 54; 1 Dears. C.C. 270.

The prisoner, the miller of the mill in a county gaol, was appointed by the county magistrates, at a weekly salary, which was paid him by the governor of the gaol out of the county rates, who received the money for that purpose from the county treasurer. It was the duty of the miller to direct persons bringing grain to be ground to obtain from the porter a ticket specifying the quantity of the grain, and the ticket was the miller's order for receiving the grain. He was to receive the grain with the ticket, to grind the grain, to take the money for the grinding, and to account for it to the governor, who had to account to the treasurer. The miller had no right to grind any grain at the mill for his own benefit. The prisoner ground some grain for certain persons who never obtained a ticket, and who were not directed by the prisoner to get one, and he applied the money

paid for the grinding to his own use:—Held, that the prisoner could not be convicted of embezzlement, as the conclusion to be drawn from the facts was that he had made an improper use of the mill by grinding the corn for his own benefit, and consequently that he did not receive the money on account of his masters, whoever they might be. *Quære*—who were his masters? *Regina v. Harris*, 23 Law J. Rep. (n.s.) M.C. 110; 1 Dears. C.C. 344.

(C) VENUE.

It was the duty of the prisoner to go into the county of D every Monday, and sell goods on account of his master, and receive the money there, and to return with it to his master in the town of N on a Saturday. The prisoner received money for his master in the county of D, but did not return on the following Saturday, or at all, to his master. There was no evidence what became of him until two months after, when he was met in N by his master, who asked him what he had done with the money; he said that he was sorry for what he had done, and that he had spent it:—Held, that there was evidence for the jury of an embezzling in the town of N. *Regina v. Murdock*, 21 Law J. Rep. (n.s.) M.C. 22; 2 Den. C.C. 298.

(D) EVIDENCE.

W entered into the following agreement with C: "W engages to take charge of the glebe lands of C, his wife undertaking the dairy and poultry, at 15s. a week, till Michaelmas 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profit, after all expenses of rent and rates, labour and interest on capital, &c., are paid, on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by W, who occupies it as bailiff, in addition to his salary":—Held, that this agreement constituted the relation of master and servant between C and W, and not that of partners; that W was not a menial servant, but a labourer; and that the agreement was admissible in evidence, though unstamped, as it fell within the exemption in the Stamp Act as an agreement for the hire of a labourer. *Regina v. Wortley*, 21 Law J. Rep. (n.s.) M.C. 44; 2 Den. C.C. 333.

The firm of S & Co. kept a book containing in one column the names of their creditors, and opposite to them in another column the sums due to each respectively. The course of business was, that when any person called and received money from S & Co. on behalf of a creditor, he wrote his name in an intermediate column between the name of the creditor and the sum due to him. No other receipt was taken by S & Co. The prisoner, who was in the employ of a creditor of the firm, went to S & Co. and received from them a large sum due to his employers, and wrote his name in the blank space in the intermediate column in the ordinary way. On an indictment against him for embezzling the money, a clerk of S & Co. proved that he paid the money to a person who wrote his name in the book; evidence of the course of business as to the signing the book was given, and the entry, consisting of the creditor's name, the signature, and the sum, was tendered to prove that the signature was in the prisoner's hand-

writing. It was objected that the entry was a receipt, and not being stamped was inadmissible either in whole or in part. The Judge received the entry and allowed it to be read to the jury, but only for the purpose of proving by means of the signature that the prisoner was the party to whom the clerk had paid the money:—Held, that the entry was a receipt and required a receipt stamp; that being unstamped it ought not to have been read to the jury at all, even for the collateral purpose of identifying the prisoner, as it had a material effect upon the direct question in issue whether the prisoner had received the money; but that the prisoner's signature alone might have been proved for the purpose of identification. *Regina v. Overton*, 23 Law J. Rep. (n.s.) M.C. 29; 1 Dears. C.C. 308.

ERROR.

[See stat. 15 & 16 Vict. c. 76. ss. 146—176, and stat. 17 & 18 Vict. c. 125. ss. 32. and 35.]

- (A) WHERE IT LIES.
- (B) QUASHING AND SETTING ASIDE.
- (C) PRACTICE AND PROCEDURE.
 - (a) *In general.*
 - (b) *Error to the House of Lords.*
 - (c) *Special Case.*
 - (d) *Bill of Exceptions.*
- (D) COSTS.

(A) WHERE IT LIES.

[See *post*, (C) (c) and (d).]

Error will lie on a nonsuit. *Hitchins v. Hollingsworth*, 7 Moore, P.C.C. 228.

(B) QUASHING AND SETTING ASIDE.

Judgment having been given against the defendants on an indictment for conspiracy and obtaining money by false pretences, which had been removed by them into the Court of Queen's Bench, they brought a writ of error to the Exchequer Chamber, assigned errors, and demanded a joinder in error; and the prosecutor not joining in error, they obtained an order of a Judge, on which a rule of the Court of Exchequer Chamber was afterwards drawn up, that judgment be signed against the defendant in error, and judgment of reversal was entered accordingly. Subsequently, a rule was obtained in the Court of Queen's Bench quashing the writ of error, on the ground that the writ was sued out with a view to a compromise, and for the purpose of effecting such compromise. This rule was entered on the record. The defendants sued out a second writ of error, and assigned as special grounds of error various objections to the order of the Court of Queen's Bench. There was also a general assignment that there were divers other errors on the record:—Held, that the Court of Exchequer Chamber had no authority to examine into the sufficiency of the rule of the Court of Queen's Bench quashing the first writ of error by virtue of its equitable jurisdiction, though the rule was improperly set out on the record; that, as the writ was quashed, the judgment which had been pronounced by the Exchequer Chamber upon it was void; that the Court of Exchequer Chamber would on motion set aside the judgment as it was void, though there was

no application to set aside the writ of error itself; that the assignment of errors on the second writ was good, there being a general assignment of error, though the objections to the order of the Court of Queen's Bench were mere surplusage. *Alleyne v. Regina*, 24 Law J. Rep. (n.s.) Q.B. 282; 1 Dears. C.C. 505.

Where a writ of error is sued out upon a judgment of the Court of Queen's Bench in a criminal prosecution, for the purpose of enabling the parties to effect a compromise of such prosecution, that Court has the power under the 12 & 13 Vict. c. 109. s. 39, to set aside such writ of error, and will exercise that power; and after the writ of error has been so set aside by a Court of competent jurisdiction, the Court of Exchequer Chamber will set aside a judgment, signed thereon by order of a Judge, for want of a joinder in error. *Regina v. Alleyne*, 1 Dears. C.C. 505; 4 E. & B. 186.

(C) PRACTICE AND PROCEDURE.

(a) *In general.*

After issue joined on error in law either party may set down the case for argument four days before the day of hearing. *The South-Eastern Rail. Co. v. the South-Western Rail. Co.*, 22 Law J. Rep. (n.s.) Exch. 72; 8 Exch. Rep. 367.

Upon the argument of a writ of error on the ground that a plea which has been found for the defendant is bad in law, it is no ground for a *venire de novo* that the finding upon that plea is inconsistent with the finding on another issue. *Cooper v. Parker* (in error), 15 Com. B. Rep. 822.

A verdict was found for the plaintiff in error, on error in fact *coram nobis*, that he being an infant had appeared in this suit by attorney. With a view to obtain reversal of the judgment, the plaintiff moved to have the cause put down in the paper for argument:—Held, that this was a proper course according to practice. *Jackson v. Marshall*, 24 Law J. Rep. (n.s.) Q.B. 143.

The 146th and following sections of the Common Law Procedure Act, 1852, which prescribe a new mode of proceeding to error "in any cause," do not extend to informations in the nature of a *quo warranto*, in respect of which the fiat of the Attorney General must still be obtained, and a writ of error sued out according to the former practice. *Regina v. Seale and Regina v. Alford*, 24 Law J. Rep. (n.s.) Q.B. 221.

(b) *Error to the House of Lords.*

In a writ of error where no one appeared for the plaintiff in error, the counsel for the defendant in error was required to state the nature of the case, and the judgment of the Court below was then affirmed, with costs. *Jones v. Camnock*, 3 H.L. Cas. 700.

Upon a suggestion being entered of error to the House of Lords from a judgment of the Exchequer Chamber, affirming the judgment of this Court, the Master will be directed, under the 155th section of the 15 & 16 Vict. c. 76, to leave the judgment roll with the clerk in parliament until the case in error has been determined. *Lane v. Hooper*, 23 Law J. Rep. (n.s.) Q.B. 372; 3 E. & B. 731.

(c) *Special Case.*

The 32nd section of the Common Law Procedure

Act, 1854, permitting parties to bring error on a judgment upon a special case, unless the parties agree to the contrary, applies only to special cases agreed to subsequently to the act coming into operation; and does not warrant error being brought on a special case which, though agreed to be drawn up previous to the act, was not finally settled until after the statute was in force. *Hughes v. Lumley* (in error), 24 Law J. Rep. (N.S.) Q.B. 29; 4 E. & B. 358.

(d) *Bill of Exceptions.*

If, upon the trial of a cause, the Judge directs a nonsuit, and the plaintiff does not appear when called, and judgment of nonsuit is therefore entered against him, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the Judge improperly directed the nonsuit. The proper course is for the plaintiff to appear and require the Judge to direct the jury in point of law in his favour, and upon the Judge refusing to permit him to appear, and nonsuiting him against his will, or refusing to direct the jury in his favour, the plaintiff may tender a bill of exceptions, and bring a writ of error. *Corsar, or Cossar, v. Reed*, 21 Law J. Rep. (N.S.) Q.B. 18; 17 Q.B. Rep. 540.

(D) *COSTS.*

If the plaintiff below recovers judgment by default, and the defendant below, after payment of the debt and costs sues out a writ of error on which the former judgment is affirmed in the Court of Exchequer Chamber, the plaintiff below is not entitled to his costs in error under the statute 3 Hen. 7. c. 10, as he has not been delayed in the execution of his judgment. *Sutherland v. Mills, or Wills*, 20 Law J. Rep. (N.S.) Exch. 28; 5 Exch. Rep. 980.

A plaintiff in the Queen's Bench, after judgment there for defendant, suggested error in the Exchequer Chamber, which defendant denied. Plaintiff resided abroad out of the jurisdiction of the English Courts. He had, by order of the Queen's Bench, given security below for costs: and the costs incurred in that court exceeded the amount for which security had been given. On the application of the defendant, after denial of error, the Court of Exchequer Chamber ordered the plaintiff to give security for costs in error to the satisfaction of the Master of the court below, proceedings to be stayed in the meanwhile. *Bougleux v. Swayne*, 3 E. & B. 829.

The 148th section of the Common Law Procedure Act, 1852, which abolishes the writ of error and makes the proceeding to error a step in the cause, does not alter the law as to the liability to costs in error; and, therefore, where judgment was simply reversed by a Court of error without any mention of costs, the party succeeding was not entitled to have his costs in error taxed as costs in the cause under the 69th of the *Regulæ Generales*, Hil. term, 1853. *Fisher v. Bridges*, 24 Law J. Rep. (N.S.) Q.B. 165; 4 E. & B. 666. And see *Marshall v. Jackson*, in a note to that case.

That rule provides only for the mode of taxing costs where costs are given by law, and has no further operation. *Ibid.*

ESCHEAT.

T C, the executor of S E, purchased the equity of redemption of an estate for 615*l.*, subject to a mortgage in fee (which contained a power of sale) to secure the repayment of 800*l.*; this security was transferred to Messrs. A and D. T C was illegitimate. He died unmarried and intestate in December 1831. S B purchased the estate, which, on the 12th of August 1834, was conveyed to him in fee by A and D, the mortgagees, and by S A, the administratrix *de bonis non* of S E. The deed recited that T C had purchased the estate in part with the money of S E. S B, the purchaser, died, and his estate was sold under the direction of the Court. Objections were taken to the title, because the mortgagees had not executed their power of sale under the mortgage, and because no person claiming through T C had conveyed the estate or was a party to the suit; because there was no evidence shewing that T C was illegitimate, or that he died without heirs, or that he was a trustee for S E, and if those statements were true, the estate had escheated to the Crown; and because, as the equity of redemption had not been foreclosed, it was assets for the payment of his debts, and his personal representative was not before the Court. The Master reported that a good title could not be made. Upon exceptions to his report,—Held, that the evidence of T C being a mere trustee was not such that a purchaser could be compelled to take the title; that, assuming T C had a beneficial title, the equity of redemption had not escheated to the Crown; that, as the equity of redemption might possibly be assets for the payment of the debts of T C generally and on covenant, no title could be made in the absence of the legal personal representative of T C. If it could, then mortgagees having the legal estate might hold the whole property against creditors discharged from the equity of redemption. The exceptions were, therefore, overruled; but, as it was on grounds different from those on which the Master had relied, without costs. *Beale v. Symonds*, 22 Law J. Rep. (N.S.) Chanc. 708; 16 Beav. 406.

Under the Escheat Act trust monies may be followed into land against the lords of the fee; and if it were otherwise, the estate in the hands of the lord by escheat is liable to the debts of the person whose estate has escheated. *Hughes v. Wells*, 9 Hare, 749.

ESTOPPEL.

[See BOND—DEED—EVIDENCE—PLEADINGS.]

In an action on a covenant for the payment of an annuity, the defendant, the grantor, is estopped from pleading that the annuity was granted for the fraudulent purpose of multiplying votes. *Phillpotts v. Phillpotts*, 20 Law J. Rep. (N.S.) C.P. 11; 10 Com. B. Rep. 85.

Where a declaration set out a libel in which it was alleged that the plaintiff was tried for murder, and that "it was understood that the counsel for the prosecution were in possession of a damning piece of evidence, viz., that he had spent nearly the whole of the night preceding the duel in practising pistol-firing"; and the plea stated that the plaintiff had

committed murder, but did not shew that he had practised pistol-firing the night before, it was held that the justification was insufficient. *Helsham v. Blackwood*, 20 Law J. Rep. (N.S.) C.P. 187; 11 Com. B. Rep. 111.

Semble—that a replication to such a plea by way of estoppel, stating that the plaintiff was tried and acquitted, is not good. *Ibid*.

Case. The declaration stated that the plaintiff and the defendant were attorneys; that the defendant falsely represented to the plaintiff that he, the defendant, was authorized by one Fennell to bring an action, in Fennell's name, against one C and B, and that he was authorized by Fennell to retain the plaintiff to bring the action; that the plaintiff brought the action; that the defendant was not so authorized, and that the plaintiff was compelled to discontinue the said action and to pay costs. Other counts charged the defendant with similar acts with reference to other parties. *Plea*—that the plaintiff was not employed, and did not act as such attorney. *Replication*, that the plaintiff ought not to be admitted to plead the said plea, because a Judge's order was made for taxing the plaintiff's bill of fees in the action, in the declaration mentioned, delivered to the defendant and one Oldershaw and one A. Jenkinson, and for the Master to certify what was due; that the defendant and A. Jenkinson should be at liberty to dispute their retainer; that the Master allowed 196*l*. 13*s*. 5*d*.; that the plaintiff sued the defendant, Oldershaw and A. Jenkinson for determining the question of the retainer and recovering the sum of 196*l*. 13*s*. 5*d*.; that the question of the retainer being referred to the Master, he certified that such retainer by the defendant, Oldershaw and A. Jenkinson was proved, whereupon the plaintiff signed judgment against the three parties for 247*l*. 3*s*. 10*d*.; and that the plaintiff's bill of fees was for fees due to him for work done by him in bringing the actions in the declaration mentioned:—*Held*, that the replication did not state a case of estoppel, and was bad. *Callow v. Jenkinson*, 20 Law J. Rep. (N.S.) Exch. 321; 6 Exch. Rep. 666.

The Westminster Improvement Commissioners were authorized by several acts of parliament to borrow such sums of money as they should think necessary for the purposes of the act, and to give bonds for the same, and which bonds were assignable. In an action by the plaintiff, as transferee of one of such bonds, the condition of which recited that the defendants had, in pursuance of the said acts, borrowed of one T P 5,000*l*. for enabling them to carry the said acts into execution, the defendants pleaded that they did not borrow the said sum of the said T P, or any part thereof, for the purposes of the said acts, and that they were not authorized to make the said bond, and that the same was made contrary to the provisions of the said acts, of which the said T P and the plaintiff had notice at the time the bond was made and transferred to the plaintiff:—*Held*, upon general demurrer, that the plea was bad. *Horton v. the Westminster Improvement Commissioners*, 21 Law J. Rep. (N.S.) Exch. 297; 7 Exch. Rep. 780.

The defendants also pleaded, that at and before the bond was made, certain persons, namely, C M and W M, were entitled to receive from the defendants certain bonds; that the said T P and others

conspired fraudulently to procure for T P one of the said bonds to which the said C M and W M were entitled, and that by means of such conspiracy and fraud they procured the said C M and W M to authorize the defendants to give to the said T P one of the said bonds they were so entitled to; and that the bond sued upon was thereupon given to T P by the defendants, and that they the defendants had never borrowed any sum of money from the said T P, of all which premises the plaintiff at the time of the transfer to him of the said bond had notice:—*Held*, bad on general demurrer, because the defendants could not set up as a defence the fraud that had been committed upon C M and W M, by whose directions they had, in pursuance of their contract with them, given the bond to T P. *Ibid*.

Mandamus to complete a line of railway, authorized to be constructed by a special act incorporating the provisions of the Lands Clauses Consolidation Act (8 Vict. c. 18). *Return*, that the undertaking authorized by the special act was intended to be carried into effect by means of a capital to be subscribed by the promoters, and that the whole of such capital had not been subscribed under a contract as required by the 8 Vict. c. 18. s. 16, or otherwise, and that the defendants had not been able to procure the subscription of such capital, and that the lands required could not be obtained without the exercise of the compulsory powers. *Plea*, by way of estoppel, that the defendants had given notices to other landowners on other parts of the line, in exercise of the compulsory powers, and that proceedings to arbitration, under the 8 Vict. c. 18, had been taken upon those notices:—*Held*, that the return was a good answer to the writ; that the plea alleging what was *res inter alios acta* could not operate as an estoppel; and that a peremptory mandamus could not, therefore, be awarded. *Regina v. the Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 191; 1 E. & B. 572.

Plaintiff, being a widow, but not executrix or administratrix of her former husband, was in possession of furniture which had formerly belonged to him. She afterwards married B, whom she supposed to be a single man, and together with him occupied the house in which the furniture was. In order to raise money to pay off a distress for rent, B sold to the defendant the furniture. The plaintiff actively interfered in this transaction, believing herself to be the wife of B. Shortly afterwards B was convicted of bigamy in marrying the plaintiff. The plaintiff then sued the defendant for the value of the furniture:—*Held*, that she could not recover as she had no title to the furniture; and that, even if it were her property, she was bound by her concurrence in the sale of it by B to the defendant. *Waller v. Drakeford*, 22 Law J. Rep. (N.S.) Q.B. 274; 1 E. & B. 749.

Declaration, alleging a wrongful imprisonment in the remand ward of the Queen's Prison. *Plea*, a justification under two writs of execution to the sheriff of Yorkshire, and a habeas corpus, changing the imprisonment of the plaintiff from York Castle to the Queen's Prison. *New assignment*, stating a petition to the Insolvent Court, a reference of the petition to the county court, and thereupon an order of adjudication and a warrant of the county court

Judge, delivered to the gaoler of York Castle, requiring him to discharge the plaintiff on the 12th of April 1852; that the plaintiff was afterwards committed by habeas corpus with the said warrant to the custody of the defendant, with the detainers, and that the defendant imprisoned the plaintiff in the said remand ward after the said 12th of April. Plea, denying the commitment to the defendant's custody with the warrant, and the possession of the order of adjudication or warrant. It appeared upon the trial that the defendant, being in custody of the sheriff of Yorkshire, under two writs of *ca. sa.*, petitioned the Insolvent Court, under the 1 & 2 Vict. c. 110, and his petition was referred to the County Court of Yorkshire. The county court Judge made an order for the discharge of the plaintiff on the 12th of April 1852, and a warrant in the terms of such order was delivered to the gaoler of York Castle, where the plaintiff was imprisoned. The plaintiff afterwards caused himself to be removed by habeas corpus to the Queen's Prison, a copy only of the warrant being sent with the plaintiff to the keeper of the Queen's Prison, and the plaintiff was thereupon imprisoned in the "remand ward" of the Queen's Prison. The defendant required that the plaintiff should obtain an order for his discharge on the 12th of April, and applications were in consequence made to the county court Judge and a Judge at chambers, who refused to make such an order, as being unnecessary; and three days after the 12th of April the plaintiff was discharged without any order. The jury found that the defendant had only a copy of the warrant, and acted upon it as his sole authority, and that he had led the plaintiff to believe that he was really acting upon the original warrant:—Held, that the rule of law which prevents a party who makes a wilful misrepresentation, and induces another to act upon a belief in the truth of such misrepresentation to his prejudice, from afterwards disproving it, did not apply so as to prevent the defendant from proving that he had received only a copy of the warrant, and had acted upon it. *Howard v. Hudson*, 22 Law J. Rep. (N.S.) Q.B. 341; 2 E. & B. 1.

Held, also, that the plaintiff's imprisonment in the "remand ward" was not any part of the cause of action, and was, therefore, no ground for judgment *non obstante veredicto*. *Ibid*.

Upon the trial of an indictment against the inhabitants of the township of H, for the non-repair of a highway, a prior judgment of Quarter Sessions upon a presentment by a Justice under the 13 Geo. 3. c. 78. for non-repair of the same highway by H, was put in. The presentment alleged that the highway was in H, and that H was liable to repair it. It also appeared by the judgment that two of the inhabitants of H had appeared and pleaded guilty, and that a fine was imposed:—Held, conclusive evidence that the highway was in H, and that H was liable to repair it. *The Queen v. the Inhabitants of Haughton*, 22 Law J. Rep. (N.S.) M.C. 89; 1 E. & B. 501.

The presentment did not state how the township was liable to repair:—Held, that although it might be bad for this reason on demurrer or error, yet, that having been submitted to by the defendants, they were conclusively bound by it. *Ibid*.

The fact of the fine imposed by the Sessions not being shewn to have been paid did not prevent the

judgment from acting as an estoppel, no fraud being imputed. *Ibid*.

A recital in a private act (since repealed) that the road in question was in D, is at most only evidence of that fact, and is not admissible against the estoppel. *Ibid*.

In an action for goods sold, there was a plea of payment, and it appeared that both the plaintiff and the defendant employed G as factor. G sold the goods to the defendant knowing he was factor. On a balance of accounts, G was indebted to the defendant. The plaintiff, who knew the state of accounts between G and the defendant, petitioned the Court of Bankruptcy to make G bankrupt, and alleged in his affidavit that G owed him a sum of money for goods sold by G, as factor of the plaintiff, to the defendant, and for which he had received payment by means of goods sold by the defendant to G. The plaintiff having afterwards sued the defendant for the price of the goods,—Held, that the statement in the affidavit was not conclusive evidence estopping the plaintiff from denying that the defendant had paid for the goods; the allegation as to payment, so explained, not being an allegation of fact, but of an inference of law drawn by the plaintiff. *Morgan v. Couchman*, 23 Law J. Rep. (N.S.) C.P. 36; 14 Com. B. Rep. 101.

The declaration stated that the plaintiff bought of the defendant divers lots of timber trees, to be felled and removed under certain conditions; and that the defendant would not permit the plaintiff to fell or remove a certain remainder of the lots pursuant to the sale and conditions. The defendant pleaded, first, that before the breach, the plaintiff felled and carried away and converted divers other trees of the defendant in substitution of the remainder mentioned in the declaration; secondly, that before breach the plaintiff fraudulently felled and removed other trees of the defendant not comprised in the lots sold, and to which the plaintiff had no right, and which exceeded in number and value the remainder in the declaration; that the plaintiff fraudulently pretended that the trees which he so took were the trees which he had purchased; that they were taken in fraudulent substitution of those named in the declaration, and that the plaintiff converted them to his own use:—Held, that these pleas were bad; that they shewed no rescission of the contract stated in the declaration, and that the plaintiff was not estopped by his own fraud and trespass from bringing his action on the contract. *Lewis v. Clifton*, 23 Law J. Rep. (N.S.) C.P. 68; 14 Com. B. Rep. 245.

An estoppel may be replied to a plea of *liberum tenementum*. *Feversham v. Emerson*, 24 Law J. Rep. (N.S.) Exch. 254; 11 Exch. Rep. 385.

Upon an indictment charging felony committed within the jurisdiction of the Central Criminal Court, plea, not guilty, a prisoner, was tried, convicted and sentenced to imprisonment. After sentence application was made to this Court for a writ of *habeas corpus* for his discharge, upon an affidavit shewing that the offence was not committed within the jurisdiction as alleged:—Held, that the record was an estoppel, and the writ was refused. *Ex parte Newton*, 24 Law J. Rep. (N.S.) C.P. 143; 16 Com. B. Rep. 97.

EVIDENCE.

[See PRACTICE; Bill of Exceptions—PRODUCTION AND INSPECTION OF DOCUMENTS—WITNESS.]

(A) GENERAL POINTS.

- (a) *Evidence made admissible by Consent.*
- (b) *Judicial Notice.*
- (c) *Admissibility of Unstamped Documents.*
- (d) *Admissibility of Particulars.*
- (e) *Proof of Handwriting.*
- (f) *Admissibility of Conduct.*
- (g) *Contradiction of Witness.*
- (h) *Proof of Deed by Admission of Party executing.*

(i) *Recitals in Acts of Parliament.*

(B) RECORDS AND JUDICIAL DOCUMENTS.

(C) PUBLIC DOCUMENTS.

(D) PRIVATE WRITINGS.

- (a) *Entries of Deceased Persons.*
- (b) *Survey and Presentment of Jury.*
- (c) *Deeds.*
- (d) *Agreements.*
- (e) *Maps.*
- (f) *Accounts.*
- (g) *Letters.*
- (h) *Bills of Costs.*

(E) SECONDARY EVIDENCE.

- (a) *In general.*
- (b) *Notice to Produce.*
- (c) *Search.*

(F) PAROL EVIDENCE.

(G) HEARSAY EVIDENCE AND DECLARATIONS.

(H) PRIVILEGED COMMUNICATIONS.

(I) PRESUMPTIVE EVIDENCE.

(K) ADMISSIONS.

- (a) *By Pleading.*
- (b) *Under Notice to admit.*
- (c) *By Conduct of Party.*

(L) CONFESSIONS.

(M) DEPOSITIONS.

- (a) *Caption.*
- (b) *Examination of Witness on.*
- (c) *Admissibility of, in Absence of Witness.*

(N) PRIOR CONVICTIONS.

(O) PRACTICE, IN EQUITY.

(A) GENERAL POINTS.

(a) *Evidence made Admissible by consent.*

Quære—whether evidence inadmissible by the legal rules of evidence can be admitted by consent. *Barbot v. Allen*, 21 Law J. Rep. (N.S.) Exch. 155; 7 Exch. Rep. 155.

(b) *Judicial Notice.*

The Court will take judicial notice that a city is a county of a city. *Regina v. St. Maurice*, 20 Law Rep. (N.S.) M.C. 221; 16 Q.B. Rep. 908.

The Court will take judicial notice of the law of England as administered in equity. *Sims*, or *Simms*, v. *Marryatt*, 17 Q.B. Rep. 281; 20 Law J. Rep. (N.S.) Q.B. 454.

A declaration in debt claimed 44*l*. The only plea was payment and acceptance of 15*l*. in satisfaction of the debt. After issue joined on a traverse to the

plea, a verdict was found for the defendant:—Held, that the plaintiff was not entitled to judgment *non obstante veredicto*, because, although the general rule of law is, that payment of a smaller sum cannot be pleaded in satisfaction of a larger, yet since the Reg. Gen. of Trin. term, 1 Vict., which relieves a defendant from pleading payment when a plaintiff by his particulars gives credit for a payment, the Court will after verdict presume, unless the contrary be proved, that the plaintiff may have delivered particulars, giving credit for payments, and so reducing the balance sought to be recovered to an amount less than that covered by the sum stated in the plea. *Turner v. Collins*, 20 Law J. Rep. (N.S.) Q.B. 259; 2 L.M. & P. P.C. 99.

The Courts will take judicial notice that the Queen's prison, being the prison of that Court, is in England. *Wickens v. Goadley*, 21 Law J. Rep. (N.S.) C.P. 50; 11 Com. B. Rep. 666; 2 L.M. & P. P.C. 572.

The Courts in this country will not take judicial notice of the meaning of a term in foreign law: *Société anonyme. Gerhard v. Bates*, 22 Law J. Rep. (N.S.) Q.B. 364; 2 E. & B. 476.

The Courts of common law will take judicial notice of the jurisdiction of the Court of Admiralty, though not of its practice. *Place v. Potts*, 22 Law J. Rep. (N.S.) Exch. 269; 8 Exch. Rep. 705.

(c) *Admissibility of Unstamped Documents.*

In an action by the plaintiff against a stakeholder to recover a sum of money deposited as a wager on a trotting match by the plaintiff, whose horse was beaten, the plaintiff, for the purpose of proving fraud, which consisted in one horse having been substituted for another, tendered in evidence an unstamped agreement relating to the match:—Held, that it was admissible without being stamped. *Holmes v. Sixsmith*, 21 Law J. Rep. (N.S.) Exch. 312; 7 Exch. Rep. 802.

An unstamped receipt for 40*l*., dated at Cologne, was held to be receivable in evidence here, and the fact that such a receipt would not be receivable in evidence at Cologne until it had been stamped on payment of a penalty, would make no difference as to its admissibility here, as our Courts do not take notice of foreign revenue laws. *Bristow v. De Sequeville*, 3 Car. & K. 6; 5 Exch. Rep. 275.

The defendant guaranteed to pay the plaintiff according to his arrangements with J. On proof that the defendant had entered into a written agreement with J, the Judge decided that it should be produced; but on production, the objection being taken that it was unstamped and that the plaintiff ought to be nonsuited, the Judge treated the agreement as a nullity, and found for the plaintiff:—Held, that the Judge was wrong, as the document, though unstamped, was an agreement, and ought not to have been treated as a nullity, as it was capable of being stamped at any future time. *Delay v. Atcock*, 24 Law J. Rep. (N.S.) Q.B. 68; 4 E. & B. 660.

Upon the trial of an issue, whether A had agreed with B for the purchase of certain leasehold premises, a receipt for the purchase-money by B, not properly stamped, was received in evidence to prove the agreement to purchase. On motion for a new trial,—Held, that proof of the payment of the purchase-money was not a collateral matter, but went directly to the matter in issue; and, consequently, that the receipt, not being duly stamped, was improperly ad-

mitted as evidence to prove the agreement to purchase. *Evans v. Prothero*, 20 Law J. Rep. (N.S.) Chanc. 448.

A document, purporting on the face of it to be a receipt for purchase-money, but inadmissible as evidence of the payment of the money for want of a sufficient stamp, is nevertheless admissible as evidence of the agreement for sale, if it contain the requisite terms.—*semble*. *Vide* s. c. 20 Law J. Rep. (N.S.) Chanc. 448, *contra*. *Evans v. Prothero*, 21 Law J. Rep. (N.S.) Chanc. 772; 1 De Gex, M. & G. 572.

(d) *Admissibility of Particulars.*

Declaration on the common money counts. Plea, set-off. Before the trial the defendant withdrew this plea, and pleaded *puis darrein continuance*, that the accounts between the plaintiff and the defendant had been settled by agreement, and a balance struck, which was agreed to be paid by instalments, two of which had been paid prior to the trial. Replication, that the agreement was obtained by fraud, on which issue was joined. At the trial, the plaintiff put in evidence the particulars of set-off, which had been delivered with the original plea, for the purpose of shewing a discrepancy between the statement of accounts upon which the agreement was founded, and that given by the defendant in the particulars of set-off:—Held, that such evidence was admissible. *Buckmaster v. Meicklejohn*, 22 Law J. Rep. (N.S.) Exch. 242; 8 Exch. Rep. 634.

(e) *Proof of Handwriting.*

For the purpose of proving a document in which a word is spelt in a particular manner, *ex. gr.* Titchborne for Tichborne, to be in the handwriting of a party, other documents not in evidence in the cause, but proved to be in the handwriting of the party, and in which the word is similarly spelt, are admissible in evidence. *Brookes v. Tichborne*, 20 Law J. Rep. (N.S.) Exch. 69; 5 Exch. Rep. 929.

(f) *Admissibility of Conduct.*

[See *post*, (K) ADMISSIONS.]

A contract having been made between the plaintiff, who was insane, and the defendant, which it was sought to set aside,—Held, upon an issue whether the defendant had notice of such insanity, that evidence was admissible of the plaintiff's conduct both before and after the signing of the contract, in order to shew that the character of his disease was such that it must have developed itself to one having the opportunity of observation afforded to the defendant, though a stranger. *Beavan v. M'Donnell*, 23 Law J. Rep. (N.S.) Exch. 326; 10 Exch. Rep. 184.

(g) *Contradiction of Witness.*

The defendant being sued as executor of A, in respect of a promissory note, purporting to be signed by A and B, but alleged by the defendant to be forged, stated, in cross-examination, that he had not heard B admit having signed the note:—Held, that the plaintiff was not at liberty to contradict the defendant by shewing that the latter had heard B make the admission. *Palmer v. Trouer*, 22 Law J. Rep. (N.S.) Exch. 32; 8 Exch. Rep. 247.

(h) *Proof of Deed by Admission of Party executing.*

A party in a cause who is called as a witness cannot prove the execution of a deed by himself where there is an attesting witness capable of being called. *Whyman v. Gath, or Garth*, 22 Law J. Rep. (N.S.) Exch. 316; 8 Exch. Rep. 803.

(i) *Recitals in Acts of Parliament.*

A recital in a private act (since repealed) that the road in question was in D, is at most only evidence of that fact, and is not admissible against the estoppel. *Regina v. Houghton*, 22 Law J. Rep. (N.S.) M.C. 89; 1 E. & B. 501.

(B) RECORDS AND OTHER JUDICIAL DOCUMENTS.

[See titles ESTOPPEL—HIGHWAY—PERJURY.]

Upon the trial of an issue whether the plaintiff had acquired a right to a watercourse by a twenty years' user as of right without interruption, evidence was offered that during the twenty years the defendants (a water company), who claimed to be entitled to divert the water, had penned it back from the plaintiff's land and had laid an information, under their local act, against the plaintiff's servant, who had removed the obstruction and who was convicted and fined a shilling, which the plaintiff paid:—Held, that this evidence was properly admissible as negating an enjoyment by the plaintiff as of right. *Eaton v. the Swansea Waterworks Co.*, 20 Law J. Rep. (N.S.) Q.B. 482; 17 Q.B. Rep. 267.

An order of removal, unappealed against or confirmed on appeal, is conclusive, not only as to the facts directly decided, but as to those facts also that are mentioned in the order, and are necessary steps to the decision of the settlement. *Regina v. the Township of Hartington Middle Quarter*, 24 Law J. Rep. (N.S.) M.C. 98; 4 E. & B. 780.

Upon an appeal against an order adjudging the settlement of Esther Gould, a lunatic pauper, who had been removed from the respondent township of L to an asylum, to be in the appellant township of H, the respondents proved a former valid order of removal made between the same townships, adjudging the settlement of John Gould, aged eleven years, and William Gould, aged five years (being at the time unemancipated), "the lawful children of William Gould and Esther Gould" (the said lunatic pauper), to be in the appellant township of H. The removal of the said two children from the respondent township of L to the said appellant township took place, and there was no appeal against the said order. This was the only evidence relied upon by the respondents to prove a settlement of the said lunatic pauper in the appellant township, derived from her husband:—Held, that as the adjudication of settlement in both the orders necessarily depended upon the same two facts, namely, the settlement of W G the father, and his marriage with the lunatic pauper before the birth of their said two children, the former order unappealed against was conclusive as to those facts, and the appellants were estopped from proving that in truth neither the said husband of the pauper, nor the pauper herself, had ever gained a settlement in their township. *Ibid*.

In 1798 a marriage was solemnized by licence between a man and a female minor. Three years afterwards, in pursuance of a previous agreement, the woman instituted a suit for nullity of marriage, and a decree of nullity was pronounced, on the ground of non-consent of the minor's father. Early in the following year a daughter was born:—Held, overruling the decision of the Court below, that evidence, shewing that the sentence of the ecclesiastical court had been obtained by fraud and collusion, was admissible; and, upon its being satisfactorily proved to the Court, the legitimacy of the daughter was established. *Harrison v. the Corporation of Southampton*, 22 Law J. Rep. (n.s.) Chanc. 722; 4 De Gex, M. & G. 137; overruling 22 Law J. Rep. (n.s.) Chanc. 372.

Where a marriage of a minor was celebrated by licence, to which the consent of the father was requisite, his consent (the presumption of law being in favour of marriage and legitimacy, and against the commission of any crime or offence,) must be presumed, until proved to the contrary; and the mere fact that the mother's name appeared in the register as the consenting party was not sufficient to contravene the presumption. *Ibid*.

The certificate of the registration of a deed in the Island of St. Vincent, by the registrar there, not being a person authorized to administer oaths, is not within the terms of the 22nd section of the 15 & 16 Vict. c. 86, and, therefore, is not receivable in evidence without proof of the handwriting of the registrar. *Baillie v. Jackson*, 22 Law J. Rep. (n.s.) Chanc. 753; 3 De Gex, M. & G. 38.

(C) PUBLIC DOCUMENTS.

[Registers, see COMPANY. And see INFERIOR COURT.]

Under the 14 & 15 Vict. c. 99. s. 14, an unstamped copy of an Act Book of the ecclesiastical court is sufficient evidence of the probate of a will to prove the executorship of the person named in it. *Dorrett v. Meux*, 23 Law J. Rep. (n.s.) C.P. 221; 15 Com. B. Rep. 142.

Under the 14th section of the statute 14 & 15 Vict. c. 99. (Lord Campbell's Act) extracts from parish registers of baptisms, marriages and deaths, purporting to be signed, some by the "incumbent," some by the "rector," some by the "vicar," and some by the "curate" of the parishes,—Held, to be receivable in evidence on a petition for the payment of money out of court, the Court considering that each incumbent was an "officer to whose custody," &c. within the meaning of the act. *In re Hall's estate*, 22 Law J. Rep. (n.s.) Chanc. 177; 2 De Gex, M. & G. 748; 9 Hare, App. xvi.

An entry in a printed copy of the Journals of the House of Commons is not receivable in evidence, unless it has been compared with some original at the House; but an examined copy of an entry in the minute book kept by the clerk at the table of the House was received in evidence. *Chubb v. Salomons*, 3 Car. & K. 75.

(D) PRIVATE WRITINGS.

(a) Entries of deceased Persons.

[See title TITHE.]

In order to prove the title of a lessor of the plaintiff in ejectment, a book headed "Account of J. V.

sen., receiver of the rents of the Earl of A.," was produced from a proper custody. The book contained for several years up to 1795 successive entries of balances due to J V sen., at the foot of which was (in a different handwriting and signed by Lord A and J V jun., a reference to a general statement of account in 1795. The entry in 1795 was as follows:—"Balance to J V sen. 76l. 19s. 7d. Feb. 18th, 1795. The above account was this day settled and the balance 76l. 19s. 7d. due thereon to J V sen. was paid by the Earl of A to the undersigned J V jun. and the vouchers delivered up. A.—J V jun." No evidence was given of J V jun.'s death or handwriting, or of his ever having been a receiver:—Held, that his death would be presumed after a lapse of fifty years, and that these entries were admissible in evidence as being made by a person accounting with Lord A for money which he acknowledges to have received. *Doe d. Ashburnham v. Michael*, 20 Law J. Rep. (n.s.) Q.B. 480; 16 Q.B. Rep. 620.

In order to prove that certain premises were parcel of the manor of H, an entry dated 1610 in an ancient book of the then steward of the lord of the manor of H was tendered in evidence. The entry purported to be a memorandum of the terms of certain leases and deeds. It commenced with a lease from S to H, from 1570, for fifty-one years, of land, including the premises in question, describing them as parcel of the manor of H, and stated the recitals of that lease as shewing that the lord of the manor of H had in 1559 granted a lease for one hundred years of the same land to L, and that L had underlet to S. The entry then added, that H had assigned to P, and P's widow to C, who claimed ten years yet to come in the premises. The lord of the manor of H was entitled to the reversion in the premises. There was no proof independent of the entry that there ever was such a lease from S to H:—Held, that the entry was not admissible as evidence of reputation, nor as an entry made in the course of business, nor as secondary evidence of the lease of which it purported to state the effect. *Doe d. Padwick v. Wittcomb*, 20 Law J. Rep. (n.s.) Exch. 297; 6 Exch. Rep. 601.

In support of the right of the Earl of L to a fishery in the Solway Frith, the defendants put in evidence the following entry in the book of a former receiver of rents of the Earl of L's estate:—"Received of T H the respective shares due from three proprietors (T H being one) of the raise net set in the Solway Frith in D in the year 1733." *Dictum*, the entry is evidence not only of rent having been paid by T H, but also by the two other proprietors. *Percival v. Nanson*, 21 Law J. Rep. (n.s.) Exch. 1; 7 Exch. Rep. 1.

Per Pollock, C.B.—If an entry is admissible as being against the interest of the party making it, it carries with it the whole statement. But if the entry is made merely in the course of a man's duty, it does not go beyond those matters which it was his duty to enter. *Ibid*.

An entry of the receipt of rates by a deceased clerk of a collector, who was duly appointed, is evidence of payment of rates to satisfy the statute 4 & 5 Will 4. c. 76. *Regina v. St. Mary, Warwick*, 22 Law J. Rep. (n.s.) M.C. 109; 1 E. & B. 816.

A deceased person who was employed to serve notices to quit, and whose duty it was to inform his employer of their service, was sent with a notice to serve on R. C., and on his return he signed a memorandum, "29th September, served R. C." It turned out that, in fact, he had served not R. C., but his father, W. C. It was then proposed to shew that he stated this fact to his employer on his return, but that the memorandum having been prepared beforehand was not altered:—Held, that this evidence was not admissible, as it was not made in the course of business or discharge of a duty. *Stapylton v. Clough*, 23 Law J. Rep. (N.S.) Q.B. 5; 2 E. & B. 933.

Semble—there is no difference in the admissibility of a declaration made by a deceased person, in the course of business or discharge of duty, whether such declaration be in writing or by word of mouth. *Ibid.*

The 54th section of the statute 15 & 16 Vict. c. 86. is retrospective—*per Lord Justice Turner*, affirming a decision of *Vice Chancellor Kindersley*; *Lord Justice Knight Bruce* doubting.—The power given to the Court by this section is not to be exercised until the Court is satisfied that the means of obtaining the ordinary legal evidence has been substantially exhausted; therefore, in a case where such means had not in the opinion of the Court been exhausted, an order of the Vice Chancellor making certain entries in books of account *prima facie* evidence of their contents was discharged without prejudice. *Ewart v. Williams*, 24 Law J. Rep. (N.S.) Chanc. 414, 366; 3 Drew. 21.

Entry of a payment by a deceased person against his interest, held admissible. *Orrett v. Corser*, 21 Beav. 52.

Entry by a deceased person shewing (in contradiction to a deed evidencing a rightful payment by him) that the payment had been made in breach of trust to A. B. instead of to the trustees, held admissible in evidence to shew the receipt by A. B., on the ground that such entry tended to charge the maker of it. *Ibid.*

(b) Survey and Presentment of Jury.

Replevin. The lordship of Denbigh having been granted to the Earl of Leicester in the 9 Eliz. was shortly before his death, which took place in the 30 Eliz., mortgaged by him to the corporation of London. The corporation afterwards conveyed the lands to the Crown, covenanting to deliver up all muniments of title, surveys, &c., and the lands have remained in the possession of the Crown ever since. The defendants, for the purpose of proving that the *Plas Bach*, on which the distress was taken, was parcel of the lordship of Denbigh, tendered in evidence a survey, which ran thus:—"Lordship of Denbigh. Survey taken in the reign of Queen Elizabeth, 11th. The presentment of the jury of survey for town lands within the Comot of Kinmerch." Then followed a statement that David ap John ap David occupied certain parcels of land in K., and amongst them "Place Baghe," and in the margin were the words "Examined with demise. Acres 112. 1l. 3s. 4d." The defendants also put in evidence certain ministers' accounts taken in the 39 Eliz. relating to a message in the tenure of David ap John ap David, situate in K. In the

margin were the words "Note, this is 6s. 6d. rent in the *old survey* in my Lord Leicester's time":—Held, that the survey being a private one was not admissible for the purpose of proving that the lands in question were parcel of the lordship of Denbigh; and, *semble*, that the presentment of the jury of survey was not admissible as evidence of reputation. *Daniel v. Wilkin*, 21 Law J. Rep. (N.S.) Exch. 236; 7 Exch. Rep. 429.

(c) Deeds.

Where a party is subject to the obligation of shewing that an unprofessional person understood the contents of a deed which he executed, the mere proof of its having been read over to him, unaccompanied with proper explanations, is not sufficient to satisfy the Court that the person hearing it read understood it. *Hoghton v. Hoghton*, 15 Beav. 278; 21 Law J. Rep. (N.S.) Chanc. 482.

Deeds of appointment of a sum of 30,000*l.* for younger children's portions having been properly executed, and being found in the custody of the family solicitor:—Held, that the onus was thrown upon the party disputing them to prove their invalidity as escrows. *Rowley v. Rowley*, Kay, 242.

(d) Agreements.

A claim for the specific performance of an agreement stated the agreement. An affidavit was made on behalf of the plaintiff, that the agreement had been made, and that the attesting witness to it was a clerk of the defendant, and that the defendant had refused to allow his clerk to prove the agreement. An affidavit was made by the defendant in which an allusion was made to "the agreement in the plaintiff's claim set forth." The defendant did not deny that the agreement had been made. No other proof was given of the agreement:—Held, that, under the circumstances, the agreement was sufficiently proved, and that the plaintiff was entitled to a decree. *Tynte v. Buller*, 23 Law J. Rep. (N.S.) Chanc. 504.

(e) Maps.

In order to shew that a house was situated in the county of N the plaintiff tendered in evidence a map printed on paper from an engraved copper plate, having on the face of it these words, "A new map of the county of S, taken from the original map published by J. K. in 1736, who took an accurate survey of the whole county, now republished, with corrections and additions by J. and W. K., sons of the author, 1766, and engraved by J. R." The map was produced by a witness, who was a magistrate of the two counties, N and S. He had bought it twelve years before the trial:—Held, that the map was not admissible in evidence. *Hammond v. Bradstreet*, (in error) 23 Law J. Rep. (N.S.) Exch. 332; 10 Exch. Rep. 390.

(f) Accounts.

A gave a bond to B for 4,000*l.* and died, leaving C his executor. B died, leaving D his executor. Bill by D against C to enforce the bond. C filed a cross-bill against D, alleging that there had been various accounts between A and B, and that the bond ought to be taken subject to the account, and not according to the letter; and, in support of such

allegations, adduced, as evidence, an account in the handwriting of B. A decree was made in the causes for taking the accounts between A and B, and for an inquiry as to the circumstances under which the bond was given:—Held, on exceptions to the Master's report, that the account in B's handwriting was to be taken as evidence in favour of B, and against A, as well as in favour of A and against B. *Dickin v. Ward, Ward v. Dickin*, 20 Law J. Rep. (N.S.) Chanc. 211; 4 De Gex & Sm. 266.

(g) *Letters.*

If a defendant give in evidence a letter of the plaintiff which purports to be an answer to a letter of the defendant, the defendant is not bound to give his own letter in evidence, even if the other side desire it; but the plaintiff's counsel may put in the defendant's letter as his evidence, or comment on its not being given in evidence. *De Medina v. Owen*, 3 Car. & K. 72.

Where letters are written "without prejudice," with a view to a compromise, they cannot be given in evidence. *Hoghton v. Hoghton*, 15 Beav. 278; 21 Law J. Rep. (N.S.) Chanc. 482.

(h) *Bills of Costs.*

A clerk of a solicitor, who was the solicitor of the mortgagor and mortgagee in the creation of the security, and who copied the bill of costs of the solicitor in the transaction of making an appointment of the estate comprised in the security, and of preparing the mortgage deed which was founded on the title created by the appointment, may be received as a witness to depose to the handwriting on the document (which proof alone does not make it evidence); but he cannot be received to depose further as to the contents of the bill of costs, or the subject to which it relates, for an attorney's bill of costs is his history of the transaction, and the attorney could not be himself permitted to give evidence of the transaction against his client, or against those claiming under his client. *Chant v. Brown*, 9 Hare, 790.

The consent of the personal representative of the mortgagor, who was one of the clients of the solicitor, to the admission of a bill of costs in evidence does not make it evidence which can be admitted against the parties claiming under the mortgagee, the other client. *Ibid.*

Communications with the solicitor of the mortgagor only, or with the solicitor of persons having interests in the mortgaged estate in default of appointment, such solicitor not being the solicitor of the mortgagee, are not privileged communications when tendered as evidence in a suit to impeach the mortgaged security as having been founded on an appointment made in fraud of the power. *Ibid.*

(E) SECONDARY EVIDENCE.

(a) *In general.*

S, on the 5th of January 1746, being tenant in fee simple of lands in Tipperary, executed an indenture, which was, two days afterwards, registered under the Irish Registration Acts. The memorial represented that S had, by the indenture, demised, or agreed to demise, these lands to C for three lives, therein named, with "a clause of renewal after the expiration of said lives thereinbefore mentioned," provided that C, his heirs, &c., should, "within six

months from the death of the last of said three lives, nominate such life or lives as he would have inserted," and pay all rent, and "the sum of 11l. 7s. 6d. for adding or renewing such life or lives for ever." The memorial was signed by C alone, and he registered it. In February 1750, S executed a settlement in contemplation of marriage, by which he made himself tenant for life only in the estate comprised in the indenture of 1746. In March 1750, he executed a lease to C, in which the indenture of 1746 was recited, and in consequence of some changes in the lands a change was made in the rent. The lease recited the indenture as a demise to C for three lives and the longest liver of them, with a covenant to "renew the same for ever, on payment of 11l. 7s. 6d. for renewing the same on the fall of every life, within six months next after the fall of each life." The *habendum* in the lease was for the same three lives; and S covenanted that, "upon the death or failure of the aforesaid life or lives, or any or either of them" (naming them), and upon C, his heirs, &c., paying "the sum of 11l. 7s. 6d. above the annual rent, within the space of six calendar months, and immediately after the death or failure of such life," and on nomination, &c., "S and his heirs," &c., would add the life so nominated; "and so in like manner from time to time successively for ever thereafter on the failure of every other several life or lives in the said lease or thereafter to be nominated." Renewals had, from time to time, been made by the successors of S in the estate, sometimes after proceedings in Chancery to compel the same, sometimes without such proceedings; but in 1845, G, the descendant of S, having absolutely refused to renew, a bill was filed against him by B, who had become possessed of C's lease. The bill prayed for a renewal according to the lease, which B alleged to have been made in conformity with, and under the obligation of, the indenture of 1746. This indenture could not be produced, but the memorial was tendered and received in evidence. The defendant alleged that the lease was ineffectual to bind the inheritance, as it was made by a person who was, at the moment of executing it, only tenant for life, and he contended that there was no legal evidence of the indenture of 1746. He also relied on the difference between the terms of renewal contained in the indenture and those contained in the lease:—Held, affirming the judgment of the Court below, that the plaintiff was entitled to the renewal as prayed; that the memorial was properly admitted as secondary evidence of the indenture; that that indenture was to be treated as an original lease, containing a covenant, under the obligation of which the lease of 1750 was executed; that the obligation entered into in 1746 being by the tenant in fee simple, his performance of it in 1750 was valid, although he was then only tenant for life; and that the acts of the successive tenants of the estate, though not evidence to prove the existence of the covenant, became, when the covenant had been otherwise proved, evidence of the construction which the parties interested had put upon it. *Sadlier v. Biggs*, 4 H.L. Cas. 435.

Upon one of the occasions of renewal, the tenant for life against whom a bill had been filed was an infant. The Court of Chancery in Ireland ordered his guardian to execute a lease in conformity with

the covenant contained in the deed of January 1746. *Ibid.*

Per Lord St. Leonards, that order was authorized by the Irish statute 11 Ann. c. 3. *Ibid.*

An attorney subpoenaed to produce a document at a trial, may in his discretion refuse to produce it, on the ground that it has been entrusted to him by a client. He is neither bound to produce it, nor to answer a question with respect to its nature; and the Judge ought not to examine it to see whether it is a document which ought to be withheld. *Volant v. Soyer*, 22 Law J. Rep. (n.s.) C.P. 83; 13 Com. B. Rep. 231.

An attorney stated that after the execution of a deed which he held for his client, a document was delivered out of his office to the defendant as a copy. The attorney having refused to produce the deed, —Held, that the document so delivered was not admissible as secondary evidence of its contents. *Ibid.*

In order to prove a deed, a witness was called who stated that it was destroyed, and that he had seen the names of the parties to it in their respective handwriting. He also stated that the instrument bore the name of one B as an attesting witness; that B was dead, but that he did not know B's handwriting, or whether the said name of B was written by B:—Held, that under the circumstances, secondary evidence of the contents of the deed was admissible without further proof of the handwriting of B. *Regina v. the Inhabitants of St. Giles, Camberwell*, 22 Law J. Rep. (n.s.) M.C. 54; 1 E. & B. 642.

Per Erle, J.—Where a document is lost and the attesting witness to it is dead, there is no necessity for proving his handwriting. *Ibid.*

Semble—that secondary evidence is receivable of the contents of a private document in the possession of a party who is beyond the jurisdiction of the Court and who refuses to produce it. But held, that a mere demand of the document made by a stranger who does not even disclose his object in making it, is insufficient to render such evidence admissible. *Boyle v. Wiseman*, 24 Law J. Rep. (n.s.) Exch. 160; 10 Exch. Rep. 647.

A copy of a document sent by the plaintiff to the defendant, with a letter stating it to be a copy, is receivable in evidence for the defendant where the document itself would be so without production or accounting for the original. *Ansell v. Baker*, 3 Car. & K. 145.

A registered memorial of a lost deed,—Held, good secondary evidence. *Cathrow v. Eade*, 4 De Gex & Sm. 527.

(b) Notice to produce.

[See *Regina v. Kitson*, title ARSON.]

A notice to produce documents upon the trial of a cause applies not only to the first, but to all subsequent trials of the same cause, and need not be repeated. *Hope v. Beadon*, 21 Law J. Rep. (n.s.) Q.B. 25; 17 Q.B. Rep. 509.

The object of a notice to produce a document is merely to give the opposite party sufficient opportunity to produce it if he pleases, and not that he may be enabled to prepare evidence to explain, nullify, or confirm it; and, therefore, where the document is in court at the time of the trial, a notice to

produce it immediately is sufficient to render secondary evidence of its contents admissible if it be not produced. *Dwyer v. Collins*, 21 Law J. Rep. (n.s.) Exch. 225; 7 Exch. Rep. 639.

The attorney of a party to a suit may be asked, and is bound to answer, whether a document which he has received from his client in the course of his professional employment is in his possession or elsewhere in the court. *Ibid.*

(c) Search.

A deed was delivered to T, with instructions not to give it up to any one but S and R M together, and it was given up by T to S and R M many years after. P and B were the trustees named in it. At S's death the deed was not found on her premises, but no proper search in the repositories of the trustees was proved:—Held, that the deed was intended to be operative, but that the search was insufficient to let in secondary evidence. *Doe d. Richards v. Lewis*, 20 Law J. Rep. (n.s.) C.P. 177; 11 Com. B. Rep. 1035.

An agreement having been traced to the possession of P, a witness was called, who stated that he went to P, and asked him whether there was any agreement between himself and the pauper respecting a house. P said, "I cannot say for a certainty; I will search," and then directed his clerk to search. The witness and the clerk then searched P's office, and could not find the agreement; P was not called as a witness. The Sessions held, that there was no sufficient proof of search without calling P. The Court refused (upon a case stated) to interfere with the decision. *Regina v. Saffron Hill*, 22 Law J. Rep. (n.s.) M.C. 22; 1 E. & B. 93.

(F) PAROL EVIDENCE.

[See titles BILLS AND NOTES—CUSTOM AND PRESCRIPTION—GUARANTIE—SHIP AND SHIPPING—WILL.]

A bill of lading provided that the goods specified therein should be delivered to the order of the consignee or his assigns at Liverpool, "he or they paying freight for the said goods five-eighths of a penny sterling per lb. with primage and average accustomed":—Held, in an action by the shipowner against an indorsee of the bill of lading, who had accepted the goods, to recover the freight and primage, that the latter might give evidence of a mercantile custom existing at Liverpool, by which he was entitled to a deduction of three months' discount from the freight. *Brown v. Byrne*, 23 Law J. Rep. (n.s.) Q.B. 313; 3 E. & B. 703.

The plaintiff contracted by parol with H, the defendant's agent, for the purchase of flour above the value of 10l. of the same quality as the defendant had supplied to M. On the next morning the defendant sent to the plaintiff a sold note, which described the flour simply as "Whites X S." On the following day flour answering the description of "Whites X S" was delivered. The plaintiff tried half a sack, and finding it not so good as the flour supplied to M, which was "Whites X S S," complained of it to H, but afterwards used two more sacks and sold a third, and then paid the contract price under protest:—Held, that parol evidence was not admissible to shew that the plaintiff had bargained for flour other than that mentioned in the

written contract, viz., "Whites X S," and that the defendant, by delivering "Whites X S," had fulfilled his contract. *Harnor v. Groves*, 24 Law J. Rep. (n.s.) C.P. 53; 15 Com. B. Rep. 667.

Held, also, that the plaintiff, after having used more of the flour than was necessary for the purpose of testing it, and sold a portion of it, was not at liberty to rescind the contract and recover the price paid as money had and received to his use. *Ibid.*

A plea alleged that the agreement in the declaration was entered into "on the condition and subject to the terms" that the said J M should give references, &c. —Held, that it was a bad plea, as endeavouring to vary the terms of a written contract—*dissentiente Maule, J.*, who held that the plea might mean that the contract in the declaration contained the condition and terms, though they were not set out. *Canham v. Barry*, 24 Law J. Rep. (n.s.) C.P. 100; 15 Com. B. Rep. 597.

On a charter-party, by which a shipper agrees to load a full and complete cargo of sugar, molasses, and other lawful produce, evidence is admissible to prove that by the custom of merchants at the port of lading, a full and complete cargo of sugar and molasses in puncheons and hogsheds, is a compliance with such contract, although the same quantity of sugar, if packed in tierces, would not constitute such full and complete cargo. *Cuthbert v. Cumming*, 24 Law J. Rep. (n.s.) Exch. 198.

(G) HEARSAY EVIDENCE AND DECLARATIONS.

Evidence of reputation is admissible in questions relating to matters of public and general interest, notwithstanding that matters of private interest may also be involved in the inquiry. *Regina v. the County of Bedford*, 24 Law J. Rep. (n.s.) Q.B. 81; 4 E. & B. 535.

Therefore, on the trial of an indictment against the county of B for the non-repair of a bridge, to which they pleaded that A was liable *ratione tenuræ* to repair a portion of the bridge, evidence of reputation that A and his predecessors were liable to do the repairs to that part, was held to be admissible. *Ibid.*

Quære—whether an appeal under the 35th section of the Common Law Procedure Act, 1854, lies in the case of an indictment? *Ibid.*

In an action by an executor for work done, it appeared that his claim was for extras incurred in the making of a machine for the defendant by the testator, beyond what was contained in an agreement and specification. The plaintiff did not produce the agreement, which was unstamped and in the hands of a third party, but proved that the defendant had ordered, and the testator executed additions and alterations, and also that the testator had told a witness that he had received money from the defendant on account of the extras. On this evidence the defendant claimed a nonsuit, but the Judge allowed the case to go to the jury, who found for the plaintiff. The Court held, that the defendant was not entitled to a nonsuit, but, deeming the evidence insufficient to justify the verdict, made the rule absolute for a new trial. *Eddie v. Kingsford*, 23 Law J. Rep. (n.s.) C.P. 123; 14 Com. B. Rep. 759.

Slight reliance is to be placed on the declarations of deceased persons, said to have been made before,

but remembered after, the cause of litigation had arisen. Such evidence is usually given with minute particularity, but is subject to no worldly sanction. *Webb v. Haycock*, 19 Beav. 342.

Declarations of deceased members of a family afford important evidence on questions of pedigree, if supported by entries and documents; but the Court has been compelled to reject a case which depends exclusively on evidence of such declarations. *Ibid.*

In pedigree cases resting on the declarations of deceased persons, the Court is compelled to regard with great suspicion the evidence of persons interested. *Ibid.*

It requires very strong evidence to satisfy the Court that a parish register is not to be trusted in so material a matter as the Christian name of a child whose baptism is recorded. *Ibid.*

In pedigree cases the question usually mainly turns on one link in the pedigree. *Ibid.*

Observations on the little reliance to be placed on the evidence of persons who strive to work out and sustain a particular pedigree. *Crouch v. Hooper*, 16 Beav. 182.

In pedigree cases, if one link be attained any two persons may be proved to be related; and, therefore, in such cases the difficulty usually consists in properly weighing and considering the evidence relating to the connecting link. *Ibid.*

In pedigree cases, it is a rule of evidence that the declarations of deceased members of the family *post litem motam* are inadmissible, and anterior declarations are little to be regarded, unless corroborated by other circumstances. *Ibid.*

When witnesses are once impressed with the belief of their relationship to a given individual, they are apt in time, by talking and discussing the matter, to bring themselves over to a conscientious belief of family conversations and declarations tending to support that relationship, but which never took place. *Ibid.*

Evidence of conversations with deceased persons is not given under the ordinary worldly sanction, from the difficulty in such a case of convicting the witnesses of perjury. *Ibid.*

The absence unexplained of the baptismal certificate of the party forming the material link of a pedigree, while those of the other sons are carefully and regularly entered, forms a difficulty almost insuperable in substantiating the alleged pedigree. *Ibid.*

The evidence of "experts" as to the age of a document, and the character of the handwriting, may in some cases be valuable. *Ibid.*

(H) PRIVILEGED COMMUNICATIONS.

A Judge is bound to decide the preliminary question of fact whether a communication is privileged or not; and his decision, if erroneous, may be reviewed. *Cleave v. Jones*, 21 Law J. Rep. (n.s.) Exch. 105; 7 Exch. Rep. 421.

In an action by the payee against the maker of a promissory note for money lent, the plaintiff, for the purpose of taking the case out of the Statute of Limitations, tendered an account-book containing an admission by the defendant of payment of interest to him. The defendant's counsel then raised a collateral issue as to the admissibility of the book, and proved that the plaintiff, being the attorney of the defendant, wrote to her for a statement of the debts

and payments of her late husband, adding, "This from you will assist me in preparing the case for counsel," whereupon the book in question was sent to the plaintiff. The Judge having heard the evidence, rejected the book:—Held, that the communication was privileged. *Ibid*.

Per *Martin, B.*, a communication by a client to his attorney made under a *bonâ fide*, although mistaken, belief of its being necessary to his case, is privileged. *Ibid*.

The defendant, J. Taylor, was entitled to an annuity under a will, subject to a proviso, that if he attempted to charge or dispose of such annuity it should be applied by the executors for the benefit of the said J. Taylor or his wife, or such other persons mentioned in the will as the executors should think fit. A writ of sequestration having issued against J. Taylor, he assigned his annuity to a trustee for the benefit of his wife. The sequestrators filed this bill to set aside the assignment, alleging that it was a fraudulent arrangement to defeat their claims. The wife of the defendant J. Taylor, by her answer, stated that the object of the assignment by J. Taylor was to effect a forfeiture of the annuity, in the expectation that the executors of the testator would apply it, or some portion of it, for the benefit of his wife, and at the same time to defeat the claims of the plaintiffs. She submitted that she was not bound to produce the documents and communications which passed between her and her solicitor relative to the assignment. The answer was excepted to for insufficiency:—Held, that there was no fraud in this transaction; that it was one as to which it was perfectly lawful for a client to ask, and for a solicitor to give professional advice, and the documents relating to it were within the admitted rule of privilege. *Follett v. Jefferyes*, 20 Law J. Rep. (n.s.) Chanc. 65; 1 Sim. N.S. 1.

A party assigned his property for the benefit of his creditors, one of whom filed a bill to set aside the deed, and insisted that a particular clause inserted in it had been concealed from him. The assignor, in his answer, stated that the creditor had known of the insertion of the clause, and in support of his case proposed to examine the solicitor of the creditor, as to what took place on a certain interview between the solicitor and the assignor with reference to the deed. The solicitor demurred to the interrogatory on the ground that it inquired respecting matters which he only knew from confidential communications made to him by or in his agency for his client while he was acting as his solicitor. The demurrer was overruled. *Gore v. Harris*, 21 Law J. Rep. (n.s.) Chanc. 10; 5 De Gex & Sm. 30, nom. *Gore v. Bowser*.

The rule which protects from disclosure confidential communications between solicitor and client is not founded on the ground of confidence between them, but on that of necessity for the existence of the rule to enable the client properly to defend or prosecute his rights and interests. Therefore, the rule is inapplicable in cases of testamentary dispositions, and as between parties claiming under the testator; and where a question is raised, whether the executors are or are not trustees for the next-of-kin, the evidence of the solicitor who prepared the will as to what passed between himself and the testator, or his agent on the subject of the will, is admissible, on behalf of

the next-of-kin, and will not be suppressed on the application of the executors on the ground of privilege; but all communications between the executors and the same solicitor, acting as their solicitor, on the subject of the will of the testator and after his death, are privileged. *Russell v. Jackson*, 21 Law J. Rep. (n.s.) Chanc. 146; 9 Hare, 387.

Evidence otherwise admissible will not be rejected on the ground that it may disclose an illegal purpose. *Ibid*.

Semble—The existence of an illegal purpose will, as in a case of fraud, prevent the privilege attaching; because it is as little the part or duty of a solicitor to advise his client how to evade the law, as it is to contrive a fraud. *Ibid*.

A defendant filed the character of solicitor only, and afterwards the double character of trustee and solicitor for others:—Held, that he was bound to produce all the documents and communications between him and his client, except those which had taken place pending the litigation (per *Lord Lyndhurst*). *Few v. Guppy*, 13 Beav. 457.

Cases and opinions of counsel taken by trustees as such merely, are not entitled to protection in a suit by the *cestuis que trust* against the trustees or their representatives. *Devaynes v. Robinson*, 20 Beav. 42.

The same rule applies to cases and opinions taken before the time when the defendant (the representative of a trustee) admits having first heard of the questions raised by the bill. *Ibid*.

Where a solicitor had been employed by residuary legatees with reference to a proposed purchase by the executors of part of the trust estate,—Held, that the executors could not use the solicitor's depositions as to what took place between them and him upon the subject, for the purpose of shewing a participation on the part of the residuary legatees in the sale. *Lodge v. Prichard*, 4 De Gex & Sm. 587.

(I) PRESUMPTIVE EVIDENCE.

A recruit received enlisting money, knowing it to be such, from a soldier who was employed by a non-commissioned officer in the recruiting service, and who had belonged to a regiment for a longer period than that within which he ought to have been attested according to the provisions of the Mutiny Act:—Held, that such soldier must be presumed to have been regularly attested. The fact that the soldier intended to have taken the recruit to be attested before a Justice who had no authority to attest, affords no counter presumption that the recruiting soldier had been himself improperly attested. *Wolton v. Gavin*, 20 Law J. Rep. (n.s.) Q.B. 73; 16 Q.B. Rep. 48.

A receipt and also a delivery order, given by the plaintiff to a witness a month after the sale, but dated on the day of the sale, and not otherwise shewn to be in existence before the sale,—Held, *dubitante Pollock, C.B.*, to be admissible, as affording some evidence of the sale having taken place on the day of the date of the documents. *Morgan v. Whitmore*, 20 Law J. Rep. (n.s.) Exch. 289; 6 Exch. Rep. 716.

Where a tenant encloses a portion of land which does not belong to his landlord, and occupies it for upwards of twenty years with and as parcel of the demised premises, the presumption at the expiration of the lease is, that as against the tenant it is included in the tenancy, and not that the encroachment was made for the benefit of the landlord. This presump-

tion is one of fact, not of law. *Andrews v. Hailes*, 22 Law J. Rep. (N.S.) Q.B. 409; 2 E. & B. 349.

A testator, by his will, gave all his real and personal estate to W, in trust for his wife absolutely, "and in case my said wife shall die in my lifetime, then in trust for such of them my three children A, B and C as shall attain the age of twenty-one, or marry under that age; or in case all of them shall die under the age of twenty-one years, being sons, or under that age and unmarried, being a daughter," then he gave all his property to W absolutely. The testator, his wife, and children were drowned at sea; the testator, his wife, and two of his children B and C, being washed off the deck of the ship by the same wave, and A was proved to have survived the others. W, as executor, proved the will. Upon a bill by the administratrix of A, claiming as under an intestacy, it was held, that, in the absence of evidence, the Court would not presume that the testator survived his wife; and that as against the next-of-kin the onus of proof rested upon the person claiming under a will to make out a perfect title, by analogy to the rule as to the heir-at-law in the case of real estate; and the fact of survivorship not being proved, the property would go to the next-of-kin; and also, upon the construction of the will, that the benefits given to W were to be dependent upon the survivorship of the husband. *Underwood v. Wing*, 24 Law J. Rep. (N.S.) Chanc. 293; 4 De Gex, M. & G. 633; affirming 23 Law J. Rep. (N.S.) Chanc. 982; 19 Beav. 459.

(K) ADMISSIONS.

(a) By Pleading.

Although, in general, pleadings in one suit cannot be used in another, as evidence of the truth of the allegations contained in them, yet, where a pleading is signed by the party, it will be regarded in the light of an admission, and as such, it will be evidence against him, not only with reference to a different subject-matter, but in a suit maintained against a different opponent. *Marianski v. Cairns*, 1 Macq. H.L. Cas. 212.

Where, in an action of contract against two, one of the defendants pleaded never indebted and the other never indebted and infancy, and the plaintiff joined issue on all the pleas except that of infancy, as to which he entered a *nolle prosequi*.—Held, that the plaintiff had thereby admitted that there never was any joint binding contract, and that he ought to be nonsuited. *Boyle v. Webster*, 21 Law J. Rep. (N.S.) Q.B. 202; 17 Q.B. Rep. 950.

In trespass for breaking and entering the plaintiff's house and taking his goods, defendant pleaded a justification under a *fi. fa.* and warrant of execution against the goods of one G H, which warrant was delivered to the defendant, a bailiff, to be executed, and that under the authority of the same the defendant entered, &c. The plaintiff replied *de injuria*, admitting the writ, the making of the warrant, and the delivery thereof to the bailiff.—Held, that the existence of a warrant was admitted by the replication, and that the defendant was not bound to prove it. *Hewitt v. Macquire*, 21 Law J. Rep. (N.S.) Exch. 30; 8 Exch. Rep. 80.

(b) Under Notice to admit.

Where, in an action against the acceptor of a bill of exchange, plea, *non acceptavit*, the defendant's

attorney signed an admission that the acceptance was in the handwriting of the defendant, without adding the usual clause, "saving all just exceptions to the admissibility of evidence."—Held, that the jury were warranted in finding for the plaintiff, notwithstanding the non-production of the bill. *Chaplin v. Levy*, 23 Law J. Rep. (N.S.) Exch. 117; 9 Exch. Rep. 531.

(c) By Conduct of Party.

An abstract of title stating the recitals in certain deeds, and relied upon by the defendant when before a Master in Chancery in a suit in which he was plaintiff, is admissible against him in an action as evidence of the matters recited, without producing the deeds. *Pritchard v. Bagshawe*, 20 Law J. Rep. (N.S.) C.P. 161; 11 Com. B. Rep. 459.

(L) CONFESSIONS.

The prisoner was indicted for an unnatural crime with a mare. T, who kept his mare in a stable at an inn, of which W was landlord, saw the prisoner in the stable with the mare under circumstances that made him suspect the commission of the offence. W and he afterwards went to the prisoner, and W said to the latter "I want to know what business you had in T's stable." The prisoner said "You know." W answered, "I don't know, and have come on purpose to know, and will know before I leave; and if you don't tell me I will give you in charge to the police till you do tell me." The prisoner again said "You know." W replied "I don't know; but from what I could see of the mare, it is the best of my belief that you had connexion with her." The prisoner then confessed. T was close by all the time.—Held, that as the confession was made after the inducement of a threat held out by W, when T was present, it was the same thing as if T had used the threat; and that as T was the owner of the mare and likely to prosecute, he was a person in authority, so that the confession made after the inducement held out in his presence was inadmissible as evidence. *Regina v. Luckhurst*, 23 Law J. Rep. (N.S.) M.C. 18; 1 Dears. C.C. 245.

A female servant being taken into custody by a policeman, on the charge of setting fire to her master's premises, expressed a wish to change her clothes. The policeman told her she might do so, but must remain in custody, and he gave her into the charge of a Mrs. A, a married daughter of her master, but who did not live in the house. Mrs. A took the girl apart and said to her, "I am sorry for you; you ought to have known better. Tell me the truth, whether you did it or no." The servant said, "I am innocent." Mrs. A replied, "Do not run your soul into more sin, but tell the truth." The prisoner thereupon confessed.—Held, that there was no inducement held out to render the confession inadmissible; and, secondly, that Mrs. A was not a person in authority, competent to hold out an inducement which would prevent the reception of the confession in evidence. *Regina v. Sleeman*, 23 Law J. Rep. (N.S.) M.C. 19; 1 Dears. C.C. 249.

A policeman who had a prisoner in his custody on a charge of felony said to him, "You need not say anything to criminate yourself; what you do say will be taken down and used as evidence against you."—Held, that this observation of the policeman did not amount to any promise or threat to induce the pri-

soner to confess so as to render a confession which the latter made after it inadmissible. *Regina v. Baldry*, 21 Law J. Rep. (N.S.) M.C. 130.

The prisoner, who was a maid servant, was indicted for the murder of an infant, of which she had recently been delivered. A surgeon had been sent for to attend her, but before he came her mistress told her she had better speak the truth; in answer, she said she would tell it to the surgeon, and when he came, she, in the presence of her mistress, made a confession to him, which was offered in evidence:—Held, that as the husband of the mistress was not the prosecutor, and as the offence was not in any way connected with the management of the house, the mistress could not be considered as a person having authority over the prosecution, and, therefore, the inducement held out by her did not affect the admissibility of the evidence. *Regina v. Moore*, 21 Law J. Rep. (N.S.) M.C. 199; 3 Car. & K. 153.

(M) DEPOSITIONS.

(a) Caption.

In a case of felony the depositions had one caption, which mentioned the names of all the witnesses, and at the end had one jurat, which also contained the names of all the witnesses, and to which was the signature of the magistrate, and each witness signed his own deposition:—Held, to be correct. *Regina v. Young*, 3 Car. & K. 106.

(b) Examination of Witness on.

On the trial of an indictment the counsel for the prisoner is not at liberty, when cross-examining a witness for the prosecution, to put into the witness's hand his deposition, taken before the magistrate, and then ask the witness whether, having looked at the paper, he still adhered to the statement already made in his evidence in court, the counsel not intending to put the deposition in evidence. *Regina v. Ford*, 20 Law J. Rep. (N.S.) M.C. 171; 2 Den. C.C. 245; 3 Car. & K. 113.

(c) Admissibility of in Absence of Witness.

The deposition of a witness who is too ill to travel to attend at the trial of a prisoner may be read as evidence before the grand jury as well as before the petty jury, by virtue of section 17. of the statute 11 & 12 Vict. c. 42. *Regina v. Clements*, 20 Law J. Rep. (N.S.) M.C. 193; 2 Den. C.C. 251.

The deposition of a witness taken before a magistrate upon a criminal charge is (independently of the 11 & 12 Vict. c. 42. s. 17.) receivable only in evidence at the trial in case the deponent is dead or is kept out of the way by the procurement of the prisoner. *Regina v. Scrafe*, 20 Law J. Rep. (N.S.) M.C. 229; 17 Q.B. Rep. 238.

Where, upon the trial of three persons for felony, it appeared that a witness had been kept out of the way by the procurement of one only of the prisoners, and the deposition was admitted in evidence against all the prisoners, it was held to have been improperly admitted against those who were unconnected with the absence of the witness. *Ibid.*

The prisoner was charged before a magistrate with wounding A with intent to do him grievous bodily harm, and A's deposition was taken. A afterwards died of the wound, and the prisoner was indicted for his murder:—Held, that on the trial for the murder,

the deposition of A might be read in evidence; as, although it was not on the same technical charge, it was taken in the same case, and the prisoner had had full opportunity of cross-examination. *Regina v. Beeston*, 24 Law J. Rep. (N.S.) M.C. 5; 1 Dears. C.C. 405.

(N) PRIOR CONVICTIONS.

When an indictment for felony charges a previous conviction, the prisoner is to be arraigned on the whole indictment, but to the jury is to be read in the first instance only that part of the indictment which charges the new offence; after they have found their verdict, that part of the indictment is to be submitted to them (without their being again sworn) which charges the previous conviction. The statute 14 & 15 Vict. c. 19. s. 9. has made no substantial alteration in the practice. *Regina v. Shuttleworth*, 21 Law J. Rep. (N.S.) M.C. 36; 3 Car. & K. 375.

If a prisoner, charged with larceny in an indictment which contains a count for a previous conviction, either call witnesses on his part, or cross-examine the witnesses for the prosecution to prove his good character, he gives evidence of his good character within the meaning of the statute 14 & 15 Vict. c. 19. s. 9, so as to entitle the prosecutor to give the previous conviction as evidence in answer to the jury, before they return their verdict on the charge of larceny. *Regina v. Shrimpton*, 21 Law J. Rep. (N.S.) M.C. 37; 3 Car. & K. 373.

If the prisoner give evidence of good character for a limited number of years last past, the previous conviction, though anterior to the period spoken to by the witness as to character, may be put in in answer to such evidence. *Ibid.*

Several previous convictions against the same prisoner may be set out in an indictment for felony. *Regina v. Clarke*, 22 Law J. Rep. (N.S.) M.C. 135; 1 Dears. C.C. 198; 3 Car. & K. 367.

A prisoner who pleads guilty to an indictment, and who has been previously convicted of felony, is a competent witness against other prisoners charged in the same indictment; for although he is a party "individually named on the record," he is no party to the proceeding there and then before the Court. *Regina v. Drury*, 3 Car. & K. 190.

(O) PRACTICE, IN EQUITY.

Where a claim, in which there are disputed facts, is brought on for hearing with defective evidence, it is competent for the Court to direct it to stand over, with liberty for the plaintiff to supply the defect. *Smith v. Constant*, 20 Law J. Rep. (N.S.) Chanc. 126; 4 De Gex & Sm. 213.

Bill against infant defendants. The plaintiff had served defendants' solicitor with notice to produce a particular deed in his possession. The defendants' solicitor sent to the plaintiff a copy of the deed:—Held, that the production of the copy at the hearing did not amount to secondary evidence of the deed against the infant defendants. *Bacon v. Cosby*, 20 Law J. Rep. (N.S.) Chanc. 213; 4 De Gex & Sm. 241.

A deed taken to be proved at the hearing by its production, and an affidavit of the handwriting of the parties who had executed it, on the ground of there being before the Court, at least, evidence of an

agreement to do a thing for valuable consideration. *Ibid.*

A plaintiff's affidavit in support of a claim will be treated as evidence where there is no opposition or conflict of affidavits. *Shardlow v. Gaze*, 20 Law J. Rep. (N.S.) Chanc. 395.

The Court has no jurisdiction to order a plaintiff to be examined *vivâ voce* before a Master under a decree. *Ward v. Homfray*, 20 Law J. Rep. (N.S.) Chanc. 556.

Evidence taken in an original suit may be read in a cross-suit under the common order, the Court having judicial notice of both causes. *Gray v. Haig*, *Haig v. Gray*, 21 Law J. Rep. (N.S.) Chanc. 542.

A cause was at issue before the Chancery Procedure Amendment Act and the Orders made under it came into operation, but no evidence had been taken. The Court, in the exercise of its discretion, on the motion of the defendants, the plaintiff opposing, ordered that the evidence in the cause should be taken according to the method prescribed by the act and Orders. *Macintosh v. the Great Western Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 70.

Under Lord Campbell's Act (14 & 15 Vict. c. 99. s. 10.) the Court will receive as evidence an affidavit sworn before a Master Extraordinary of the Court of Chancery in Ireland without requiring proof of the signature or appointment of such Master. *In re Mahon's Trust*, 22 Law J. Rep. (N.S.) Chanc. 75; 9 Hare, 459.

Upon a motion for a decree, after affidavits in reply, the defendant may obtain an order to cross-examine a plaintiff. *Williams v. Williams*, 22 Law J. Rep. (N.S.) Chanc. 639; 17 Beav. 156.

Where witnesses are examined *vivâ voce* on an appeal, whose evidence was not before the Court below, and the appeal is successful, the appellant is entitled to the costs of the appeal. *Langford v. May*, 22 Law J. Rep. (N.S.) Chanc. 978.

It is not imperative that commissioners appointed by the Court to examine witnesses in a suit should be barristers-at-law. *Henderson v. Philipson*, 22 Law J. Rep. (N.S.) Chanc. 1037.

Affidavits filed in a cause may be used as evidence in a subsequent petition in the same cause. *Jones v. Turnbull*, *in re Turnbull*, 22 Law J. Rep. (N.S.) Chanc. 1055.

Since the 14 & 15 Vict. c. 99. a plaintiff may examine a defendant as a witness as to matters in which he is interested and yet obtain a decree against him. *Robinson v. Briggs*, 22 Law J. Rep. (N.S.) Chanc. 1056.

After the time for closing the evidence in a cause has expired, the Court will not extend the time to enable either party to answer it, the special leave mentioned in the 38th section of the statute 15 & 16 Vict. c. 86. being only to be obtained upon special application and under special circumstances; therefore, where a plaintiff had made repeated applications for extension of time to file his affidavits, and the time for closing the evidence expired on the 3rd of November, and he did not file them till the 1st of that month, and the defendant did not see them till the 8th, and one of the Vice Chancellors had extended the time to enable the defendant to answer the plaintiff's affidavits, this Court discharged the order. *Thompson v. Partridge*, 23 Law J. Rep. (N.S.) Chanc. 158; 4 De Gex, M. & G. 794.

Consistently with the terms of the 38th section of the statute, and of the 32nd Order of August 1852 made thereon, the parties to a suit may abstain from filing their affidavits till the last hour of the day fixed for closing the evidence in the cause. *Ibid.*

Where the validity of a deed was impeached by the answer, although no cross-bill had been filed to set it aside, the Court refused to allow the plaintiff to prove the deed by affidavit at the hearing, the defendant having elected that the evidence should be taken orally. *Hitchcock v. Carew*, 23 Law J. Rep. (N.S.) Chanc. 166; Kay, App. xiv.

Where, under a decree directing accounts to be taken, no order was obtained under the 54th section of the statute 15 & 16 Vict. c. 86, that the books of account should be taken as *prima facie* evidence, but the Judge's chief clerk so admitted them and granted his certificate, the court of appeal, upon a motion to discharge the certificate, refused the same, but without costs. *Newberry v. Benson*, 23 Law J. Rep. (N.S.) Chanc. 1003.

P, confiding in the carefulness and secrecy of C, entrusted her from time to time (beginning in the year 1806) with money to invest in the funds on P's behalf. In 1839 P and C had a dispute about the amount belonging to P, and the dispute was terminated by S, the nephew of C (who, on account of C's growing age and infirmities, had for some time been accustomed to go with her to the Bank when she received her dividends, who drew up a paper in which it was stated that it was "agreed" that the sum belonging to P amounted to 4,300*l.* This paper was left in S's custody. For some few years afterwards S, on returning with C from the Bank, regularly paid to P dividends calculated on that sum. In 1845 S took out a commission of lunacy against his aunt and managed the commission. The verdict returned was, that C had been a lunatic since 1842. S was appointed committee of the lunatic. In 1847 S refused to give up to P the paper signed in 1839. P filed a bill against the lunatic and S, and an answer was put in. C died, and on a bill of revivor and supplement, S, who was her personal representative, put in a further answer referring to his first:—Held, that, under the circumstances of this case, the first answer was admissible in evidence against S in the second suit. *Stanton v. Percival*, 24 Law J. Rep. (N.S.) Chanc. 369; 5 H.L. Cas. 257.

Quære.—By the Lord Chancellor, whether, as a general rule, the answer of a committee of a lunatic is admissible in a suit against the lunatic's personal representative to bind the lunatic's estate. *Ibid.*

It is open to either party in a suit to produce fresh evidence until the time fixed for closing the evidence; and, therefore, where a plaintiff having closed his case, and stated that he had no further evidence to produce, proposed, after hearing the witnesses for the defendant, to adduce fresh evidence, the Court held, that he was entitled to do so. *Wood v. Scarth*, 24 Law J. Rep. (N.S.) Chanc. 392.

In a suit which was in the nature of a supplemental suit, an order was obtained that the evidence in the original suit should be used in the supplemental suit. A witness was examined in chief by the plaintiff in the original suit, and was also examined by the defendant in the supplemental suit. The Court held, that the same witness might be

cross-examined by the plaintiff. *Lord v. Colwin*, 24 Law J. Rep. (n.s.) Chanc. 517; 3 Drew. 222.

It was also held, after consultation between the Judges, that witnesses examined in chief by one defendant may be cross-examined by the other defendants as well as by the plaintiff, and that all the evidence given either in chief or on cross-examination will be common to all parties, and every party will have a right to take a copy. *Ibid*.

A witness who was examined for the plaintiff to prove a contract was cross-examined for the defendant upon a subject irrelevant to the matter in dispute between the parties. The defendant then examined witnesses to contradict the statement made by the plaintiff's witness with regard to such irrelevant matter:—Held, that it was not competent for a party to call witnesses to contradict evidence which was immaterial to the question at issue. The affidavits of the defendant's witnesses were ordered to be taken off the file for containing scandalous and irrelevant matter. *Goddard v. Parr*, 24 Law J. Rep. (n.s.) Chanc. 783.

The evidence of a defendant in favour of a co-defendant is admissible, under the 6 & 7 Vict. c. 85, if it proves the case of the witness himself. *Triston v. Hardey*, 14 Beav. 21.

The cross-examination of a defendant tendered as a witness, is a waiver of his incompetency, where the objection must be assumed to have been known at the time of the cross-examination. *Ibid*.

A motion for an injunction was ordered to stand over, with liberty to bring an action:—Held, that a witness, who had made an affidavit on the occasion might, afterwards and before the trial, be cross-examined under the 15 & 16 Vict. c. 86. s. 40. *Lloyd v. Whitty*, 19 Beav. 57.

Depositions of witnesses examined under a bill to perpetuate testimony in aid of an ejectment, and who were resident abroad and refused to come to this country, ordered to be published. *Biddulph v. Lord Camoys*, 19 Beav. 467.

A similar application refused, as to a witness in England, who, on account of blindness and infirm state of health, was stated to be unable to leave home, and who had stated his age to be eighty-three. *Ibid*.

The Court will not act on the testimony of a single witness against the express denial on oath of the defendant; but where the written evidence has been destroyed by the defendant *pendente lite*, the Court will assume that if forthcoming, it would have proved the statement of the single witness. *Gray v. Haig*, 20 Beav. 219.

A witness examined under a bill to perpetuate testimony was very old and unable, through illness, to leave his home without danger; another was resident in Canada. Their depositions were ordered to be published and produced at the trial about to take place, and that either party might make such use of them "as by law they can." *Biddulph v. Camoys*, 20 Beav. 402.

A, without authority, sold a trust estate to B. In a suit to recover the money from A, B, who was not a party, was examined as a witness. A suit was afterwards instituted against the representatives of B to recover the estate itself, and an order of course was obtained in it to use the depositions in the former suit, saving just exceptions. It was dis-

charged as irregular. *Hope v. Liddell*, 21 Beav. 180.

The plaintiff's case was proved by a written document as well as by the examination of a witness who was also examined in chief by the defendants and in the course of such examination referred to the document. The plaintiff relied upon the document before the Vice Chancellor, but, on appeal before the Lord Chancellor, rested his case upon the examination of the witness only:—Held, that it was competent for him to do so, and that the defendant's objection to the reception of this evidence as secondary, could only be supported by his producing the written document. *Ogle v. Morgan*, 1 De Gex, M. & G. 359.

The meaning of the act 15 & 16 Vict. c. 86. s. 54. is, that where vouchers have been lost or the accounts cannot be taken in the ordinary way, the Court may give special directions; but such directions will not be given unless it appears that the ordinary evidence cannot be had, or merely to save expense. *Lodge v. Prichard*, 3 De Gex, M. & G. 906; 1 Sm. & G. App. viii.

Semble—that by the ordinary rules of the Court partnership books are admissible in evidence for and against all the partners and their estates. *Ibid*.

Semble—that the 15 & 16 Vict. c. 86. s. 54. does not operate retrospectively. *Ibid*.

EXCHANGE.

The General Inclosure Acts authorize the Commissioners to sanction exchanges of estates in separate and distant counties, and to shift the title, though per the Master of the Rolls, not the tenure of the one estate to the other; but, per the Lords Justices—*quere*. *Minet v. Leman*, 24 Law J. Rep. (n.s.) Chanc. 545; 20 Beav. 269.

Tenants for life or for other partial interest may, notwithstanding the settlement under which they hold, initiate such exchanges, so as, when complete, to bind those in remainder. *Ibid*.

A purchaser must complete his purchase of an exchanged estate, though, until the exchange, it was subject to limitations in strict settlement, under which the vendor had only a life interest. *Ibid*.

Commissioners of Inclosure have no powers in exchanging freehold lands subject to heriots and reliefs to make the allotted lands so subject. *Mayor and Corporation of Basingstoke v. Lord Bolton*, 3 Drew. 50.

EXECUTION.

[Upon judgments of inferior Courts, see title INFERIOR COURT. Landlord's claim for rent, see title LANDLORD AND TENANT. Speedy execution, see 15 & 16 Vict. c. 76. s. 120. As to issuing, executing, and renewing, see 15 & 16 Vict. c. 76. ss. 121—125; 17 & 18 Vict. c. 125. s. 94; and as to the Cinque Ports, 18 & 19 Vict. c. 48. s. 2. As to priority of executions, see 15 & 16 Vict. c. 76. s. 124. And see Reg. Gen. Hil. term, 1853, rr. 70—77, 22 Law J. Rep. (n.s.) xiii; 1 E. & B. App. xlviii—Sequestration.]

- (A) ON A SUNDAY AND COLLUSIVELY.
- (B) WHERE THE SUM RECOVERED DOES NOT EXCEED 20*l*.
- (C) UPON RULES AND ORDERS.
- (D) WHERE JUDGMENT REGISTERED.
- (E) WHAT PROPERTY MAY BE TAKEN.
- (F) ELEGIT.
- (G) SETTING ASIDE.

(A) ON A SUNDAY AND COLLUSIVELY.

The summary remedy provided by the 5 & 6 Will. 4. c. 76. s. 60. of committing to gaol town clerks or other officers appointed by a town council, who wilfully refuse to account or deliver up books, &c. to the council, is in the nature of civil process, and an arrest under such a warrant of commitment upon a Sunday is illegal. *Ex parte Eggington*, 23 Law J. Rep. (n.s.) M.C. 41; 2 E. & B. 717.

Nor can a prisoner so arrested be legally detained under a second warrant, subsequently lodged against him, which has been issued at the instance of the same parties, though not in their capacity of town council, but as Commissioners under a local act. *Ibid*.

But a detainer under a *ca. sa.*, subsequently issued by a third party and without collusion, is a valid ground for refusing to discharge the prisoner. *Ibid*.

Where a return to a *habeas corpus* states that a prisoner is detained under civil process, it is competent to him to shew, by affidavit, that he was originally arrested on a Sunday. *Ibid*.

(B) WHERE THE SUM RECOVERED DOES NOT EXCEED 20*l*.

The 57th section of the 7 & 8 Vict. c. 96. enacts that, no person shall be taken in execution on a judgment in an action for a debt where the *sum recovered* does not exceed 20*l*. Where judgment was recovered for 500*l*. on a warrant of attorney given to secure payment of an annuity of 30*l*., but only 15*l*. was due, the defendant, having been taken in execution, was discharged under that section, the word "recover" being susceptible of two meanings, according to one of which only 15*l*. was recovered.—*Dubitante Williams, J. Johnson v. Harris*, 24 Law J. Rep. (n.s.) C.P. 40; 15 Com. B. Rep. 357.

(C) UPON RULES AND ORDERS.

In an action of trover, by churchwardens, to recover a parish book, *Erle, J.*, to whom the cause was referred after verdict, by consent of the parties, made an order, which was made a rule of court, that the costs of both sides should be paid by the parish. The cause came on for trial a second time, when, by like consent, it and all matters relating to it were by order of *Nisi Prius*, which was made a rule of court, referred to *Williams, J.*, to direct in what manner the order of *Erle, J.* was to be carried into effect. *Williams, J.*, on the 10th of August 1852, made an order upon the defendants to pay the plaintiffs their costs on the 1st of March 1853, "unless in the mean time the sum be paid to the plaintiffs out of the parish funds." This order was made a rule of court in Michaelmas term 1852, and the defendants not having paid the money on the 1st of March 1853, execution was issued against them:—Held, first, that

the order of the 10th of August was a Judge's order, and not an award, and that *Williams, J.* had not exceeded his authority in making it. *Gibbs v. Flight*, 22 Law J. Rep. (n.s.) C.P. 256; 13 Com. B. Rep. 803.

Secondly, that the order being conditional was not an "order to pay money" within the meaning of the 1 & 2 Vict. c. 110, upon which execution could issue. *Ibid*.

(D) WHERE JUDGMENT REGISTERED.

The plaintiff, after making an entry of a judgment obtained against the defendant in the book of the senior Master of the Common Pleas, pursuant to 1 & 2 Vict. c. 110. s. 19, with a view of charging the defendant's real estate, took him in execution under the same judgment. The defendant became insolvent, and his assignee contracted to sell his real estate. The purchaser refused to complete the purchase in consequence of the entry of the judgment which charged the property. The plaintiff having refused to consent to an entry of satisfaction being made in the book, the Court, on the application of the assignee, granted a rule ordering the plaintiff's attorney to attend before the senior Master of the Common Pleas and consent to an entry being made, that the plaintiff had taken the defendant in execution under the judgment after having made the entry. *Lewis v. Dyson*, 21 Law J. Rep. (n.s.) Q.B. 194; 1 Bail C.C. 33.

(E) WHAT PROPERTY MAY BE TAKEN.

By the 1 & 2 Vict. c. 110. s. 12. money seized under a *fi. fa.* is exactly in the same position as money the proceeds of goods seized. Therefore, where the sheriff seized bank notes and coin under a *fi. fa.* at the suit of A, against whom he held an unexecuted *fi. fa.* at the suit of B, he was not justified in paying the amount over to B as money belonging to A under the statute. *Collingridge v. Paxton*, 21 Law J. Rep. (n.s.) C.P. 39; 11 Com. B. Rep. 683; 2 L. M. & P. P.C. 654.

(F) ELEGIT.

Under the 92nd section of the Municipal Corporation Act, 5 & 6 Will. 4. c. 76, a creditor of a corporation cannot have execution, in respect of a debt which accrued before the passing of the act, against property acquired by the corporation since the passing of the act. *Arnold v. Rigge*, 22 Law J. Rep. (n.s.) C.P. 235; 13 Com. B. Rep. 745.

(G) SETTING ASIDE.

Where judgment has been signed, costs taxed and execution issued for the amount of debt and costs without notice of taxation, the Court will not set aside the judgment or execution, but will direct a review of the taxation. *Field v. Partridge*, 21 Law J. Rep. (n.s.) Exch. 269; 7 Exch. Rep. 689.

EXECUTOR AND ADMINISTRATOR.

- (A) GRANT OF ADMINISTRATION.
 - (a) *By what Jurisdiction.*
 - (b) *Operation of; Title by Relation.*
- (B) RIGHTS, DUTIES AND DISABILITIES.
 - (a) *Indemnity against Covenants.*

- (b) *Setting off Debts due to the Deceased.*
- (c) *Carrying on Trade.*
- (d) *Selling and pledging Estate.*
- (e) *Right of Action, when suspended.*

(C) LIABILITIES.

- (a) *For Testator's Debts.*
- (b) *As to Policies.*
- (c) *As to Shares in Public Companies.*
- (d) *As to Value of Testator's Property.*
- (e) *For Default in selling Estate.*
- (f) *For Sums improperly dealt with.*
- (g) *For Interest.*
- (h) *To Costs.*
- (i) *To Co-executors in respect of Assets.*

(D) ASSETS.

- (a) *What constitute.*
- (b) *Admission of.*
- (c) *Administration of.*

(E) EXECUTOR DE SON TORT.

(F) ACTIONS AND SUITS BY AND AGAINST.

- (a) *What Actions maintainable.*
- (b) *When maintainable.*
- (c) *Devastavit.*
- (d) *Pleas.*
- (e) *Set-off.*
- (f) *Practice.*

(A) GRANT OF ADMINISTRATION.

(a) *By what Jurisdiction.*

Where a mortgage deed, in the form prescribed by the General Turnpike Act, 3 Geo. 4. c. 126. s. 81, assigned the tolls and toll-houses of a turnpike road, to hold for the residue of the term for which the tolls were granted, unless the mortgage money, with interest, were sooner repaid, it was held that a mortgage was *bona notabilia* where the road and toll-houses were situated, and not where the deed was at the time of the death of the mortgagee. *Regina v. the Trustees of the Balby and Worksop Turnpike Road*, 22 Law J. Rep. (n.s.) Q.B. 164; 1 Bail C.C. 134.

Under such a mortgage the mortgagee has only an equitable right to enforce payment of the principal and interest, and, consequently, no mandamus will be granted to compel the trustees of the road to pay the interest. *Ibid.*

(b) *Operation of; Title by Relation.*

The distribution of an intestate's estate amongst the next-of-kin before administration granted is not an act for the benefit of the estate; so that a person who subsequently takes out administration will be entitled to recover the property, although it was distributed with his assent. *Morgan v. Thomas*, 22 Law J. Rep. (n.s.) Exch. 152; 8 Exch. Rep. 302.

(B) RIGHTS, DUTIES AND DISABILITIES.

[See DEBTOR AND CREDITOR.]

(a) *Indemnity against Covenants.*

The Court will compel the executors of a testator, who has covenanted to accept and execute a counter-part of a lease, to perform the contract of their testator, although such lease contains personal covenants on the part of the lessee; but it will see that the

covenants are so framed as not to bind the executors personally. *Stephens v. Hotham*, 24 Law J. Rep. (n.s.) Chanc. 665; 1 Kay & J. 571.

The executors of a lessee held entitled to no further indemnity against the covenants than the personal indemnity of the residuary legatees. *Dean v. Allen*, 20 Beav. 1.

(b) *Setting off Debts due to Deceased.*

An executor indebted to his testator's estate created a charge on his (the executor's) own freehold estate in favour of his wife and children, to the amount specified in the testator's will, as part of their share of his residuary estate:—Held, that the wife and children were entitled to the benefit of the charge, although the debt due to the testator's estate remained unpaid. *Stillwell v. Mellersh*, 20 Law J. Rep. (n.s.) Chanc. 356.

The executor of A sold A's book debts to B. At the time of A's death, A was himself indebted to several of the persons who appeared as his debtors in his books. The executor, instead of setting off the debts due by A against the debts to him, paid in full the debts due from A. In a suit for the administration of A's estate,—Held, that the executor was entitled to be allowed these sums in his accounts. *Chick v. Blackmore*, 23 Law J. Rep. (n.s.) Chanc. 622; 2 Sm. & G. 274.

(c) *Carrying on Trade.*

A testator by his will, after making his debts, funeral and testamentary expenses a general charge upon his estate, gave to his wife A an annuity charged upon his real and personal estate; he then gave all his real and personal estate to his wife and B upon trust for his son J absolutely; but directed that if J should die under twenty-one, the whole should go to A. The testator appointed A and B executrix and executor, and directed them to continue his business of a coal proprietor during his interest in certain mines, and declared that they should not be liable for any loss to his estate in carrying on such trade, and that they might compound debts and settle all matters relating to his estate. The testator at his death was entitled to a lease of the mines mentioned in his will for a term of years, of which eight years were then unexpired, and he died in 1844. At the time of his death, real estates of the testator were in mortgage to C, but the money was paid off by the executrix, the deeds remaining in the possession of the mortgagee, from whom at a subsequent time the executrix, who had previously married again, borrowed money for the purpose of carrying on the colliery, upon the security of the deeds. The equitable mortgagee filed a bill against the executrix and her husband to enforce this security. One of the Vice Chancellors made a decree in the plaintiff's favour, holding that the executors had the power of pledging the real estate of the testator for eight years after his death (that is, during the residue of the term in the mines), for the purpose of carrying on the business. But, on appeal,—Held, first, that the executors had no such power; secondly, that no portion of the assets beyond that which was employed in the trade at the time of the testator's death could be employed in carrying on the same; thirdly, (the executrix claiming a debt against the estate, the real and personal estate being made subject to the annuity and the payment of the

debts, and her husband being entitled to the same debt in her right, and interested in the real estate in respect of the annuity), that the plaintiff was not entitled as equitable mortgagee by virtue of his deposit; but that he was entitled to stand in the place of the husband of the executrix against the real estate of the testator comprised in the deeds deposited with him, in so far, if at all, as the husband had at the time of such deposit any claim or demand against the real estate, and, therefore, to an account accordingly. *M'Neillie v. Acton*, 23 Law J. Rep. (N.S.) Chanc. 11; 4 De Gex, M. & G. 744; 22 Law J. Rep. (N.S.) Chanc. 820.

Held, also, that where a party advances money to an executor under circumstances sufficient to put him upon inquiry, (although as a general rule, where there is a power to raise money for payment of debts, a lender is not bound to inquire, and even if the money be not wanted, and be misapplied, the estate is bound,) he can be in no better position than those with whom he deals. *Ibid*.

A testator who was seised and possessed of real and leasehold estate and of personal property (part of the leasehold being a colliery) specifically devised part of his real estate to his son, and then devised and bequeathed all the residue of the real and the whole of his personal estate to trustees upon trust, at some convenient time, with the approbation of his son, to sell and convert the same, and raise and invest and apply 1,000*l*. upon certain trusts, and to pay two life annuities, and then to pay his, the testator's, daughter an annuity of 200*l*. a year for her life, over and above half the income of the real and personal estate given to the trustees. The testator then directed that the daughter's annuity should not exceed 600*l*. a year, and that the profits of the mine should not be deemed income until 10*l*. per cent. was set apart for expenses; and he gave all his property, subject to the legacy and annuities, to his son, and empowered his trustees to let his son into possession of all the property upon his securing the legacy and annuities. He appointed his two trustees and his son executors. At the death of the testator his debts exceeded the amount of the pure personalty. The son alone proved the will, the trustees having disclaimed the trusts and renounced probate. The son entered into possession of the whole property. The colliery was worked out and yielded a profit of altogether 27,000*l*. The daughter filed a bill against her brother and other parties for the administration of the testator's estate:—Held, that the son, having acted as sole executor and trustee, could not be allowed to make a profit of the trust; that the clear income of the colliery formed part of the capital of the testator's personal estate, and that, although the colliery ought to have been sold twelve months after the testator's death, yet, not having been so, the son was not entitled to have its value ascertained at that time and to be only charged with that sum and interest, but that the 27,000*l*. must be treated as part of the general personal estate, the son being allowed his reasonable expenditure on the colliery. *Lord v. Wightwick*, 23 Law J. Rep. (N.S.) Chanc. 235; 4 De Gex, M. & G. 803; 1 Drew. 576.

Three executors and trustees (A, B and C) were authorized to carry on the testator's farm. A (with the concurrence of B and C) managed the whole

affairs relating thereto:—Held, that in taking the accounts against B and C, A was to be considered their agent. *Toplis v. Hurrell*, 19 Beav. 423.

Three executors were authorized to lend trust monies to A. One of the executors (C) employed part of the trust monies in his business. In 1812 A and C entered into partnership, when A took upon himself the debt, and gave security for the money to the executors. The amounts with further advances were employed in the business, but the whole with interest was fully repaid. The *cestuis que trust* after long delay insisted that they were entitled to a share of the profits made by the employment of the trust funds in trade, but the Court held that the transaction amounted to a loan to A under the power, and dismissed the bill with costs. *Parker v. Bloxam*, 20 Beav. 295.

(d) *Selling and pledging Estate.*

E H, by will, after charging all his real and personal estate with the payment of his debts, funeral and testamentary expenses, and of a certain legacy, gave and devised the rents and profits of all his messuages, tenements, farms and lands, except his Bala houses, to A H his wife; and by the same will he gave her the whole of his personal estate and appointed her sole executrix:—Held, that the Bala houses passed to the heir-at-law of E H, subject in equity to the charge of debts, and that A H had no power to dispose of them for the purpose of paying the debts. *Doe d. Jones v. Hughes*, 20 Law J. Rep. (N.S.) Exch. 148; 6 Exch. Rep. 223.

An executor borrowed money upon a representation that it was wanted for the purposes of his testator's estate. The money was lent upon the personal security of the executor, who afterwards mortgaged part of the testator's property as a security for the money antecedently advanced:—Held, by the Vice Chancellor, that the onus of proof lay on the person who advanced the money, to shew that it was applied for executorship purposes: but held, on appeal, that there was no evidence to shew that the advances were not made for executorship purposes; and the bill was dismissed. *Miles v. Durnford*, *Durnford v. Wood*, 21 Law J. Rep. (N.S.) Chanc. 667; 2 De Gex, M. & G. 641; 2 Sim. N.S. 234.

The plaintiff was the representative not only of the executor, who had borrowed the money, but also of the original testator, and in the latter character he sought to impeach the mortgage:—Held, by the Vice Chancellor, that the plaintiff, although he was executor of the original testator, in which character he might sue, could not repudiate the character of representative to the executor, who could not sue: but held, *contra*, on appeal. *Ibid*.

An administratrix mortgaged the leasehold estates of an intestate, and gave the mortgagee a power of sale in case of default in payment of the mortgage-money:—Held, that a purchaser under such power was bound to accept the title. *Russell v. Plaise*, 23 Law J. Rep. (N.S.) Chanc. 441; 18 Beav. 21.

If a testatrix has taken a doubtful security for money advanced, her executor, if after making all possible inquiries he thinks it expedient, will be justified in making further advances out of the assets, to render the security available. *Collinson v. Lister*, 24 Law J. Rep. (N.S.) Chanc. 762; 20 Beav. 356.

An executor, however, will not be justified in borrowing money when no previous inquiries have been made, or when, had they been made, there would have been no apparent advantage in doing so. *Ibid.*

(e) *Right of Action, when suspended.*

The rule that when a creditor is appointed executor by his debtor, his right of action is suspended, because he is presumed to have retained the amount of his debt, and is the person both to pay and receive, applies only where the executor has received assets. *Lowe v. Peshett*, 24 Law J. Rep. (N.S.) C.P. 196; 16 Com. B. Rep. 507.

Semble—*per* *Jervis, C. J.* and *Crowder, J.*, that it applies only where he has had legal assets, and not equitable alone. *Ibid.*

The rule does not apply where the debt arises on a negotiable instrument, which has been legally transferred by the executor. *Ibid.*

(C) LIABILITIES.

(a) *For Testator's Debts.*

[See title FRAUDS, STATUTE OF.]

A, at his death, left among his papers two letters sealed, and directed to the plaintiff (who had been his housekeeper for some years, but had left his service after giving birth to a child, of which he was the father) containing two promissory notes for 400*l.* and 200*l.* respectively. In one letter the note was said to be "in consideration of the long and faithful services of the plaintiff"; in the other he had written "in addition to any sum I owe you I inclose 200*l.* as a mark of my respect." The defendants, who were the executors of A, paid 200*l.* after his death on account of these notes to the plaintiff, and promised, in writing, to pay the residue, but subsequently declined to do so; and the plaintiff brought an action of assumpsit against them, in which were counts upon the notes, and a count upon an account stated with the defendants as executors:—Held, that the testator's estate was not liable in respect of the notes, as they had not been delivered by him to the plaintiff, and could not operate as testamentary dispositions, because not in conformity with the 1 & 2 Vict. c. 26. (the Wills Act); and held, also, that the defendants were not liable upon the count for an account stated, because the payments and promise had been made under a mistake as to the liability of the testator's estate, and without consideration. *Gough v. Tindon*, 21 Law J. Rep. (N.S.) Exch. 58; 7 Exch. Rep. 46.

The right of a succeeding rector to bring an action for dilapidations against the executor or administrator of his predecessor rests upon particular custom, derived from ecclesiastical law; and it is an incident of such custom that the claim in respect of dilapidations is to be postponed in the distribution of assets to the payment of specialty and simple contract debts. *Bryan v. Clay*, 22 Law J. Rep. (N.S.) Q.B. 23; 1 E. & B. 38.

Where therefore to a declaration in case, upon the custom, the defendant, an executor, pleaded that, after the commencement of the suit, and before plea, he had paid and satisfied a bond debt, and several other debts due from the testator at his death, and that at the commencement of the suit he had fully admitted all the goods and chattels of the testator

at the time of his death, which had come to his hand to be administered, except goods and chattels of a value which were not sufficient to satisfy the said bond and other debts paid by the defendant,—Held, on demurrer, that the plea was a good answer to the plaintiff's claim for dilapidations. *Ibid.*

A testator by will devised 400*l.* to his daughter Mary, and, in the event of her dying without issue, the same to be divided amongst such of his other children as should be then living. Mary died without issue, the testator's other children having died in her lifetime. Edward, the son and executor of the testator, covenanted by indenture with the defendant, another son, that the latter should apply the share of Mary, viz. 400*l.*, towards the purchase of an estate, which Edward the executor had sold to him; that that sum should continue in his, the defendant's, hands, and be payable with interest to Edward, the executor, or to Mary; and that the defendant should be chargeable with such principal money as might become payable agreeably to the will of the testator. The indenture then witnessed, that in consideration of the said sum of 400*l.* trust money, &c. by these presents lent to the defendant, the latter covenanted with the executor for payment to him for the use of Mary of so much of the said principal money as might become payable agreeably to the said recited will. The plaintiff was the administrator of Edward, the executor:—Held, that this was money lent, and that the defendant was bound to repay it to the plaintiff, and was not entitled to delay payment, for the purpose of paying it to the administrator *de bonis non* of the original testator as soon as he should be appointed. *Dodd v. Dodd*, 24 Law J. Rep. (N.S.) Exch. 162; 10 Exch. Rep. 878.

(b) *As to Policies.*

At the death of a testator a sum of 4,000*l.* was due to the estate by a person whose life was insured for 2,500*l.* After the testator's decease his executor, finding that the debtor was quite incapable of paying either the debt or premiums, effected a further insurance on his life for 2,500*l.* for seven years. After paying three premiums, the executor, of his own accord, allowed the policy to drop, on the ground that the assets of the testator were insufficient to meet the debts and legacies. Upon bill filed to render the executor liable for the full amount of the second policy, it was held, that the executor, having effected the policy, had made himself a trustee of it for the testator's estate, and was not justified in allowing it to drop without the consent of the *cestui que trust* or the sanction of the Court. The defendant was ordered to pay the amount of the policy, less the premiums he had actually paid. *Garner v. Moore*, 24 Law J. Rep. (N.S.) Chanc. 687; 3 Drew. 277.

(c) *As to Shares in Public Company.*

A testator, who died in 1837, was possessed of shares in a banking company, and had executed the company's deed, by which he agreed to pay instalments and perform covenants. His executors received the dividends upon the shares, and paid the simple contract debts. The banking company failed in 1847, and upon being wound up under the act, the executors were called upon for a contribu-

tion, and the assets being insufficient, a claim was made by the official manager, that the payments to simple contract creditors by the executors should be disallowed:—Held, that although the executors, by receiving the dividends, had implied notice of the liabilities of the testator in respect of the shares, yet that as the liability had not arisen till after the simple contract debts were paid, they could not now be disallowed. *Henderson v. Gilchrist*, 22 Law J. Rep. (N.S.) Chanc. 970.

(d) *As to Value of Testator's Property.*

An executrix and tenant for life unnecessarily and improperly sold out a sum of stock; a common decree for an account was made against her representatives:—Held, that her estate was liable to replace the stock and dividends, and that relief might be had on further directions, though the particular matter was not charged in the bill. *Davenport v. Stafford*, 14 Beav. 319.

Executors were ordered to sell canal shares before the 14th of April 1833; they did not sell them until 1836, and a great loss occurred:—Held, that they were personally liable for the loss. *Ibid*.

(e) *For Default in selling Estate.*

A testator gave all the residue of his property, of what kind soever and wheresoever, to his wife for life, to be invested in the public funds, in the joint names of his executors; he also left to his wife his business of a dyer, and also a lease of the house and premises in Carpenter Street for twenty-one years from the day of his death; and at the demise of his wife, the rest of his property to be equally divided among his three remaining daughters, or the "heirs of their bodies lawfully begotten, should they be taken away before the time of our demise":—Held, that all the testator's property, freehold, copyhold and leasehold, ought to have been sold upon his death, including the house in Carpenter Street, subject to the lease to the testator's widow, and that the widow's representatives were liable for any loss occasioned by the non-sale at that period; and also that the other acting executor ought to have joined in selling all the estates, but could not be rendered liable for any loss occasioned by non-sale, upon this bill, as the parties had elected to take the property in specie. *Pattenden v. Hobson*; *Pattenden v. Church*, 22 Law J. Rep. (N.S.) Chanc. 697.

Held, also, that the words "heirs of their bodies," when applied to personally, meant "children," who would be entitled to take in substitution for their parents. *Ibid*.

Held, also, that the Court having directed inquiries as to who were the "heirs of their bodies," and such heirs being interested in the question of liability of the executors for loss, it was competent for the Court to determine that question upon further directions. *Ibid*.

(f) *For Sums improperly dealt with.*

Where a will contains no direction for the executors to invest the proceeds of the testator's estate, and the proceeds are left in the hands of the testator's bankers, and a residuary legatee refuses to accept his share by small sums on account, the executors will not be held liable for any loss which may ensue by failure of the bankers before the expiration of

twelve months from the testator's decease. *Johnston v. Newton*, 22 Law J. Rep. (N.S.) Chanc. 1039; 11 Hare, 160.

Where a security is made by deposit of the testator's title-deeds for an advance to and for the private benefit of an executor having power to deal with the testator's real estate, and not for the purposes of the will, the person making the advance takes the security, subject to the trusts and charges created by the will; but subject thereto the security will extend to the beneficial interest of the executor in the testator's property; and where the executor has any such interest, the lender will have a right to marshal the assets. *Haynes v. Forshaw*, 22 Law J. Rep. (N.S.) Chanc. 1060; 11 Hare, 93.

(g) *For Interest.*

Interest on balances may be charged against an executor, though it is not prayed by the bill. *Hollingsworth v. Shakeshaft*, 21 Law J. Rep. (N.S.) Chanc. 722; 14 Beav. 492.

In an administration suit by one executor against his co-executors, the pleadings raised a question of wilful default; but upon the hearing, a decree was made for the common accounts of what had been received, without any special direction or inquiry as to what might have been received but for the wilful default of the defendants. Upon the cause coming on for further directions, it was held that the plaintiff was then precluded from raising the question as to wilful default, but that if the question were still open, the plaintiff could not call upon his co-executors to account for what he jointly with them might have received. The plaintiff claimed interest upon balances remaining in the hands of the defendants:—Held, that the Court was not precluded from entertaining this question by the decree, which might have afforded materials for forming an opinion; but the circumstances of this case were not such as to entitle the plaintiff to interest, there having been no improper retention of balances to any substantial amount. *Jones v. Morvall*, 21 Law J. Rep. (N.S.) Chanc. 630; 2 Sim. N.S. 241.

A S, the sole executrix and tenant for life, died, having 12,500*l.* of the assets in her hands. Her executors admitted assets:—Held, that, in the absence of any further proof, they were not liable for interest. *Davenport v. Stafford*, 14 Beav. 319.

Executor engaged in trade and mixing the assets with his own at his bankers' charged with compound interest at 5*l.* per cent. *Williams v. Powell*, 15 Beav. 461.

(h) *To Costs.*

The mere fact that an executor neglected to render accounts when asked, is not of itself sufficient to make him liable to the costs of a suit for administering the estate. *White v. Jackson*, 15 Beav. 191.

A bankrupt executor was charged with interest on his balances, but he was allowed his costs of suit:—Held, that the costs subsequent to the bankruptcy were not to be set off against his debt, which had accrued prior to his bankruptcy. *Cotton v. Clark*, 16 Beav. 134.

Executors who had retained the assets in their hands for seven years uninvested, there being no debts, ordered to pay the costs (to the hearing) of a

legatee's suit to administer the estate. *Tickner v. Smith*, 3 Sm. & G. 42.

(i) *To Co-executors in respect of Assets.*

One of several executors cannot, without the assent or concurrence of his co-executors, mortgage, to secure his private debt to a third person, leaseholds specifically bequeathed to or in trust for him by his testator, to the prejudice of his co-executors' claims against him in respect of the assets of their testator. The lien of the co-executors on the property mortgaged will take priority over the lien of the mortgagee; and a mortgagee, with notice of the debt due by the mortgagor to the testator's estate, or his transferee, with or without notice, will be subject to the costs of a suit by the co-executors to establish their lien and recover the title deeds of the mortgaged property. *Cole v. Muddle*, 22 Law J. Rep. (N.S.) Chanc. 401; 10 Hare, 186.

By an assignment by one of several executors of a leasehold estate the property of the testatrix, which had been bequeathed to that executor absolutely for his benefit, reciting that the assignor and another executor had proved the will (but not stating the fact that a third executor had also subsequently proved), and reciting that the executors had assented to the bequest to the assignor, it was witnessed that the assignor in his several capacities of executor and legatee of the testatrix, in consideration of the sum therein mentioned, sold and assigned the premises to the purchaser. The assignor in his character of executor was at the time of the assignment indebted to the estate of the testatrix in a sum greater than the value of the property assigned. On a bill by the co-executors on behalf of the estate of the testatrix to set aside the assignment and recover the title deeds, it was held that the assignment by the executor to the purchaser was effectual, and that whether there had or had not been an assent to the bequest by the other executors, the Court would not disturb the sale. *Cole v. Miles*, 10 Hare, 179.

Whether, without any express assent by executors to a bequest of a leasehold estate, the entering of the legatee into possession and the receipt of the rents and profits with the knowledge and without any objection from the executors does not amount to an assent by them—*quære*. Ibid.

(D) ASSETS.

(a) *What constitute.*

Where in an action by an indorsee against the executors of the maker of a promissory note, one of the executors pleaded that the other executor was the payee, and had taken on him the burden of the will, and had received monies and goods applicable to the payment of the note, whereby the debt became extinguished.—Held, that this allegation of assets applied to legal and not to equitable assets. *Lowe v. Piskett*, 24 Law J. Rep. (N.S.) C.P. 196; 16 Com. B. Rep. 507.

It appeared that the testator had devised to the executor, who was payee of the note, a freehold house subject to the payment of 240*l.* in twelve months after his death to the uses of the will, and that the executor took possession of the house, and an action was brought on the note, before the expiration of the twelve months, and before the executor

had raised the 240*l.*—Held, that there was no evidence of legal assets to support the plea. Ibid.

(b) *Admission of.*

A and B were partners. A, by his will, gave C and D 5,000*l.* each, and sums to others who as well as D were infants, and directed that the same should remain in the business, and interest be paid thereon. A, by his will, appointed B and three others his executors, and died. B continued the business, and transferred into his books the amount at which he estimated the estate, to an account called "The account of the executors of A," and in the same books opened accounts with C and with D, in which he credited them respectively with their legacies, and interest thereon from time to time. B paid the legacy duty on C's and D's legacies, and paid legacy duty on the estimated value of A's residuary estate. B died, and a suit was instituted to administer his estate, and C and D claimed to be creditors thereon in respect of their legacies, and one of the Vice Chancellors decided in their favour.—Held, upon appeal, that the transactions of B were not an admission of assets of A; and that as the suit was for the administration of the executor's, and not of the testator's estate, all that the Court would do was to direct the reservation of such dividends as are reserved in cases of claims, leaving C and D to take any steps in respect of the administration of the estate of A, and in respect of the dealings of B therewith. *Hulton v. Rosseter*, 24 Law J. Rep. (N.S.) Chanc. 106.

A testator gave a leasehold estate for lives to his son absolutely, subject to an annuity of 100*l.* to his daughter for life; and after the decease of his daughter he gave to trustees the sum of 2,000*l.* to be paid by and out of the said leasehold estate, which he charged with the payment of the same, in trust for the children of his daughter; and he appointed his son executor. The testator died in 1807, and his son proved the will; and the personal estate, exclusive of the leaseholds, was sworn under 2,000*l.* In 1821, the son, as executor, signed a document, professing to have retained the 2,000*l.* charged upon the leaseholds, and to that document was attached a formal legacy duty receipt for 20*l.* The lessors having declined to renew the lease, a bill was filed, by a child of the daughter, against the executor of the son, to have the 2,000*l.* secured.—Held, upon appeal, affirming the decision below, that the entire interest of the son in the leaseholds was liable to the payment of the 2,000*l.* legacy, and that the receipt for the legacy duty, which was paid fourteen years after the death of the testator, amounted to an admission of assets. *Lazonby v. Rawson*, 24 Law J. Rep. (N.S.) Chanc. 482; 4 De Gex, M. & G. 556: affirming 2 Sm. & G. 267.

Payment of probate duty, no part of it having been reclaimed, is presumptive evidence of assets to the extent covered by the amount of the duty. Ibid.

(c) *Administration of.*

A testator, whose estate was charged with certain sums of money for the benefit of his widow, died and appointed two persons his executors. A suit was instituted to administer his estate, and before decree his widow died and appointed the same two persons her executors.—Held, after decree, that the execu-

tors were entitled to retain out of the husband's estate the money due to the wife in priority over other creditors *pari passu*. *Wynch v. Grant*, 24 Law J. Rep. (N.S.) Chanc. 6.

An executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations; and on the same principle may have a right to retain his own just debt, although barred by the statute. *Stahlschmidt v. Lett*, 1 Sm. & G. 415.

Semble—that the executor's right to retain for his own debt may be asserted, not only after the assets have been paid by him into court, but at any time before the distribution of the estate. *Ibid*.

By admitting assets, the executor of an executor renders himself liable to the same decree as the executor himself, if living, would have been liable to in respect of the personal estate of the original testator. *Davenport v. Stafford*, 2 De Gex, M. & G. 901.

(E) EXECUTOR DE SON TORT.

Validity of transfer by an executor *de son tort*, and effect of suing him (see Partners). *Buckley v. Barber*, 20 Law J. Rep. (N.S.) Exch. 114; 6 Exch. Rep. 164.

Where an executor *de son tort* really acts in the character of executor, and out of the assets in his hands makes a payment in satisfaction of a debt due from the deceased, to a person who at the time might reasonably suppose that he had authority to act as executor, such payment is valid and binding upon the person who afterwards becomes the rightful administrator. *Thompson v. Harding*, 22 Law J. Rep. (N.S.) Q.B. 448; 2 E. & B. 630.

(F) ACTIONS AND SUITS BY AND AGAINST.

[As to judgments of assets *quando*, see 17 & 18 Vict. c. 125. s. 91.]

(a) What Actions maintainable.

A special contract was entered into by B to do the whole of certain work for G, for a stated sum. Before the completion of the work B died, and an arrangement was then come to between G and C, under which C, on his own account, completed the portion of the work left unfinished at B's death. C, who afterwards became administrator of the effects of B, sued G on the common *indebitatus* counts for the proportion of the work done by B, alleging that G was indebted to B in his lifetime, and was liable to pay B on request:—Held, that although the special contract was to be considered as rescinded by the arrangement between C and G, still that the above form of declaration was not supported. *Crosthwaite v. Gardner*, 21 Law J. Rep. (N.S.) Q.B. 356; 18 Q.B. Rep. 640.

Semble—That an action of law may be maintained for contribution against the representatives of deceased co-contractors. *Batard v. Hawes*, 22 Law J. Rep. (N.S.) Q.B. 443; 2 E. & B. 287.

In an action by an executor for work done, it appeared that his claim was for extras incurred in the making of a machine for the defendant by the testator, beyond what was contained in an agreement and specification. The plaintiff did not produce the agreement, which was unstamped and in the hands of a third party, but proved that the defendant had ordered, and the testator executed, additions and

alterations, and also that the testator had told a witness that he had received money from the defendant on account of the extras. On this evidence the defendant claimed a nonsuit, but the Judge allowed the case to go to the jury, who found for the plaintiff. The Court held, that the defendant was not entitled to a nonsuit, but, deeming the evidence insufficient to justify the verdict, made the rule absolute for a new trial. *Edie v. Kingsford*, 23 Law J. Rep. (N.S.) C.P. 123.

A contracted with the plaintiff that he should endeavour to sell a picture belonging to A, and if he succeeded A should pay him 100*l*. A died. The plaintiff endeavoured to sell the picture, and after A's death succeeded in selling it, and brought an action against A's administratrix. The declaration set out these facts, and alleged that the defendant confirmed the sale as administratrix, and the plaintiff claimed the 100*l*. from the defendant as administratrix:—Held, that the declaration was bad. That the defendant was not liable as administratrix, or personally, for the 100*l*., the original authority having been revoked by A's death.—*Semble*, that the defendant might be liable personally, to the plaintiff, on the confirmation of the sale, for a *quantum meruit*, as on a fresh employment by her to sell. *Campanari v. Woodburn*, 24 Law J. Rep. (N.S.) C.P. 13; 15 Com. B. Rep. 400.

In January 1833 A gave B, then a feme sole, his note for 246*l*. B, after having received part of the amount, died in 1834, leaving her husband, the plaintiff surviving and one child. The plaintiff did not then take out letters of administration, but arranged with A that the interest on the note should go towards the maintenance of B's child, then under the care of A. In September 1839 A and the plaintiff settled their accounts, and A indorsed on the note a memorandum that all the interest was paid up to that date, but no money passed. In 1848 the child died. In 1853 the plaintiff took out letters of administration, and brought an action, as administrator, against A to recover the amount of the note, alleging a promise by A to himself as administrator after the death of B:—Held, *per Alderson, B., Platt, B. and Martin, B.* (*dubitante Parke, B.*) that there was a payment of interest sufficient to take the case out of the Statute of Limitations, the maintenance of the child being treated by the parties as a money payment equivalent to the interest. *Bodger v. Arch*, 24 Law J. Rep. (N.S.) Exch. 19; 10 Exch. Rep. 333.

(b) When maintainable.

A person having died intestate, the defendant and B took possession of his goods and divided them between themselves. Letters of administration having been subsequently obtained by the plaintiffs, an action of detinue was brought against the defendant:—Held, that the action was not maintainable as to the goods which B had kept possession of, as they had not been in the defendant's possession after the grant of letters of administration. *Crossfield v. Such*, 22 Law J. Rep. (N.S.) Exch. 325; 8 Exch. Rep. 825.

Where money is invested in the funds in the joint names of two persons, the survivor is, at law, the absolute owner, whatever the intention of the investment may have been. *Ibid*.

Since the abolition of profer and oyer by the Common Law Procedure Act, the Court may, on proper

cause being shewn, interfere, under its common law jurisdiction, in an action brought by a plaintiff, as executor, to order a stay of proceedings till probate be taken out and notice thereof given to the defendant. *Webb v. Atkins*, 23 Law J. Rep. (N.S.) C.P. 96; 14 Com. B. Rep. 401.

A legatee will be restrained from proceeding in the county court against an executor, after a decree has been made in an administration suit for the general administration of the assets of a testator. *Ratcliffe v. Winch*, 22 Law J. Rep. (N.S.) Chanc. 915; 16 Beav. 576.

Where an estate is administered and the residue is paid over under an order of the Court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law. *Dean v. Allen*, 20 Beav. 1.

A B, entitled to a share of a residue, made a settlement of the balance appearing upon a settlement of accounts with the executors, upon himself, and afterwards on C D, a volunteer:—Held, that C D could not, against the will of A B, open the settlement of accounts with the executors. *Parker v. Bloxam*, 20 Beav. 295.

(c) *Devastavit*.

When a plaint is brought in a county court for a legacy, and the executor, the defendant, shews that he has paid for the testator debts exceeding the amount of the assets, and the plaintiff contends that the executor has been guilty of a *devastavit*, and on that account seeks to charge him with assets, the county court Judge has jurisdiction to try the question of the *devastavit*. *Winch v. Winch*, 22 Law J. Rep. (N.S.) C.P. 104; 13 Com. B. Rep. 128.

About a year after a testator's death the executrix brought an action against a debtor and recovered judgment, but she did not issue execution until a year after, when a bankruptcy ensued and the debt was lost. The executrix was empowered to compound, or allow time for the payment of any debt:—Held (under the particular circumstances), that she was not liable for a *devastavit*. *Ratcliffe v. Winch*, 17 Beav. 217.

(d) *Pleas*.

To an action by the executor of E C, deceased, on a promissory note made by the defendant, payable to E C, on demand, the defendant pleaded that E C, by his will (made after the passing of the 1 Vict. c. 26), bequeathed the note to C C; that the plaintiff assented to the bequest, whereby C C became entitled to the said note and the money due thereon; and that whilst the said C C was so entitled, he was convicted of felony, by reason whereof he forfeited to the Crown the said note, and all interest therein, and causes of action in respect thereof:—Held, on general demurrer, that the plea was no answer to the action. *Bishop v. Curtis*, 21 Law J. Rep. (N.S.) Q.B. 391.

(e) *Set-off*.

Where a defendant is sued as executor for a debt which accrued due from his testator during his lifetime, he may set off a debt which has accrued due from the plaintiff to him as executor since the death of his testator. *Mardall v. Thelluson*, 21 Law J. Rep. (N.S.) Q.B. 410.

Such debts are mutual, and due in the same right, within the meaning of the 2 Geo. 2. c. 22; the second clause of which, authorizing the set-off against an executor of debts due from the testator, does not limit the operation of the preceding clause. *Ibid*.

To an action for money had and received by the defendant to the use of the plaintiff as administrator, and on accounts stated with him as such administrator, the defendant cannot plead a set-off for money lent by him to the intestate in his lifetime. *Watts v. Rees*, 23 Law J. Rep. (N.S.) Exch. 238.

[This case has been affirmed in error, and *Mardall v. Thelluson* overruled. See *Rees v. Watts*, 25 Law J. Rep. (N.S.) Exch. 30.]

(f) *Practice*.

An executor for some years received the rents of property specifically bequeathed; the specific legatee having instituted a suit against him:—Held that he could not set up the adverse title of a third party as a defence to a motion to pay the amount into court: Held, also, that the executor was not entitled to deduct the amount of debts, &c. paid by him, there having apparently been sufficient assets, out of which they ought to have been paid. *Lord v. Purchase*, 17 Beav. 171.

A sum set apart on motion by the executor under 13 & 14 Vict. c. 35. s. 23, to provide for an unascertained debt mentioned in the Master's report, the creditor not having appeared or established the liability before the Master, but having been served with notice of and appearing on the motion. *In re Hawkins*, 10 Hare, App. xxxiii.

Semble, in an administration suit by legatees against executors alleging that the legacies ought long since to have been paid, and seeking to charge the defendant with the costs, the plaintiff may adduce evidence of wilful default, though not specifically charged by the bill. *Tickner v. Smith*, 3 Sm. & G. 42.

In an administration suit instituted by an infant *cestui que trust* under a will against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property which had been entered into by the executor. Under this order the purchase-moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances and deliver the title deeds to the petitioners, but the executor's solicitors refused to give up the deeds, claiming a lien upon them for costs due from the executor, and advances made for the maintenance of the plaintiff:—Held, that the Court had jurisdiction on petition to order the solicitors to deliver up the deeds. *Francis v. Francis*, 2 De Gex, M. & G. 73.

EXTENT.

If a party has an estate in lands and also a power of appointment for his own benefit, he cannot, after entering into a bond to the Crown, divest the right of the Crown to extend the lands for the bond debt by executing the power of appointment in favour of

a *bona fide* purchaser without notice. *Ellis v. Regina* (in error), 20 Law J. Rep. (N.S.) Exch. 348; 6 Exch. Rep. 921: affirming *Regina v. Ellis*, 19 Law J. Rep. (N.S.) Exch. 77.

Where an extent on a fiat at the suit of the Crown issues against a bankrupt on the same day that the official assignee is appointed, the extent shall prevail, and the property of the bankrupt may be taken under it, notwithstanding that the appointment of the assignee is made at an earlier time of the day than that at which the extent issues. *Edwards v. Regina* (in error), 23 Law J. Rep. (N.S.) Exch. 165; 9 Exch. Rep. 638: affirming *Regina v. Edwards*, 23 Law J. Rep. (N.S.) Exch. 42; 9 Exch. Rep. 32.

FACTOR.

[See PRINCIPAL AND AGENT.]

FACTORY.

The occupier of a cotton-mill is bound by the statute, 7 & 8 Vict. c. 15, to provide a secure fence for the mill gearing and machinery, and to keep up the fence when the parts required to be fenced are in motion for manufacturing purposes, but not when they are in motion for other purposes. *Coe v. Platt* (in error), 21 Law J. Rep. (N.S.) Exch. 146; 7 Exch. Rep. 460: affirming the judgment below, 20 Law J. Rep. (N.S.) Exch. 164; 6 Exch. Rep. 752.

The 7 & 8 Vict. c. 15, the Factories Act, enacts, section 21, that every part of the steam-engine near to which children or young people are liable to pass or to be employed, and all parts of the mill gearing in a factory, shall be securely fenced, and the said protection of each part shall not be removed while the parts required to be fenced are in motion by the action of the steam-engine for any *manufacturing process*. The defendants were proprietors of a cotton factory, containing machinery worked by steam. The original moving power was conveyed along the lower floor of the factory by an horizontal shaft, which communicated motion by its own revolution to machinery there used for manufacturing cotton. This shaft communicated motion to several vertical shafts, which passed through the upper floors and were used in each floor for turning machinery there. The vertical shafts turned whenever the horizontal shaft revolved, and could not be stopped as long as the latter was in motion. The plaintiff, a girl of about thirteen years of age, being employed in sweeping one of the upper floors through which a vertical shaft passed, and which was then undergoing repair, was caught by the shaft, the fencing to which had been removed, and had her arm torn off and her ankle fractured. The vertical shaft which caused the injury was not, at the time of the accident, communicating motion to any machinery on the floor in question or any other floor:—Held, that the defendants were not answerable to the plaintiff in damages for negligence at common law; nor were they liable under the statute, the vertical shaft at the time of the accident not being used for any “manufacturing

process,” within the meaning of the act. *Coe v. Platt*, 22 Law J. Rep. (N.S.) Exch. 164; 7 Exch. Rep. 923.

FALSE IMPRISONMENT.

[By servants of railway company, see title COMPANY (G) (1), *ante*, p. 159. Form of count for, see 15 & 16 Vict. c. 76; Schedule B, No. 26. Plea of *son assault demesne*, see 15 & 16 Vict. c. 76, Schedule B, No. 45. And see titles ASSAULT—JUSTICE OF THE PEACE.]

(A) ACTION FOR; EVIDENCE AND DAMAGES.

(B) JUSTIFICATION OF THE IMPRISONMENT.

(a) *Defence of Possession.*

(b) *To preserve the Peace.*

(c) *Suspicion of Felony.*

(A) ACTION FOR; EVIDENCE AND DAMAGES.

[See *Abley v. Dale*, title INFERIOR COURT.]

In an action against the defendant for giving the plaintiff into custody on a charge of stealing oysters from an oyster-bed,—Held, that the defendant could not, for the purpose of proving *bona fides* on his part, give evidence of a prior conviction of a third party for stealing oysters from the same bed, such conviction not having come to the knowledge of the defendant at the time of his giving the plaintiff into custody. *Thomas v. Russell*, 23 Law J. Rep. (N.S.) Exch. 233; 9 Exch. Rep. 764.

The plaintiff, who had been committed to gaol for manslaughter by a coroner's warrant, was afterwards admitted to bail, and subsequently got the inquisition, under which he had been committed, quashed. In an action against the coroner for false imprisonment, alleging as special damage that he had been obliged to pay money in procuring his discharge from custody,—Held, that he was entitled to recover the costs of quashing the inquisition. *Foxhall v. Barnett*, 23 Law J. Rep. (N.S.) Q.B. 6; 2 E. & B. 928.

(B) JUSTIFICATION OF THE IMPRISONMENT.

(a) *Defence of Possession.*

Trespass for assault. Plea, that the plaintiff was wrongfully and unlawfully in a certain close of the defendant Bagge without, &c., whereupon the said defendant, and the other defendant, as his servant, and by his command, requested the plaintiff to depart, and because, &c. (justifying the assault). Plea, also, that before, &c., eleven members of a certain cricket club, called the Lynn Club, to wit, &c., and eleven members of a certain other cricket club, called the Litcham Club, to wit, &c., were lawfully possessed of a certain close, and were lawfully playing a game of cricket in and upon the said close; that the plaintiff was wrongfully and unlawfully in and upon the said close, and interrupted, hindered and prevented the playing of the said game, whereupon the defendant Bagge in his own right, and by the command and authority of the ten other members of the Lynn Club and the said eleven members of the Litcham Club, requested the plaintiff to depart out of the said close, and to desist from interrupting the playing of the said game, which the

plaintiff refused to do, whereupon the defendant Bagge in his own right, and by the command, &c., and the other defendant, as the servant, &c., removed the plaintiff from and out of the said close, &c. Replication, to the first of the above pleas, that the same close was the close and soil of the plaintiff together and along with the said Bagge and the other members of the Lynn Club, as joint tenants thereof, and that the plaintiff was then as such joint tenant possessed, &c., and the defendant Bagge had nothing in the said close except as joint tenant with the plaintiff, &c. And as to the other plea, *de injuriâ*. It appeared at the trial that whilst a game of cricket was being played between eleven members of the Lynn Club (the defendant Bagge being one) and eleven members of the Litcham Club, the plaintiff, who was a member of the Lynn Club, but not one of the eleven players, took the place of one of the players, and thereupon a misunderstanding arose, which led to the assault complained of in the forcible removal of the plaintiff from off the space of ground upon which the match was played, and which was tabooed off for the purposes of the game, and within which only the players were properly at liberty to go. The close in question was occupied at an annual rent under an agreement between the owner of the soil and the Lynn Cricket Club, of which the defendant Bagge was the president. A verdict was found for the plaintiff:—Held, that the agreement under which the close was occupied established the issue on the first of the above pleas as to the plaintiff being jointly possessed of the close. *Holmes v. Bagge*, 22 Law J. Rep. (N.S.) Q.B. 301; 1 E. & B. 782.

Held, also, that the issue on the other plea was properly found for the plaintiff, the ground of the justification pleaded being that the twenty-two members of the Lynn and the Litcham Clubs were possessed of the close, and that the trespass had been committed in the exercise of such right. *Ibid*.

To a declaration in trespass for assault, the defendants pleaded a justification in defence of the possession of a dwelling-house. The plaintiff new assigned that the trespasses were committed, not in a dwelling-house, but on a certain bridge and in certain yards and fields, parcel of a farm. The plea to the new assignment stated that W was possessed of the dwelling-house, and also of the bridge, yards, and fields, which belonged and were adjacent to the dwelling-house, and then justified the trespasses in defence of the possession of the house, bridge, yards, and fields, and then averred that the defendants removed the plaintiff from the bridge, yards, and fields, and took him by the nearest way to a public highway near to the dwelling-house, bridge, yards, and fields. The replication alleged the seisin of W in the farm, the demise of it by him to J as tenant from year to year, the entry of J, an assignment by J to B to secure a debt, of the present and future growing crops on the farm, with a power to B, in default of payment, to take possession. It then alleged a default by J; that W, at the time of the default, was in possession of the farm, on which there then were growing crops which belonged to J after the date of the assignment; that the plaintiff, as servant of B, took possession, and continued in possession of the growing crops for a reasonable time;

and that before a reasonable time had elapsed, the defendants removed him, and dragged him from the dwelling-house, across the bridge, yards, and fields, to the highway:—Held, that the plea was good, as it confessed and justified the trespasses committed on the bridge, yards, and fields, which were all that were alleged in the new assignment; and that the allegation in the plea, admitting that the defendants dragged the plaintiff from the bridge to the highway might be treated as surplusage, as it was not made a ground of complaint in the new assignment. *Hayling v. Okey* (in error), 22 Law J. Rep. (N.S.) Exch. 139; 8 Exch. Rep. 531.

Held, further, that the replication was bad, as it did not shew any right in B to place a person on the premises to retain possession of the growing crops after J's tenancy had come to an end, and the landlord had regained possession; and that if B's right to do so depended upon the mode of the termination of the tenancy or the nature or condition of the crops, the replication ought to have set forth the circumstances which abridged the *primâ facie* rights of the owner of the farm to remove all other persons from it. *Ibid*.

If a person comes into a house, or is in it, and makes a noise and disturbs the peace of the family, although no assault has been committed, the master of the house may turn him out or call a policeman to do so. *Shaw v. Charvittie*, 3 Car. & K. 21.

If a servant, in the house of his master, at a late hour of the night, be violent in his manner, and be making a great noise, and abuse his master, and lay hold of him, and struggle with him, the master will be justified in giving the servant into the custody of a policeman to be dealt with according to law. *Ibid*.

(b) To preserve the Peace.

Trespass, for that the defendant "assaulted the plaintiff, and beat, bruised, pushed, dragged, and pulled about, kicked, wounded, and ill-treated him, and then knocked down and prostrated him on the deck of a certain vessel, and then hit and struck him numerous blows." Plea "as to the assaulting, beating, and ill-treating" the plaintiff, a justification by the defendant as captain of a vessel on board of which the plaintiff and others were passengers, and alleging that the plaintiff made a great noise, disturbance, and affray on board the said vessel, and was then fighting with another person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," and was striving to beat and wound the said person, wherefore the defendant as such captain, to preserve peace and order, and prevent the beating and wounding of such person, gently laid his hands upon the plaintiff, which was the trespass complained of:—Held, first, that the plea would have been good, without the statement that the person with whom the plaintiff was fighting was a passenger on board the vessel whose name was unknown to the defendant. Secondly, that such statement did not necessarily contain matter of description, and consequently, that a failure of proof of that part of the plea was not material. Thirdly, that the knocking down and prostrating of the plaintiff was alleged as a distinct trespass, and was not covered by the justification in the plea. *Noden v. Johnson*, 20 Law J. Rep. (N.S.) Q.B. 95; 16 Q.B. Rep. 218.

To a declaration for assault and false imprisonment, the defendant pleaded that the plaintiff forcibly broke into the dwelling-house of W, within the city of London police district, and committed the said breach of the peace in the presence of a police officer of the city, and thereupon the defendant gave the plaintiff in charge of the said police officer for the said offence, and directed him to take him in custody and convey him before a magistrate of the city to answer for the said offence, and that the said police officer accordingly took into custody and imprisoned the plaintiff:—Held, on demurrer, that the plea was a good answer to the action. *Derecourt v. Corbishley*, 24 Law J. Rep. (N.S.) Q.B. 313.

(c) *Suspicion of Felony.*

Trespass for imprisoning the plaintiff and putting him in irons. Plea, that the defendant was the commander of a ship of war on the high seas, and that the plaintiff was steward of the said ship and servant of the defendant, and had access to the defendant's cabin and charge of the goods there; that money of the defendant had been feloniously stolen out of a certain desk in the said cabin on two several occasions, just before the said time when, &c.; and that upon each occasion the said desk had been clandestinely opened by means of a key; that the plaintiff had access to and could have obtained the key of the said desk, and could have opened the same and carried away the said money, and that the defendant then believed that no other person had or could have obtained access to the key of the said desk without the knowledge of the plaintiff; wherefore the defendant, suspecting the plaintiff for the causes aforesaid to be guilty of or concerned in the stealing of the said money, did, as such commander as aforesaid, put and detain him in irons (the same being a reasonable mode of detainer) until he could examine into and investigate the circumstances of suspicion against the plaintiff according to law; that the defendant did afterwards examine into and investigate the said circumstances, and did discharge and release the plaintiff:—Held (after verdict), that the plea shewed a sufficient justification for the imprisonment. Held, also, that the putting in irons must be taken to be a reasonable mode of detainer, and that if there were any excess, the plaintiff should have new assigned. *Broughton v. Jackson*, 21 Law J. Rep. (N.S.) Q.B. 265; 18 Q.B. Rep. 378.

FALSE PRETENCES.

- (A) WHAT CONSTITUTES THE OFFENCE.
- (B) INDICTMENT FOR.
- (C) EVIDENCE.

(A) WHAT CONSTITUTES THE OFFENCE.

It was the duty of the prisoner, who was a servant of the prosecutors, in the absence of their chief clerk, to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale. On one occasion he falsely stated to the chief clerk that he had paid 2s. 3d. for kitchen stuff which he had bought for his masters, and demanded to be paid for it. The clerk on this paid him 2s. 3d. out

of money which his master had furnished him with to pay for the kitchen stuff. The prisoner applied the money to his own use:—Held, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining it by false pretences. *Regina v. Barnes*, 20 Law J. Rep. (N.S.) M.C. 34; 2 Den. C.C. 59.

The prisoner, who had a circular letter of credit for 210*l.*, from a bank at New York, authorizing him to draw for that sum on the Union Bank of London, in favour of certain named correspondents in foreign countries, went to St. Petersburg, and having fraudulently altered the figures in the letter of credit, so as to make it appear to be a letter of credit for 5,210*l.*, presented it so altered to W & Co., of St. Petersburg, one of the specified correspondents, and drew in their favour, on the Union Bank, a cheque for the sum of 1,200*l.* This cheque was cashed for the prisoner by W & Co., who sent it to London and had it presented at the Union Bank, but the bank, discovering the fraud, refused to pay it:—Held, that the prisoner was not indictable for an attempt to obtain 1,200*l.* by false pretences from the Union Bank, since, if W & Co. had obtained payment, it would not have been in pursuance of the prisoner's wish or desire, and they would have obtained the money for their own and not for the prisoner's use or benefit, and, therefore, there would have been no obtaining of any money by him. *Regina v. Garrett*, 23 Law J. Rep. (N.S.) M.C. 20; 1 Dears. C.C. 232.

A baker had contracted with the guardians of a parish to deliver loaves of a certain weight to the poor people. The relieving officer gave the poor people tickets, which they were to take to the baker. He was to give them loaves on their presenting the tickets to him, and afterwards to return the tickets, as his vouchers, once a week, with a statement of the amount of the loaves, to the relieving officer, who would give him credit in his account for the amount. The baker was to be paid by the guardians some months later; and by a clause in the contract the guardians had the power, in case of a breach of contract by the baker, of deducting any damages caused by such breach from the amount to be ultimately paid. The baker supplied the poor people who presented tickets with loaves short of the contract weight:—Held, that this was not a fraud indictable at common law. *Regina v. Eagleton*, 24 Law J. Rep. (N.S.) M.C. 158.

Held, also, that the baker, by returning the tickets for these loaves to the relieving officer, was guilty of falsely pretending that the loaves were of full weight; and though he only obtained credit for their amount in the books of the relieving officer (as the time of payment had not arrived before detection), yet that the baker might be indicted for attempting to obtain money by the false pretence, as the making the false pretence was an act done with the intent of obtaining the money, and was sufficiently proximate to the obtaining it to be considered an attempt to obtain it, since no other act remained to be done by the baker to entitle him to receive it. *Ibid.*

G, a secretary to a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer in the following form:—"Bolton United

Burial Society, No. 23, *Bolton*, Sept. 1st, 1853, Mr. A. Entwistle, treasurer. Please to pay the bearer 2l. 10s., *Greenhalgh*, and charge the same to the above society. *Robert Lord, Benjamin Beswick*, president":—Held, that this was a valuable security under the 7 & 8 Geo. 4. c. 29. s. 53, as explained by the 5th section of the same statute. *Regina v. Greenhalgh*, 1 Dears. C.C. 267.

G was indicted for larceny. The evidence shewed that he was the prosecutor's servant; that it was his duty to receive and pay monies for the prosecutor, and make entries of such receipts and payments in a book which was examined by the prosecutor from time to time; that the prisoner, on one occasion, shewed a balance in his favour of 2l., by taking credit for payments falsely entered in the book as having been made by him, when in fact they had not been made by him, and that the prisoner received from his master the sum of 2l. as a balance due to him. Prisoner was convicted:—Held, that the conviction was wrong. *Regina v. Green*, 1 Dears. C.C. 323.

The defendant was indicted for obtaining goods by false pretences. It appeared that he obtained the goods from the prosecutors by pretending that he wanted them for one J S, whom he represented as living at N, and being a person to whom he would trust 1,000l., and who went out twice a year to New Orleans to take goods to his sons. The jury found that all the representations were false, and that the prosecutors, believing that the defendant was connected with the said J S, and employed by him to obtain the goods, contracted with the defendant and not with the supposed J S, and delivered the goods to the defendant for himself and not for J S:—Held, that the defendant was, under these circumstances, rightly convicted of the offence charged in the indictment. *Regina v. Archer*, 1 Dears. C.C. 449.

In an indictment for obtaining money under false pretences, the only pretence charged was that the defendant falsely pretended to one T W that he had received an order for payment of money from W M C for a quarter's salary then due and owing to the defendant. It was proved that the defendant was curate to the said W M C, and that the defendant, after telling T W that he had received an order to go and receive his quarter's salary of L, and that L was very ill, and could not do it for him, asked T W to let him have the money, and shewed L a paper to this effect: "Received of L the sum of 25l. for the Rev. W M C's note." T W gave him 15l., and the defendant gave him the following receipt: "Received from T W 15l. on account of Rev. W M C's order for 25l." T W, in his evidence, stated that he had no doubt the paper produced by the prisoner was genuine, and that he rested on that as much as on the other part of the transaction; that it contributed to produce confidence, and that it was in consequence of what he saw, and what the prisoner said, and what the prisoner gave him that he was induced to let the prisoner have the money. T W also said that the defendant first told him that he had received a letter from W M C that morning, wishing him to go to L and draw his quarter's salary, and that that was part of the inducement to T W to let the prisoner have the money. The points left to the jury were, 1. Did the defendant make use of the pretence alleged in the indictment? 2. Did T W part with his money

in consequence of his belief in that pretence? 3. Was that pretence false? 4. Did the defendant obtain the money with intent to defraud? The jury returned a verdict of Guilty:—Held, first, That there was no variance between the pretence laid and the pretence proved. Secondly, That the actual substantial pretence on which T W parted with his money was the pretence of the order. Thirdly, That the manner in which the case was left by the Court to the jury was right. *Regina v. Hewgill*, 1 Dears. C.C. 600.

(B) INDICTMENT FOR.

The omission, in an indictment for obtaining money, &c. by false pretences, to state whose property the money obtained was, is not a formal defect which is cured after verdict by section 25. of the 14 & 15 Vict. c. 100; nor does section 8. of the same statute, which enacts that it shall be sufficient in such indictments to allege that the defendant did the act with intent to defraud, without alleging the intention to be to defraud any particular person, render it unnecessary to state the ownership of the money, &c., alleged to have been obtained by the defendant—*hesitante Wightman, J. Sill v. Regina* (in error), 22 Law J. Rep. (n.s.) M.C. 41; 1 E. & B. 553; 1 Dears. C.C. 132.

An indictment alleged that the prisoner falsely pretended to A that he having executed a certain lot of work for A & B, there was due and payable to him, by A & B, for and on account of the said work, a certain sum, whereas the said sum was not due:—Held, that the indictment was bad, in arrest of judgment, for not disclosing any false pretence of an existing fact, as it would be supported by evidence that the prisoner had knowingly overcharged in respect of the value of his work, which would not be a false pretence within the statute 7 & 8 Geo. 4. c. 29. *Regina v. Oates*, 24 Law J. Rep. (n.s.) M.C. 123; 1 Dears. C.C. 459.

(C) EVIDENCE.

An indictment charged the prisoner with attempting, by false pretences made to J B and others, to defraud the said J B and others of certain goods, the property of the said J B and others. On the trial, it was proved that the prisoner made the false pretence set forth in the indictment to J B only, with intent to defraud J B and others his partners of property belonging to their firm:—Held, that there was no variance between the indictment and proof, as the words "and others" in the allegation that the false pretence was made "to J B and others" might be rejected as surplusage. *Regina v. Kealey*, 20 Law J. Rep. (n.s.) M.C. 57; 2 Den. C.C. 69.

The prisoner called on the prosecutrix and asked her to subscribe to a burial club, which he said was a strong club, and respectable, and had 7,000l. in the bank. She, however, declined. A month afterwards he called again for the same purpose, and still said that the club was strong and respectable, but he did not repeat the statement respecting the 7,000l. in the bank. On this second occasion she consented to become a member, and paid him threepence for admission. The statement respecting the account of money in the bank was false:—Held, on an indictment against the prisoner for obtaining the threepence by false pretences, that the jury were at liberty to connect together as one continuing representation

the statements made at the two interviews, and to convict the prisoner if they thought the prosecutrix was influenced to part with her money by means of the representation respecting the 7,000*l.* which the prisoner had stated the club to possess in the bank. *Regina v. Welman*, 22 Law J. Rep. (N.S.) M.C. 118; 1 Dears. C.C. 188.

FALSE REPRESENTATIONS.

[See FRAUD AND MISREPRESENTATION.]

FAMILY COMPROMISE.

To render a family compromise binding there must be an honest disclosure by each party to the other of all such material facts known to them relative to the rights and title of either, as are calculated to influence the judgment in the adoption of the compromise; and any advantage taken by either of the parties of the known ignorance of the other of such facts would render the compromise void in equity, and liable to be set aside. *Smith v. Pincombe*, 3 Mac. & G. 653.

FEIGNED ISSUE.

Where a feigned issue is directed under the Commons Inclosure Act, 3 & 9 Vict. c. 118. s. 44, to try the question of boundary between two adjoining manors, and the lord of the manor making the claim falls on the issue, the Court will order him to pay the costs of it. *Regina v. Kelsey*, 20 Law J. Rep. (N.S.) Q.B. 283; 2 L. M. & P. P.C. 134.

FIERI FACIAS.

[See EXECUTION.]

FINE AND RECOVERY.

ACKNOWLEDGMENTS BY MARRIED WOMEN.

[See 17 & 18 Vict. c. 75.]

- (A) VALIDITY OF, IN GENERAL.
- (B) PARTIES' NAMES.
- (C) DISPENSATION WITH HUSBAND'S CONCURRENCE.
- (D) ENLARGING TIME FOR RETURNING THE COMMISSION.
- (E) CERTIFICATE.
- (F) AFFIDAVIT.

(A) VALIDITY OF, IN GENERAL.

This indenture was prepared by John Lord and William Ackerley, who were the only solicitors employed in the transaction, and was executed by John Ollerton and Ellen his wife, and was acknowledged by the latter before the said John Lord, one of the mortgagees of the said indenture, and one E. Woodcock, perpetual Commissioner for taking the acknowledgments of married women, the said E. Woodcock not being in any manner interested in the transaction giving occasion for the said acknowledgment or

concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned, and a certificate in the form pointed out by the 3 & 4 Will. 4. c. 4. s. 84. was signed and filed of record, with an affidavit in the usual form:—Held, that the certificate having been filed of record, and being on the face of it correct, it must be taken to be valid until set aside by the Court of Common Pleas. *Bancks v. Ollerton*, 23 Law J. Rep. (N.S.) Exch. 285; 10 Exch. Rep. 168.

Semble—That the acknowledgment was invalid, one of the Commissioners having been an interested party; and, *semble*, that the invalidity of the certificate might have been set up had it appeared on the face of the certificate and deed that the party to whom the conveyance was made was one of the Commissioners. *Ibid.*

Motion to take off the files of the court a certificate of acknowledgment, on the ground of one of the Commissioners being interested in the transaction giving occasion for the acknowledgment. *In re Ollerton*, 15 Com. B. Rep. 796.

(B) PARTIES' NAMES.

The Court allowed a commission for taking the acknowledgment of a married woman in Australia, under the 3 & 4 Will. 4. c. 74. s. 83, to go out with a blank for the christian name of the husband, which (the marriage having taken place there) was unknown here. *In re Legge*, 15 Com. B. Rep. 364.

(C) DISPENSATION WITH HUSBAND'S CONCURRENCE.

The Court made an order, under the 3 & 4 Will. 4. c. 74. s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's property, upon an affidavit stating, that, having fallen into distressed circumstances, the husband about two months before left England for Australia, with the intention of never returning, and that he had ever since been living separate and apart from his said wife. *In re Kelsey*, 16 Com. B. Rep. 197.

(D) ENLARGING TIME FOR RETURNING THE COMMISSION.

The Court refused to enlarge the time for returning a commission for taking the acknowledgment of a deed by a married woman at Sydney, in order to get defects in the affidavit of verification amended, the time for the return having expired. *In re Tierney*, 15 Com. B. Rep. 761.

(E) CERTIFICATE.

Where a deed acknowledged by a married woman, under the 3 & 4 Will. 4. c. 74, forms an essential part of a title, a good title is not made out to a purchaser by the mere production of the deed, with an indorsement thereon of an acknowledgment before a Judge; proof must also be given of a certificate of such acknowledgment filed of record in the Common Pleas, pursuant to the 85th section. *Jolly v. Hancock*, 22 Law J. Rep. (N.S.) Exch. 38; 7 Exch. Rep. 820.

The Court dispensed with the notarial certificate in the case of an acknowledgment taken at Corfu, under the 3 & 4 Will. 4. c. 74, it being sworn that there was no English notary in the island. *In re Hurst*, 15 Com. B. Rep. 410.

It is no objection to the filing of a certificate of

acknowledgment under the 3 & 4 Will. 4. c. 74, that the date of the certificate is written on an erasure. *In re Anonymous*, 16 Com. B. Rep. 574.

(F) AFFIDAVIT.

The Court allowed a certificate of acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit, there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn. *In re Bingle*, 15 Com. B. Rep. 449.

The jurat of an affidavit of the due taking of an acknowledgment at Sydney had an interlineation in the body of it, and an erasure in the jurat: the Court refused to allow it to be filed. *In re Tierney*, 15 Com. B. Rep. 761.

Where an acknowledgment of a married woman, under the 3 & 4 Will. 4. c. 74, was taken at Milan, the Court allowed a certified copy of an act of the Imperial Royal Civil Tribunal of that city to be received in lieu of the affidavit verifying the certificate of the Commissioners, upon the production of an affidavit from a competent party shewing that by the law of that country depositions on oath are always deposited amongst the records of the court, and office or certified copies only delivered out to the parties. *In re Clericetti*, 15 Com. B. Rep. 762.

An acknowledgment of a deed by a married woman, under the 3 & 4 Will. 4. c. 74, was taken in the year 1842, and the certificate and memorandum thereof duly signed by the Commissioners; but, by some inadvertence on the part of the solicitor employed in the transaction, there was no affidavit of verification by the Commissioners, and the documents were not filed. After the lapse of thirteen years, the Court allowed the certificate to be received and filed, upon an affidavit by the surviving Commissioner, stating that it had always been his practice, and, as he believed, that of his co-Commissioner, to make all requisite inquiries of the married woman before taking the acknowledgment, and that, from the circumstance of his having signed the certificate and memorandum, he verily believed that all proper inquiries had been made on this occasion, though, from the lapse of time, he was unable positively to state what the answers were. *In re Warne*, 15 Com. B. Rep. 767.

FISH AND FISHERY.

[See *Thomas v. Russell*, title FALSE IMPRISONMENT (A).]

A custom for all the inhabitants of a parish to angle for, catch and carry away fish is a bad custom. *Bland v. Lipscombe*, 24 Law J. Rep. (N.S.) Q.B. 155, n.; 4 E. & B. 713, n.

FIXTURES.

[See LANDLORD AND TENANT—TROVER.]

FOREIGN JUDGMENT.

Messrs. P and R, the plaintiff and defendant, were writers to the signet in Edinburgh, P being the agent of the mortgagee, and R being the agent of the mortgagor of an estate in Scotland, upon which various incumbrances were existing. 2,100*l.*, part of the mortgage-money, was deposited in the Bank of Scotland, in the joint names of Messrs. P and R, to discharge existing claims upon the estate, but this sum was subsequently drawn out by them from the deposit account, and applied partly in payment of charges upon the estate, and partly to satisfy other liabilities of the mortgagor. Some creditors of the mortgagor afterwards obtained an order from the Court of Session in Scotland to arrest the money in the hands of Messrs. P and R, and after various proceedings in Scotland an order was made upon them jointly and severally that they should re-deposit in the Bank of Scotland the fund paid out. R did deposit a part, and afterwards left Scotland and came to England. P then re-deposited the whole of the fund, in pursuance of the order of the Court of Session, and took an assignment of the order of the Court, and after exhausting the process in Scotland against R, and failing to enforce payment there, filed a bill in this court:—Held, that no final judgment had been obtained; that this Court would enforce a foreign judgment if final; that the order made was not final, and that this Court would not enforce an interlocutory order of a foreign Court; that the assignment of the order by parties in the foreign suit did not render them the less necessary parties to this suit, and created no separate contract between Messrs. P and R; and that this Court had no jurisdiction, and the bill was dismissed, with costs. *Paul v. Roy*, 21 Law J. Rep. (N.S.) Chanc. 361; 15 Beav. 433.

Before this Court interposes upon an interlocutory application to stay proceedings in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice and covers the whole subject of the suit. *Ostell v. Le Page*, 2 De Gex, M. & G. 892.

FOREIGN LAW.

[See FRAUDS, STATUTE OF.]

In an action on a judgment of the Tribunal of Commerce, at Brussels, in Belgium, the plea was, that the judgment was obtained in an action commenced in the court "according to the laws then and still in force" by process or summons; and that the defendant had never been served with process, or appeared in the action, and was not a native of the foreign country, nor a resident, or domiciled within the jurisdiction of the Court, nor had he any property there. Replication, that the judgment was founded upon a bill of exchange drawn in Belgium, according to the laws in force in that country, and accepted by the defendant, payable at the house of M. de W, at Bruges, in Belgium; that by the law of Belgium, "where a bill is accepted, payable at a particular place, such place may, for all purposes and in all actions relating to such bill, be deemed the elected domicile of the acceptor"; and that the process or summons by which the action was com-

menced was duly served upon the defendant at the said house, where the bill was made payable, the same being such domicile of the defendant, by leaving and delivering the same at such house for him; and that "by the law of Belgium and practice of the said Court" in which the judgment was pronounced in an action against the acceptor of a bill of exchange, made payable at a particular place, leaving and delivering the process or summons, by which such action is commenced, at such place, or at the last residence or domicile of such acceptor, is good service of such process or summons in order to found the jurisdiction of such Court; and "that the issuing of the said process or summons in the said court, and the summoning of the defendant, and the proceedings in the said action, were in all things in accordance with the law of Belgium and the practice of the said Court, and according to such law and practice the judgment is good, valid and binding":—Held, that the replication was bad, as it did not sufficiently shew what was the law of the foreign country at the time of the acceptance.—*Pollock, C.B. dubitante. Meus v. Thellusson*, 22 Law J. Rep. (N.S.) Exch. 239; 8 Exch. Rep. 638.

A railway company in Belgium was established as a "société anonyme." There were English and foreign directors. Deposits on allotted shares were paid in to the bankers. Disputes took place between the English and Belgian directors, in consequence of which all the former resigned. In the following month J and G, two of the English directors, to whose account the deposits had been paid, returned the deposits to all the allottees who were willing to take them, and they also purchased back some shares, which had been allotted, for the benefit of the company. Accounts of all this were laid before the committee of management, and the balance remaining in the hands of the English directors was paid over, and the transactions were approved by a general meeting. A shareholder filed a bill on behalf of himself and all the other shareholders not defendants, against J, the assignees of G, and the committee of management, praying the repayment of the money returned to the allottees, and for an account; but the bill was dismissed at the Rolls, and on appeal, the decree was affirmed; the Court holding that by the law of Belgium the plaintiff was not competent to sue for such a purpose, and by the law of England he had shewn no case for the suit against the English directors. *Kent v. Jackson*, 21 Law J. Rep. (N.S.) Chanc. 438; 2 De Gex, M. & G. 49; 14 Beav. 367.

Although a point of foreign law has been proved in this country and acted upon in reported cases, the Courts will not act upon such decisions without the law being proved in each case as it arises. *M'Cormick v. Garnett*, 23 Law J. Rep. (N.S.) Chanc. 777; 5 De Gex, M. & G. 278.

Bill by an English shareholder against a Dutch railway company to be relieved against a forfeiture of shares, dismissed with costs, the undertaking and direction being foreign, and there being a decision in the Dutch courts opposed to the plaintiff's view. *Sudlow v. the Dutch Rhenish Railway Co.*, 21 Beav. 43.

No right in land situate in the colony of British Guiana is acquired except by a transport or conveyance in court in the form of a judicial act, and

therefore an assignment executed in this country of the benefit of a contract for the purchase of land in the colony as a security for monies lent to the purchaser to enable him to complete the purchase, confers no right, estate, interest, lien or charge upon such land, and such land, whether it be or be not actually conveyed to the purchaser in the form required by the law of the colony, by the payment of the purchase-money becomes subject to the claims of the creditors of the purchaser generally, without the necessity of such creditors first proceeding to judgment and execution, and a transport or conveyance cannot without notice be made to any party other than the purchaser, thereby affording an opportunity for the general creditors of the purchaser to interfere. *Waterhouse v. Stansfield*, 10 Hare, 254.

FOREIGN PRINCE.

[*The King of the Two Sicilies v. the Peninsular and Oriental Steam Packet Co.*, 6 Law J. Dig. 288; *nom. King of the Two Sicilies v. Willcox*, 1 Sim. N.S. 332.]

FORFEITURE.

[See LEASE.]

FORGERY, AND UTTERING FORGED INSTRUMENTS.

- (A) BILLS AND NOTES.
- (B) WARRANTS, ORDERS AND REQUESTS.
- (C) TRANSFERS OF SHARES.
- (D) UTTERING.

(A) BILLS AND NOTES.

The prisoner caused a fac-simile engraving to be made on a plate, of the royal arms of Scotland, and of the figure of Britannia, in the position in which they stand on the border of a promissory note of the B L Banking Company:—Held, that he was indictable under the statute 11 Geo. 4. & 1 Will. 4. c. 66. s. 18, as engraving part of a promissory note, purporting to be part of a promissory note of the B L Banking Company; as every part of what usually circulated as a note of the B L Banking Company, the ornamental border as well as the obligatory words, was to be considered part of the note within the statute. *Regina v. Keith*, 24 Law J. Rep. (N.S.) M.C. 110; 1 Dears. C.C. 486.

Held, also, that it was not necessary that the engraving should shew on the face of it, without reference to extrinsic evidence, that it purported to be part of a note of the B L Banking Company; but that the jury might look at a genuine note of the B L Banking Company, and would be justified in convicting the prisoner, if on comparison they were satisfied that the engraving on the plate purported to be part of a genuine note. *Ibid.*

(B) WARRANTS, ORDERS AND REQUESTS.

The prisoner forged and delivered as genuine to B, who owed money to A, a letter purporting to be written by A, and addressed to B, in which, after setting out the amount due from B, A was made to say, "Sir,—I hope you will excuse my sending for such a trifle," &c., "but I am obliged to hunt after every shilling":—Held, that the document was a forged "warrant" for the payment of money within the meaning of the statute 11 Geo. 4. & 1 Will. 4. c. 66. s. 3. *Regina v. Dawson*, 20 Law J. Rep. (N.S.) M.C. 102; 2 Den. C.C. 75.

Semble—that it was also a forged "order" for the payment of money. *Ibid*.

The indictment charged the prisoner with uttering, knowing the same to be forged, a certain warrant, order and request for the delivery of goods, in the words and figures following: "Mr. B, —S. Pleas sen by bearer a quantity of basket nails a clasp. E L." It was proved that E L was a customer of B's, and had employed the prisoner in his service; and that the prisoner had delivered to B a paper as set forth in the indictment, which was a forgery of E L's handwriting. The prisoner was convicted. On a case reserved it was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order and request:—Held, that there was no variance, as the document being set out *in hæc verba* in the indictment, the description of it therein became immaterial. *Regina v. Williams*, 20 Law J. Rep. (N.S.) M.C. 106; 2 Den. C.C. 61.

Forging a document purporting to be an order for the payment of money, though not addressed to any one, is punishable by the statute 11 Geo. 4. & 1. Will. 4. c. 66. s. 3. as the forging an order for the payment of money, if it can be explained by evidence to whom the order is in fact addressed. *Regina v. Snelling*, 23 Law J. Rep. (N.S.) M.C. 8.

(C) TRANSFERS OF SHARES.

The prisoner was indicted for forging a transfer of railway shares from H to himself, with intent to defraud. It was stated on the trial, before the Recorder of London, by a witness, that the shares had been transferred to H without consideration, but no evidence of a transfer was given. The only evidence of H's title was the register of shareholders in which his name was inserted. Objection was taken to the admissibility of the register, and it was also objected that the transfer to H should have been proved. The Recorder overruled the objection, and told the jury upon the question of the intention to defraud, that it was not necessary to find an intent to defraud any one in particular, but they must have in view some person who could be defrauded, so that the consequence of the prisoner's act would necessarily or possibly be to defraud some person, and it was for them to say whether, as H would be the person to whom the dividends, if any (of which there did not seem to be much probability), would legally be payable, he might not have been defrauded if the company got into better circumstances, or whether the company might not have been defrauded if they had been induced by the forgery to insert P's name on the register, and had made a call (which they appeared about to do), or whether any person might

not have been defrauded if induced to advance money on the shares in anticipation of the company coming round, and on the faith that P was the real owner of them:—Held, that though the register did not prove H's title to the dividend, it was admissible in evidence; that it was not necessary to prove H's title as a shareholder; and further, that the direction, though possibly open to objection in some respects, was sufficient considered with reference to the intent to defraud H. *Regina v. Nash*, 21 Law J. Rep. (N.S.) M.C. 147.

(D) UTTERING.

G applied to D to lend him money, and proposed the prisoner as his surety; D on that, with a view of satisfying himself as to the prisoner's responsibility, went to the prisoner's house, and asked him to produce his receipts. The prisoner thereupon placed a certain forged receipt, purporting to be a receipt for poor-rates for the house, in the hands of D, for his inspection, with the fraudulent intent of inducing him to lend the money to G. After inspecting it, D returned it to the prisoner:—Held, that the prisoner might be convicted under the statute 11 Geo. 4. & 1 Will. 4. c. 66. s. 10, of uttering a forged receipt; and that, in order to render him liable, it was not necessary that he should directly gain credit upon it operating as a receipt, but that it was sufficient that he had used it fraudulently, to get money by means of it, and whether for himself or another was immaterial. *Regina v. Ion*, 21 Law J. Rep. (N.S.) M.C. 166.

Uttering a forged testimonial to character, knowing it to be forged, with intent to deceive and thereby obtain a situation of emolument, is a misdemeanour at common law. *Regina v. Sharman*, 23 Law J. Rep. (N.S.) M.C. 51; 1 Dears. C.C. 285.

On a trial for uttering a forged note, *scienter*, the admissibility of evidence of other utterings is not affected by the case of *Regina v. Oddy*. *Regina v. Green*, 3 Car. & K. 204.

FORMEDON.

[See title LIMITATIONS, STATUTE OF.]

FRAUD AND MISREPRESENTATION.

[See titles CONTRACT—WARRANTY.]

(A) ACTION FOR.

(B) RELIEF AGAINST, IN EQUITY.

(A) ACTION FOR.

Where the intended lessor of a particular house knows that the house is in a ruinous state and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it, or unless the conduct of the lessor amounts to a deceit practised upon the

lessee. *Keates v. Cadogan*, 20 Law J. Rep. (N.S.) C.P. 76; 10 Com. B. Rep. 591.

A declaration in case stated that the defendant knowing that a certain house was in such a ruinous and dangerous state as to be dangerous to enter, occupy, or dwell in, and knowing that the state of the house was unknown to the plaintiff, by agreement in writing demised the said house to the plaintiff, and the plaintiff agreed to take the same at a certain rent, the plaintiff having previously proposed to take the house for the purpose of immediately occupying and dwelling in the same; that the plaintiff commenced dwelling in the house without notice of its state, and so continued to the knowledge of the defendant; and that the defendant neglected his duty in not giving the plaintiff notice that the house was in the said state before entering into the said agreement, and before the plaintiff commenced occupying. That, shortly after the plaintiff commenced occupying, the house fell down; alleging special damage:—Held (on demurrer to the plea), that this declaration was bad, there being nothing to shew that the plaintiff was not to put the house into repair before he commenced occupying, and it not being alleged that he was induced by his belief of the soundness of the house to enter into the agreement, or that any misrepresentation was made by the defendant to the plaintiff as to the condition of the house. *Hill v. Gray*, 1 Stark. N.P. 434, distinguished. *Ibid*.

A declaration alleged that the defendants falsely and fraudulently deceived the plaintiff in this, that "they, as brokers of the plaintiff, employed by him to purchase oil, falsely represented to him that they had purchased for him twenty-five tons of palm oil, to arrive by the *Celma*, at the price of 30*l*. per ton;" whereas, in fact, the defendants purchased the oil on the terms "that the said twenty-five tons were sold, and would be delivered to the plaintiff after and subject to the prior delivery of 800 tons of palm oil from the said vessel." Averments, that the vessel arrived with less than 800 tons, and the consequent non-delivery to the plaintiff of the twenty-five tons and loss thereby. At the trial the facts were proved as stated in the declaration, but it was conceded that there was no fraudulent intention on the part of the defendants:—Held, that an action was not maintainable on this declaration. *Thom v. Bigland*, 22 Law J. Rep. (N.S.) Exch. 243; 8 Exch. Rep. 725.

Quære—whether by the law merchant it is the duty of the broker in all cases to furnish his principal with a correct account of the contracts he has made. *Ibid*.

The second count alleged that the defendant and others had formed the company as in the first count mentioned, and that the said 12,000 shares were actually offered to the public; that the defendant, as such promoter and managing director, intending to deceive the public and to cause it to be publicly represented and advertised that the said company was likely to be a safe and profitable undertaking, and also to deceive the public who might become purchasers of the said 12,000 shares, and to induce them to become such purchasers, falsely, fraudulently and deceitfully caused it to be publicly advertised and made known in and by a prospectus issued by the defendant as such director, (*inter alia*) that the promoters of the said company, in proposing to issue

to the public the said 12,000 shares at 12*s*. 6*d*. per share free from all further calls, did not hesitate to guarantee to the bearers of the said 12,000 shares a minimum annual dividend of 33*l*. per cent., payable in half-yearly dividends of 16*l*. 10*s*. per cent. each, and that the said guarantee should remain in force until the said 12*s*. 6*d*. per share should be thus repaid to the shareholder; that the defendant, by means of the said false, fraudulent and deceitful representation, fraudulently induced the plaintiff to become, and the plaintiff by reason thereof became the purchaser and bearer of 2,500 of the said 12,000 shares at 12*s*. 6*d*. per share, and by means of the premises the plaintiff was induced to pay, and did pay 12*s*. 6*d*. for each of the said shares; whereas, in truth and in fact at the time of making the said statement, the same was false and fraudulent to the knowledge of the defendant, and the defendant had no ground whatever for offering such guarantee to the public, as the defendant well knew; by means whereof the plaintiff had lost the money so paid by him as aforesaid:—Held, that the count contained a sufficient allegation of a false representation by the defendant, and that the plaintiff was entitled to judgment upon it, as there was no necessity for any privity between the parties to support an action of tort for a false representation. *Gerhard v. Bates*, 22 Law J. Rep. (N.S.) Q.B. 364; 2 E. & B. 476.

(B) RELIEF AGAINST, IN EQUITY.

A, the executor of B, filed a bill against C, stating that C had fraudulently obtained a bill of exchange from B, and praying that the bill might be delivered up. It appeared that an action had been brought by the direction of C on the bill, and that, after the evidence for the plaintiff had been gone into, the counsel for the plaintiff had elected to be nonsuited. C declined to give any undertaking to have another action tried at the next assizes. The Court took into consideration the alleged fraud, and being satisfied that an inference of fraud was to be drawn, ordered the bill to be delivered up. *Allen v. Davis*, 20 Law J. Rep. (N.S.) Chanc. 44; 4 De Gex & Sm. 133.

After the death of A, a captain in the navy, who died at a very advanced age in Greenwich Hospital, B, a dentist, produced a bill of exchange for 262*l*., alleged to have been given him by A, and stated at one time that 100*l*., part of it, was for medical attendance, and the rest a gift, and at another time that there was a contract that he was to attend to A's teeth for the rest of his life, and supply him with teeth. B indorsed the bill to C, to whom he owed about 14*l*., on the understanding that C should bring an action for their joint benefit. The action was tried, and the counsel for the plaintiff elected to be nonsuited:—Held, that under all these circumstances an inference of fraud was to be drawn. *Ibid*.

S was aware that R was entitled to property, but might not at first be aware that the interest of R was not precarious, and impressed R with the notion that it was so; S however became aware that the interest was not precarious, yet he did not inform R of that fact, but on the contrary still represented that it was both precarious and could not be established without difficulty, delay and expensive litigation. R in such a state of circumstances sold one half of the estate to S, the latter giving him an indemnity against all costs of recovering the property, and representing that men

of business conducted cases on the arrangement that no law expenses were paid unless the proceedings were successful; but if they were, that law costs were paid out of the money recovered, and the party conducting the proceedings and furnishing the information was allowed half what was recovered to satisfy him for risk of paying law expenses. Subsequently, R agreed to sell the other half for a stated sum. R filed a bill to set aside the conveyance and to have the contract for the sale of the second moiety declared void, but died before the hearing, and the suit was revived by his devisee and executrix. S filed a cross-bill for the specific performance of the sale of the second moiety. In the first suit the solicitor of S was made a party, and was charged with a participation in the fraud. The Court below set aside the conveyance, and as the contract for the sale of the second moiety was based on the former conveyance it declared the same void, and ordered S to pay the costs, but dismissed the original suit as against the solicitor, without costs. The Court also dismissed the bill for specific performance, with costs. From this decree S appealed:—Held, that as R did not know his rights when he executed the conveyance, nor when he signed the contract for the sale of the second moiety, and that as the former was based on fraud and misrepresentation, and as the latter depended on the former, both must fail, and the decree must be affirmed, with costs. *Reynell v. Sprye, Sprye v. Reynell*, 21 Law J. Rep. (N.S.) Chanc. 633; 1 De Gex, M. & G. 660.

Where a party has induced another to act on the faith of several representations made by him, any one of which has been made fraudulently, he cannot set up the transaction by shewing that every other representation was truly and honestly made, or was the result of innocent error. *Ibid*.

A representation that remuneration for professional services rendered, as above stated, was customary, being untrue, is a ground for setting aside a conveyance and contract founded on it. *Ibid*.

Whether the agreement amounted to champerty, or savoured of champerty, still as the parties were not *in pari delicto*, and as the vendor had no legal advice but that of the solicitor of the purchaser, who adhered more to the purchaser than to the vendor, and failed in his duty to the latter, the Court considered that the vendor's suit ought not to fail, on the ground that he was a party to a contract against public policy or illegal. *Ibid*.

The Court being of opinion that, although the solicitor had acted contrary to public policy, whether through misapprehension or otherwise, and although his duty professionally prohibited him from assisting where there was *aliquid simulatum aliquid actum*, and although he abetted in the composing and uttering of documents which recorded an affair as it was not, yet still as the Court had no firm impression that the decree below ought to have charged him with costs, it refused to vary the decree in this respect. *Ibid*.

A, being liable to the plaintiff for a breach of trust, conveyed his property to his son in consideration of a life annuity of 60*l*. The consideration for the conveyance was greatly inadequate. The father was in a dangerous state of health, and died seven days after, leaving no property. The conveyance was set aside as fraudulent, for the benefit not only

of the plaintiff, but of all the other creditors of A. *Strong v. Strong*, 18 Beav. 408.

It is an established doctrine of equity that, where a bill sets up a case of fraud as a ground for relief and such fraud is not proved, the plaintiff is not entitled to relief by establishing some other fact independent of the fraud, which might of itself create a title to relief under a head of equity, distinct from that applicable to the case of the fraud alleged. *Price v. Berrington*, 3 Mac. & G. 486.

Where a person by a deed, eight days before his death, grants a benefit to his grandson and son-in-law, there is no such confidential relation as to induce this Court to presume fraud. *Beanland v. Bradley*, 2 Sm. & G. 339.

A tenant for life and his son, who was tenant in tail male in remainder, joined in recovery deeds purporting to assure the entailed property to the use of trustees for a term in trust to pay off certain mortgage debts, with remainder to the use of the son during the life of the father, with remainder to the use of the father's wife for life, with remainder to the use of the son for life, with remainder to the use of the sons of the son successively in tail, with remainder to the use of his daughters in tail, with an ultimate remainder to the use of the father in fee. The father executed these deeds with the intent to defraud his creditors, but that object was concealed from the son. The father became bankrupt, and the deeds were at the suit of his assignees ordered to be delivered up and cancelled:—Held, in a subsequent suit of a grandson (tenant in tail under the recovery deeds) that the deeds were not only void as against the creditors, but that the grandson had no equity as against a purchaser from the son to have the trusts of the term performed. *Tarleton v. Liddell*, 4 De Gex & S. 533.

If a case of fraud is made by a bill and is not established by the evidence, and another case for relief is alleged in the same bill and proved, so much only of the bill as relates to the case of fraud is dismissed, and relief may be given on the other part of it. *Parr v. Jewell*, 1 Kay & J. 671.

But if a case of actual fraud is alleged by the bill, the plaintiff cannot obtain relief upon such a bill by proving only a case of constructive fraud. *Ibid*.

The bill alleged that the plaintiff, without consideration, gave a promissory note and accepted certain bills of exchange for the accommodation of A, and that A discounted the note and negotiated the bills for his own use, and paid them before or after they became due, and told the plaintiff that he had done so, and that he was ready to give them up to the plaintiff. The bill also alleged that A afterwards fell ill, and when he was near his death his son found among his papers the note and bill uncanceled, and handed them over to B, who gave them to the defendant, and that the defendant knew when he received them that B had obtained possession of them without the sanction of A and without consideration, and the bill sought to have the note and bills delivered up, and to restrain an action by the defendant upon them. *Quære*—whether, the case of fraud not having been proved, the plaintiff could obtain relief upon proof that the note and bills were given without consideration to A, and that there was an express agreement between him and the plaintiff that they should not be negotiated when overdue. *Ibid*.

A, who was a labouring man, receiving about 9s. a week and totally uneducated, believing himself to have a contingent interest in an estate in fee simple, offered in February 1838 to sell his interest to B. B applied to his attorney, who advised that, as A's father might cut off the entail, A had no saleable interest. B declined the purchase, but shortly afterwards consented to lend money to A, and lent different sums, amounting in the whole to 20*l.* A, on the 5th of May 1838, executed a money bond conditioned in the penalty of 40*l.* to secure the payment of 20*l.*, with 5*l.* per cent. interest, on the 5th of November then next. A was not called on for interest, nor did he hear of the matter again till the 22nd of September 1840, the day of his father's funeral. His father had not interfered with the descent of the property, and A had at that time become possessed of the estate. On the 24th of September A entered into an agreement to sell the estate to B, and that agreement was carried into execution by a conveyance on the following 10th of October. The bond, agreement, and conveyance were prepared by B's attorney, and executed at his office. A had no attorney. The estate was sold considerably under its value. A afterwards filed a bill alleging these facts, and praying that the deed of conveyance might be set aside as fraudulent and void:—Held, that the bill, as a bill charging fraud, was properly dismissed. *Curson v. Belworthy*, 3 H.L. Cas. 742.

Quære—whether A might not have maintained a bill to set aside the conveyance as improvidently made and hastily executed. *Ibid.*

A debtor having contracted to purchase an estate caused the conveyance to be made to trustees, and trusts to be declared by deeds dated in March 1850, which recited the agreement of the debtor for the purchase, and that the conveyance to the trustees was by his direction, and declared the trusts to be for the sale of the property, and retaining the proceeds for the benefit of the wife and children of the debtor. By one of the deeds of March 1850 the debtor also assigned to the same trustees all the furniture in certain houses (one of which was on the purchased estate), upon the same trusts for his wife and children. The debtor was at the date of these deeds indebted to an extent which would render a voluntary disposition of his estate fraudulent under the statute 13 Eliz. c. 5, as against creditors. The trustees were not informed of the assignment of the furniture to them, and it continued in the possession of the debtor until the subsequent assignment next mentioned. By a mortgage-deed dated in November 1851 the debtor conveyed and assigned all his real and personal estate to a creditor, to whom he had after the voluntary deeds of March 1850 become largely indebted, to secure so far as it would go the debt owing to such creditor, and the creditor thereupon took possession of the furniture:—Held, that although the purchased estate was never vested at law in the debtor, yet as he had by the contract acquired an equitable interest in it, which interest was conveyed to the trustees under the voluntary deeds of March 1850, such conveyance was fraudulent as against creditors under the statute 13 Eliz. c. 5. That the assignment of the furniture by the voluntary deed of March 1850 was also fraudulent as against creditors. That as against the creditor entitled under the mortgage by the debtor of all his

real and personal estate by the deed of November 1851, although it did not specify in particular the purchased estate comprised in the voluntary deeds of March 1850, those deeds were, as to such purchased estate, fraudulent and void under the statute 27 Eliz. c. 4, and that that estate passed to such creditor by the mortgage-deed of November 1851. That the furniture assigned to trustees by the voluntary deed of March 1850 did not pass by the assignment of all the personal estate of the debtor by the mortgage-deed of November 1851, and that the creditor claiming under that deed did not acquire any specific lien or title to such furniture, either by the said deed or by the act of taking possession thereof. *Barton v. Vanheghthuysen*, 11 Hare, 126.

FRAUDS, STATUTE OF.

- (A) OPERATION OF THE STATUTE.
- (B) CONTRACTS REQUIRED TO BE IN WRITING.
 - (a) *Concerning an Interest in Land.*
 - (b) *For Leases—Surrender by Operation of Law.*
 - (c) *To answer for Debt, &c. of another.*
 - (d) *Part Performance.*
- (C) WHAT A SUFFICIENT NOTE OR MEMORANDUM IN WRITING.
- (D) ACCEPTANCE AND RECEIPT.
- (E) PLEAS.

(A) OPERATION OF THE STATUTE.

The 4th section of the Statute of Frauds does not make the agreements therein mentioned void, but only prevents their being enforced by action, if the requirements of that section are not complied with. *Leroux v. Brown*, 22 Law J. Rep. (N.S.) C.P. 1; 12 Com. B. Rep. 801.

Therefore, an action cannot be maintained in this country upon a parol agreement, which is not to be performed within a year, although made in France, and valid and enforceable there. *Ibid.*

(B) CONTRACTS REQUIRED TO BE IN WRITING.

(a) *Concerning an Interest in Land.*

A verbal agreement was made between the plaintiff and defendant, that in consideration of the plaintiff giving up to the defendant immediate possession of a house which the former held and occupied under an agreement from his landlord for a seven years' lease, and of certain fixtures and improvements done by the plaintiff on the premises, the defendant would pay the plaintiff 100*l.* The landlord assented to the change of tenants. The plaintiff gave up possession to the defendant, who came in and was accepted as tenant, and paid to the plaintiff a portion of the 100*l.* The plaintiff brought a plaint on the contract to recover the balance:—Held, that this was a contract concerning an interest in land, and that as it was not in writing, section 4. of the Statute of Frauds prevented any action being maintainable upon it, though it had been so far performed. *Kelly v. Webster*, 21 Law J. Rep. (N.S.) C.P. 163; 12 Com. B. Rep. 283.

In an action to recover the expenses incurred by the plaintiff in investigating the defendant's title to

mortgage certain lands, upon the ground that the defendant's title had turned out to be defective, the declaration stated, that, in consideration the plaintiff would advance 2,000*l.* upon the security of a mortgage of the land, upon the defendant's making out a good title to mortgage the said lands to the plaintiff, the defendant promised the plaintiff to pay him the expenses to which he might be subjected in case the loan should go off by reason of the defendant changing his views or of the defectiveness of the defendant's title. The evidence of the defendant's title was as follows:—The defendant, shortly before the agreement with the plaintiff, had contracted to purchase the premises of one W E, who claimed as heir-at-law *ex parte maternâ* to one B H, the person last seised. J H, the father of B H, married E E, and died in 1787, aged 59, and devised the property to his son B H and his two daughters, and, after their death, to B H in fee. The daughters both died unmarried, before B H, who died a bachelor, in 1839. In order to negative the existence of any heirs *ex parte maternâ*, depositions in a Chancery suit of E v. E, in 1843, had been forwarded to the plaintiff, in which the deponents stated that they were well acquainted with B H, who told them that "he had no relation left." And the deponents stated, that they believed B H had no relation left, on his father's side, living at the time of his death. It further appeared, that two issues had been directed in the same suit, in which both parties claimed the property as heir to B H *ex parte maternâ*; and that the jury had found, upon two occasions (the cause having been tried twice), first, that B H did not leave any heir *ex parte maternâ*; and, secondly, that the plaintiff in that suit (W E, from whom the defendant claimed), was heir-at-law of B H *ex parte maternâ*. A statutory declaration had also been furnished to the plaintiff, in which the declarant stated, that B H and his sisters had told him, on several occasions, that they had no relations whatever on their father's side, and that they had often heard their father declare that he had no relations whatever, but that he was the last of his family:—Held, first, that the agreement between the plaintiff and defendant was not within the 4th section of the Statute of Frauds; and, secondly, per *Pollock, C.B., Alderson, B., and Platt, B.*, that the defendant had not made out a good title to the land; for that by "a good title" was to be understood such a title as the Court of Chancery would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment by any claimant; *dissentiente Martin, B.*, who held that it was sufficient to establish a legal title in point of fact. *Jeakes v. White*, 21 Law J. Rep. (N.S.) Exch. 265; 6 Exch. Rep. 873.

An agreement for the sale of a milk-walk, by which the plaintiff agreed to let the defendant into occupation of premises of which the plaintiff was tenant, and the defendant agreed to pay the rent, rates and taxes, is a contract concerning an interest in land requiring a memorandum in writing under the 4th section of the Statute of Frauds. *Smart v. Harding*, 24 Law J. Rep. (N.S.) C.P. 76; 15 Com. B. Rep. 652.

Commissioners were empowered by act of parliament to borrow money on mortgage of lands, hereditaments and funds, or on bond; and by a subse-

quent act the bondholders were to be "entitled to the benefit of" the mortgage, which the act recited had been executed by the Commissioners to a trustee in trust for the bondholders:—Held, that the obligee of such bond was in the situation of a mortgagee; and that a contract for the sale of the bond was a contract for the sale of an interest in land within the 4th section of the Statute of Frauds. *Tophin v. Lomas*, 24 Law J. Rep. (N.S.) C.P. 144; 16 Com. B. Rep. 159.

A contract for the sale of shares in a mining company managed on the cost-book principle is not a contract for the sale of land or an interest in land, under the 4th section of the Statute of Frauds, 3 Car. 2. c. 19; *dissentiente Parke, B.* Nor is it a contract for the sale of goods, wares and merchandise, within the 17th section of that statute. *Watson v. Spratley*, 24 Law J. Rep. (N.S.) Exch. 53; 10 Exch. Rep. 222.

(b) *For Leases—Surrender by Operation of Law.*

In an action of debt for rent on a demise for seven years the defendant pleaded that whilst the demise was in force, and before the accrual of the rent, it was agreed between him and the plaintiff that the plaintiff should make certain alterations, and that in consideration thereof he the defendant should relinquish his interest under the demise, and take a new lease for seven years; and until such new lease should be tendered, that he should remain tenant from year to year; that the plaintiff did make the alterations, and that he the defendant, in pursuance of the agreement, relinquished his interest under the lease, and entered upon the premises under the agreement; and that, by means of the said premises, he the defendant was tenant from year to year, and that his title under the lease was surrendered. Issue was taken on this plea, and at the trial no written agreement was proved, but the jury found a verdict for the defendant:—Held, that the agreement was an entire agreement, and the part relative to a lease for seven years being required to be in writing under the Statute of Frauds, no part of it could be proved by parol. *Forquet v. Moore*, 22 Law J. Rep. (N.S.) Exch. 35; 7 Exch. Rep. 870.

(c) *To answer for Debt, &c. of another.*

[See *Macrory v. Scott*, post (C).]

An agreement by a factor to sell upon a *del credere* commission need not be in writing, not being a promise to answer for the debt, default, or miscarriage of another person, within the 4th section of the Statute of Frauds. *Couturier v. Hastie*, 22 Law J. Rep. (N.S.) Exch. 97; 8 Exch. Rep. 40.

(d) *Part Performance.*

A, the owner of leasehold property, told B that he intended to give him that property on the marriage between B and the daughter of A. After the marriage A gave up possession to B, and B expended money upon it. A died, and his administrator claimed the money which had been paid into court on the purchase by a charity of the property: but the Court held, that the parol agreement having been followed up, not only by marriage, but by possession of the property and money expended on it in repairs, belonged to B; and that the case was not within the Statute of Frauds. *Surcome v. Pinniger*,

22 Law J. Rep. (N.S.) Chanc. 419; 3 De Gex, M. & G. 571.

(C) WHAT A SUFFICIENT NOTE OR MEMORANDUM IN WRITING.

As between buyer and seller, the bought and sold notes, signed and delivered by a broker acting for both parties, when they agree, and there is no signed entry of the contract in the broker's book, are the memorandum in writing which constitutes the contract binding on both parties within the Statute of Frauds. But when they materially vary, there is no such binding contract; and neither the bought note delivered to the buyer, nor the sold note delivered to the seller, can then be treated by itself as such memorandum in writing. *Stevewright v. Archibald*, 20 Law J. Rep. (N.S.) Q.B. 529; 17 Q.B. Rep. 103.

The entry of the contract made in the broker's book, and signed by him, constitutes the binding contract between the parties; and a variance between it and the bought or sold note afterwards delivered by the broker would not affect its validity.—*per Lord Campbell, C.J., Patteson, J. and Wightman, J.* But, *per Erle, J.*, bought and sold notes signed and delivered by a broker acting for both parties, who has made no signed entry in his books of the contract, are not, by presumption of law, without other evidence of intention, a binding contract in writing, and do not exclude other evidence of the contract, and of a compliance with the Statute of Frauds, in case the bought and sold notes materially vary. *Ibid.*

Declaration, setting out a sold note, signed by a broker for the sale to the defendant of "500 tons Messrs. Dunlop, Wilson & Co.'s pig-iron," and averring a breach of the contract on the part of the defendant in not accepting or paying for the iron when tendered. Plea, non assumpsit. It was proved that the broker on behalf of the plaintiff had verbally agreed to sell the defendant "Dunlop, Wilson & Co.'s iron"; and on the 26th of February 1849 delivered a bought note to the defendant. The bought note, being produced, differed from the sold note delivered to the plaintiff, in stating the purchase generally as of "500 tons of Scotch pig iron." There was no signed entry of the contract in the broker's book. The learned Judge allowed the declaration to be amended according to the terms of the bought note. It was then further proved that the broker had the delivery orders for iron ready to be handed to the defendant on the 26th of March; and between that date and the 27th of October the defendant several times authorized the broker to propose terms to the plaintiff as to the delivery of the iron, and the payment of the purchase-money, without, however, any reference being made to the terms of either the bought or sold note. The jury found that the defendant had subsequently ratified the contract in the terms stated in the bought note:—*Held, per Lord Campbell, C.J., Patteson, J. and Wightman, J.*, first, that there was a material variance between the bought and sold notes; and therefore, that they did not constitute a valid contract. Secondly, that assuming there was evidence of a parol contract, there was no sufficient memorandum in writing, within the Statute of Frauds, to make such contract binding upon the defendant. *Ibid.*

Held, also, per Lord Campbell, C.J. and Wightman, J., that there was no sufficient evidence of any subsequent ratification by the defendant of the contract, as stated in the bought note. *Ibid.*

Held, per Erle, J., that the jury were warranted in inferring, as it appeared they intended to do, the substance of the contract to be as stated in the bought note and amended declaration; and that the plaintiff, therefore, was entitled to succeed, on the ground either that the bought and sold notes did not substantially vary, or that the bought note, which stated the substance of the contract, was a sufficient memorandum within the Statute of Frauds to bind the defendant. *Ibid.*

Assumpsit for the price of certain barrels of flour. The defendant wrote to the plaintiff, stating that he had received the barrels, which were not so fine as the samples, and were not the barrels he had bought, and that he would not have them. The plaintiff answered that he was astonished at any fault being found with the flour, that it was sold subject to the defendant's examining the bulk, and that it was not until after the defendant had examined it and satisfied himself of both quality and condition that he confirmed the purchase, and could not, therefore, object to fulfil his agreement. The defendant replied that the barrels received were not the same as those he saw, nor so fine as the samples, and that if the plaintiff would take them back and pay charges the defendant would send them, and that he could not tell what to do with them:—*Held*, that as the letters did not express all the terms of the contract, but contained an express refusal by the defendant to receive the flour, they did not constitute a sufficient contract to take the case out of the 17th section of the Statute of Frauds. *Archerv. Baynes*, 20 Law J. Rep. (N.S.) Exch. 54; 5 Exch. Rep. 625.

Debt on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for Scott Brothers, for monies advanced by the plaintiff to them; that after the judgment recovered the plaintiff settled with Scott Brothers, and that there was nothing due upon the judgment for monies advanced. Replication, that after judgment recovered an indenture was executed between the plaintiff and Scott Brothers, whereby, after reciting the judgment and various disputed accounts, an agreement was made between the plaintiff and Scott Brothers for the settlement of all disputes, by which it was agreed, *inter alia*, that the plaintiff should advance 800*l.* to the Ulster Banking Company, which he had guaranteed to them, and 200*l.* to Scott, Brothers, and that the debt from Scott Brothers, should be fixed at 1,000*l.*, and that the agreement should be without prejudice to the security of the said judgment against the defendant. Averment, that after the making of the said indenture, and before the execution by the plaintiff, in consideration that the plaintiff would execute it, and would advance the said sums of 800*l.* and 200*l.*, the defendant promised that the said judgment should stand security for the repayment of the said sum of 1,000*l.* and interest. Averment of performance by the plaintiff, and that the said sums of 800*l.* and 200*l.* had been advanced, but never repaid. Rejoinder, traversing the promise, *modo et forma*. Issue thereon. To prove this issue, the plaintiff put in the following letter from the defendant and another

surety, dated before the execution of the deed by the plaintiff:—"We hereby consent to the within deed being executed by and between the parties, without prejudice to the rights and remedies of the plaintiff, &c., under his judgment for 10,000*l.*, to recover the sum of 1,000*l.* &c. This letter had been annexed to the deed, and was intended to have been sent therewith to the defendant for signature, but the letter alone was sent, and the defendant signed it without seeing the deed. *Semble*—that this was not a promise to pay the debt of another within the Statute of Frauds; but that if it were, there was a sufficient memorandum in writing, as the letter signed by the defendant incorporated so much of the deed as formed the consideration of his promise; and,—Held, that the issue was rightly found for the plaintiff. *Macrory v. Scott*, 20 Law J. Rep. (N.S.) Exch. 90; 5 Exch. Rep. 907.

Mortgages having offered to give the defendant, the executor of the mortgagor, time for payment of the mortgage-money provided a sum of 1,500*l.* should be made up on a day fixed, the defendant, on the 18th of December, wrote them a letter, stating his present inability to pay, and asking for a year's time, but saying he had 100*l.*, which he would pay over, and that he would engage by the beginning of April to have another 100*l.* ready, and other sums afterwards. The letter contained other statements, and a further request for time. On the third of January the mortgagees sent the defendant an answer saying they considered that 200*l.* would be paid by the 1st of April, but could not promise further time unless the amount was made up to 1,500*l.* The 200*l.* not having been paid by the 1st of April, an action was brought by the mortgagees against the defendant, seeking to charge him personally on a promise to pay him that sum, made in consideration of forbearance to the 1st of April:—Held, by *Jervis, C.J., Williams, J. and Talfourd, J.*, that there was no sufficient promise in writing to bind the defendant personally, under the Statute of Frauds, the correspondence not shewing any unqualified promise by the defendant; by *Maule, J. dissentiente*, that the letter of the 18th of December was separable into two parts, the first of which contained an unqualified offer as to the 200*l.* in consideration of forbearance till the 1st of April, which was accepted in the letter of the 3rd of January, and that, therefore, the Statute of Frauds was satisfied. *Hamilton v. Terry*, 21 Law J. Rep. (N.S.) C.P. 132.

A having agreed to sell to B two parcels of goods before they were delivered, B procured from C a letter as follows:—"Upon your handing me your two drafts upon B respectively for 200*l.* and 146*l.* at two months from this date, I undertake to get them accepted by B, and to see them paid." This was signed by C. The goods were then delivered, but B a few days afterwards discovered that the goods charged 146*l.* should have been charged 150*l.*, and drew two bills accordingly for 200*l.* and 150*l.* respectively, which C procured B to accept, and C then wrote across the guarantee the following words: "I have received the two drafts, one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*, both accepted by B." Under this the plaintiff signed his own name:—Held, that this was rightly described as an undertaking by C to see the two bills of 200*l.* and 150*l.* respectively paid by B,

and that it was sufficiently signed within the Statute of Frauds. *Bluck v. Gompertz*, 21 Law J. Rep. (N.S.) Exch. 278; 7 Exch. Rep. 862.

Defendant being solicitor for the purchaser of real estate, who had made default, wrote to the solicitors of the plaintiff, who was the vendor, in the following terms:—"To save the purchaser from danger of entire destruction of his credit, there appears to be no alternative but for me to undertake to settle the purchase. After long consideration, I very reluctantly undertake to settle it within two months, if that will be satisfactory to your client:—Held, that this expressed a promise conditional on the plaintiff's accepting the offer, and was therefore a memorandum of a contract in consideration that the plaintiff would accept the offer, sufficiently shewing the consideration to satisfy the 4th section of the Statute of Frauds. *Powers v. Fowler*, 4 E. & B. 511.

A letter signed by the purchaser not containing the terms of the contract, but on a fair view of the evidence referring (though not in terms) to a memorandum containing them:—Held, sufficient within the Statute of Frauds. *Morgan v. Holford*, 1 Sm. & G. 101.

(D) ACCEPTANCE AND RECEIPT.

In an action to recover the price of ten hogsheads of claret it appeared that the defendant having verbally ordered ten hogsheads of the plaintiff, the latter, in October, sent him fifteen, whereupon the defendant wrote to him, stating that he could only take ten on their proving satisfactory, and would hold the other five on account of the plaintiff. To this the plaintiff answered thus, "Whatever suits you best is most acceptable to us. The wine is superior. You will ascertain in the spring if you have room for it." The defendant placed the fifteen hogsheads in the bonded warehouse in his own name, and shortly after tasted and disapproved of the wine, but gave no notice to the plaintiff of his disapproval until April following, and in May refused to take any of the wine:—Held, that there was not an acceptance of the ten hogsheads within the 17th section of the Statute of Frauds. *Cumliffe v. Harrison*, 20 Law J. Rep. (N.S.) Exch. 325; 6 Exch. Rep. 903.

Upon a verbal order for the supply of a cargo of china stone from Cornwall, to be sent to the Anderton Carrying Company, at Liverpool, to be by them forwarded to Hanley, in Staffordshire, the vendors, on the 21st of April, shipped the stone on board a vessel not named by the vendees, and the captain signed a bill of lading for delivery of the stone to the Anderton Company at Liverpool, a copy of which was sent by post, on the 23rd of April, to the Anderton Company. On the 24th of April, the vendees were informed by letter that the stone had been shipped and consigned to the Anderton Company. On the 4th of May the vendees were informed, by letter, of the loss of the vessel and cargo on the 25th of April, and thereupon they repudiated the contract, and refused payment of the price:—Held, in an action for the price, that there was no evidence of an acceptance and receipt of the stone within the 17th section of the Statute of Frauds, so as to bind the defendants. *Meredith v. Meigh*, 22 Law J. Rep. (N.S.) Q.B. 401; 2 E. & B. 364.

Where a person agrees to buy goods to be separated from the bulk, and directs them to be sent, when separated, to a particular place, the mere delivery at that place by the vendor is not of itself a sufficient acceptance and receipt within the Statute of Frauds, for the purchaser must have the opportunity of exercising his option after the separation has been made, unless he has done some act to deprive himself of that option. *Hunt v. Hecht*, 22 Law J. Rep. (N.S.) Exch. 293; 8 Exch. Rep. 814.

(E) PLEAS.

A plea that the promise sued upon was a promise to answer for the debt of another person, and that there was no agreement or memorandum or note thereof in writing and signed by the defendant, is bad as amounting to the general issue. *Reed*, or *Reade*, v. *Lamb*, 20 Law J. Rep. (N.S.) Exch. 161; 6 Exch. Rep. 130.

FRIENDLY AND BENEFIT SOCIETIES.

[See title COMPANY, 3—(A) (d).]

- (A) ILLEGAL SOCIETIES.
- (B) RIGHTS AND POWERS OF THE TRUSTEES.
- (C) RULES AND REGULATIONS.
- (D) LOANS AND ADVANCES.
- (E) JURISDICTION OF JUSTICES.
- (F) ARBITRATION.
- (G) QUALIFICATION OF MEMBER TO VOTE FOR MEMBER OF PARLIAMENT.
- (H) DUTIES AND LIABILITIES OF OFFICERS.
- (I) DISSOLUTION OF.

(A) ILLEGAL SOCIETIES.

[See *Burridge v. Cotton*, post (D).]

A company, consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot. In connexion with this company there was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the company; and as part of the same concern, a bank in which the subscribers of the company might place their savings for purchasing their land from the company. The Judge, in an action of libel, having directed the jury that the whole of this scheme was illegal, on the grounds of its being contrary to the Lottery Acts and also to the Bank Act.—Held, that the scheme being illegal, as being contrary to the Bank Act, there was no misdirection. *O'Connor v. Bradshaw*, 20 Law J. Rep. (N.S.) Exch. 26; 5 Exch. Rep. 882.

Quære—Whether it was contrary to the Lottery Acts. *Ibid*.

(B) RIGHTS AND POWERS OF THE TRUSTEES.

Money which, by the rules of a friendly society, ought to have been deposited with a treasurer appointed by the society, was paid directly to the bankers of the society. The bankers were adjudicated bankrupts, and the society, under the 167th section of the Bankrupt Act, claimed to be paid in

full, and in support of the claim filed an affidavit, swearing that the bankers were "employed in the office of treasurer":—Held, that the petitioners were not entitled to payment in full. *Ex parte Oxford*, in re *Rufford*, 21 Law J. Rep. (N.S.) Bankr. 31; 1 De Gex, M. & G. 483.

A bankrupt was the treasurer of a benefit building society, and at the time of the adjudication he was a defaulter as treasurer. The trustees claimed to be paid in full in preference to the other creditors, by virtue of the 167th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), but the Commissioner disallowed the claim, whereupon the trustees appealed:—Held, that the 167th section did not apply to benefit building societies, and that the trustees had no right of priority over the other creditors. *Ex parte Bailey*, in re *Barrell*, 23 Law J. Rep. (N.S.) Bankr. 36; 5 De Gex, M. & G. 380.

Held, also, that any preference given by the 12th section of the statute 4 & 5 Will. 4. c. 60. and the 4th section of the statute 6 & 7 Will. 4. c. 32. is taken away by the Consolidation Act. *Ibid*.

Quære—whether the claim could have been sustained under those sections before the passing of the Consolidation Act. *Ibid*.

The trustees of a benefit building society having, through a shareholder as their agent, purchased an estate out of the funds of the society, and paid a sum of money on account of the deposit, filed their bill against their agent, who had himself obtained a conveyance of the estate, which he refused to convey to the trustees of the society, to compel him to convey the estate to them upon the trusts and for the purposes of the society. Upon a demurrer for want of equity and for want of parties.—Held, that the trustees had power to institute this suit to obtain a conveyance, though the purchase which had been made was alleged to be illegal and contrary to the act of parliament and the rules of the society; and that a suit instituted by the trustees authorizing the purchase, on behalf of themselves and all the other members and shareholders of the society, was sufficient; that it was not necessary to bring all the members before the Court to consent to the purchase, and that the jurisdiction of this Court was not ousted by the appointment of a separate jurisdiction for the regulation of the affairs of these societies. *Mullock v. Jenkins*, 21 Law J. Rep. (N.S.) Chanc. 65; 14 Beav. 628.

(C) RULES AND REGULATIONS.

The rules of a friendly society, duly certified under the 4 & 5 Will. 4. c. 40. s. 4, by the barrister appointed for that purpose, are binding and conclusive upon the members, and their validity cannot, after they have been so certified, be questioned. *Dewhurst v. Clarkson*, 23 Law J. Rep. (N.S.) Q.B. 247; 3 E. & B. 194.

Held, therefore (*Erle, J.* differing in opinion), in an action by the three trustees of a friendly society, acting under new rules certified by the barrister, to recover the funds of the society from a treasurer appointed under the old rules of the society, that the defendant could not object to the validity of the new rules on the ground that they had been irregularly passed. *Ibid*.

The new rule, under which the plaintiffs had been appointed, provided for the appointment of trustees,

one of whom was to be treasurer, in whose names the funds of the society should be invested. The treasurer of the society was not one of the trustees; and held, therefore, that the action could not be maintained. *Ibid.*

By the rules of an association established under the Building Societies Act, 6 & 7 Will. 4. c. 32, it was provided that the funds of the society should from time to time be put up for sale, the highest bidder to be the purchaser, and to receive shares at the rate of his bidding. Shares were paid for by monthly subscription. The nominal value of the shares was 120*l.* When the actual value reached that amount by the payments made, all arrears of subscription, &c. to be called in, the 120*l.* per share to be paid, and the society dissolved. In the mean time, any member desirous of receiving the actual value of his share or shares by way of loan might obtain it on mortgage of buildings, paying then 4*s.* per share monthly, beyond his subscription, for redemption money or interest. The directors were empowered to borrow money for the purpose of making advances on shares. By the declared practice of the society, members who did not wish to take loans might allow their monthly payments to accumulate at compound interest till the society dissolved: and there were in fact capitalists who so placed their money without any view to borrowing for building purposes or otherwise:—Held, that the rules and practice of this association did not contravene statute 6 & 7 Will. 4. c. 32, or deprive the society of the protection against the usury laws given by section 2, and thereby render it an illegal association if the loan produced more than 5 per cent. annually. *Doe v. Morrison v. Glover*, 15 Q.B. Rep. 103.

Whether the regulations of such a society were a mere colour for usury would be a question for a jury, looking to the regulations themselves and the other evidence. *Ibid.*

By a rule of the society, actions relating to their property were to be brought by the trustees, who were to be indemnified out of the funds; but they were not to commence any action without consent of the directors:—Held, that, on the trial of an action brought by them, the defendant (though a member of the society) could not allege that they were suing without the requisite consent. *Ibid.*

By another rule, disputes between the association and any of its members were to be referred to arbitration, according to statute 10 Geo. 4. c. 56. (Friendly Societies Act) s. 27. A member, borrowing the amount of his share from the association, gave the trustees a mortgage of premises held by him on lease, which contained a clause of forfeiture on non-payment of rent; and he covenanted, by the mortgage-deed, to pay his dues to the association, and to pay his landlord the rent reserved by his lease:—Held, that, on default by the mortgagor in payment of the society's dues, and also in payment of the rent, the trustees might proceed at law, and were not bound by the arbitration clause. *Ibid.*

(D) LOANS AND ADVANCES.

In 1845 a society, called the Frugal Investment Society, was established, and a book of rules was framed and approved of by the barrister appointed under the Friendly Societies Act. By these rules it was declared that the society should last for one

hundred months; that every member should pay 1*l.* a month in respect of each share held by him; that members might be paid their shares in advance upon the terms of paying 8*s.* a month by way of interest in respect of each share so anticipated, in addition to the subscription, and giving security for such payments. All monies which should be paid to the society, exclusively of the subscriptions, were to be divided among the members every year. The society consisted of 180 members. A took some shares in the society, and received the amount of them in advance, and made a mortgage of real estate to the trustees of the society, for the purpose of securing the sums payable by him under the rules. A paid sums to the society, to an amount, however, less than the sums so payable. He afterwards filed a bill against the trustees, praying that, upon accounting for the sums advanced to him and interest, the difference, if any, between this amount and the sums paid by him might be repaid to him by the trustees, and that the mortgaged property might be reconveyed to him:—Held, that A had, on this bill, no right to relief. *Burbidge v. Cotton*, 21 Law J. Rep. (N.S.) Chanc. 201; 5 De Gex & Sm. 17.

The above-mentioned loans made to A, under the rules of the society, were not usurious. *Ibid.*

Whether the society came within the Friendly Societies Act, or whether it was an illegal one—*quære*. *Ibid.*

A building society was formed under the 6 & 7 Will. 4. c. 32. The articles of the society provided that certain monthly subscriptions and payments should be made by the members, in respect of each share held by them, until the joint contributions were of an amount to enable each member to receive 100*l.* in respect of each share. Power was given to the society to advance to any member his shares at a discount; such member executing a mortgage to secure the due payment of his future subscriptions. The plaintiff took an advance upon his five shares at the rate of 45*l.* 10*s.* per share, and executed to the society a mortgage for securing the payment of his future subscriptions, &c. The mortgage deed contained no covenant or stipulation for the repayment of the money advanced upon the shares; and the articles of the society provided that at the termination of the society the mortgage should be indorsed as satisfied, without contemplating the repayment of the advance made. Upon a suit by the mortgagor to redeem,—Held, reversing the decision of the Court below, that the advance so made to the plaintiff was not a loan, but an anticipatory payment, by way of discount, of the shares he would otherwise have been entitled to at the termination of the society; and that the mortgage was to secure his future subscriptions, &c. until that period; and that he was not entitled to redeem upon the terms of repayment of the advance, minus the amount of subscriptions paid by him up to the notice to redeem; and the bill was dismissed. *Per Lord St. Leonards, L.C.* the dismissal of the bill was not a slip in the decree; and a petition for a second rehearing was dismissed. *Seagrave v. Pope*, 22 Law J. Rep. (N.S.) Chanc. 258; 1 De Gex, M. & G. 783.

(E) JURISDICTION OF JUSTICES.

The rules of a society established under the 10 Geo. 4. c. 56, provided for a reference of disputes

to arbitrators, nine of whom were duly appointed at the first meeting of the society, and by the rules five of them, whose names were to be drawn by the complaining party, were to be the arbitrators to decide the dispute. In April 1852 D was expelled by the society. In June 1852, the society *bond fide* believing that some of the arbitrators were dead, and that others had left the neighbourhood and were incapable of acting, at a meeting duly called for the purpose appointed nine new arbitrators in the place of those originally appointed. In September 1852 D applied to have the question of his expulsion referred to arbitration. At a meeting held in October 1852 in compliance with his application, six of the nine new arbitrators were present, and D refused to draw out five names as required by the rules, but proposed to refer the dispute to five of the six arbitrators present. This was assented to, and an award made by the five confirming the expulsion. On the 18th of January 1853 D made a second application for a reference of the same dispute, to which the society agreed, and at the meeting held for that purpose on the 25th of February 1853, when the names of the nine arbitrators had been placed in a box for the purpose of D drawing out five of them, D refused to do so and went away, and consequently no arbitrators were ever appointed. In March 1853 D obtained a summons under the 4 & 5 Will. 4. c. 40. s. 7. calling upon the president of the society to appear before Justices for the purpose of having the dispute decided, the society having refused to comply with the application for a reference. The president appeared, and objected to the jurisdiction of the Justices, on the ground of the prior award and proceedings. D then contended that the existing arbitrators had not been legally appointed, and therefore that the Justices had jurisdiction to decide the dispute. The Justices decided that they had jurisdiction; and after hearing the evidence of D made an order for the reinstatement of D as a member of the society:—Held, that the Justices had no jurisdiction to make such an order; that the 10 Geo. 4. c. 56. s. 27. had been substantially complied with in the appointment of the second set of arbitrators, who had authority to decide the dispute; and that their award of October 1852 was, as against D, conclusive. *Regina v. Evans*, 23 Law J. Rep. (N.S.) M.C. 100; 3 E. & B. 363.

(F) ARBITRATION.

The declaration alleged the making of an indenture of mortgage between the trustees of a benefit building society of the one part, and the defendant, a member of the society, of the other part, whereby in consideration of 600*l.*, the amount appropriated in respect of the defendant's shares, and paid to him by the trustees, the defendant mortgaged certain land to the trustees for the use and benefit of the society, and did also thereby covenant to make the several payments, and perform all the rules of the society in respect of the said shares. It then alleged, after the other necessary averments, as breaches, first, the non-payment of certain monthly instalments according to one of the rules of the society; secondly, and thirdly, the non-payment of subscriptions and fines pursuant to other rules of the society. Pleas, first, that the 33rd rule provided that "the directors shall decide any disputes that may arise between the so-

ciety and any member, or any person complaining on account of any member, respecting the construction of or any omission in the rules, or respecting any other matter relating to the society and such member or person; and the decision of the directors, if satisfactory to both parties, shall be conclusive; but if not satisfactory, such dispute shall be referred to arbitrators, pursuant to 10 Geo. 4. c. 56. s. 27," &c. The plea then alleged that the causes of action were matters in dispute between the society and the defendant as a member, respecting matters relating to the society and the defendant as a member. That arbitrators were duly appointed according to the said rule, and continued to be arbitrators until the commencement of the suit. That the defendant had never had notice of or assented to any decision of the directors, and had always been and was ready and willing to refer the causes of action to the said arbitrators, &c. Secondly, that the 18th rule provided that before a member should be allowed to receive the amount of the appropriation mentioned in the rule, he should deliver to the manager of the association a written statement of the nature and situation of the premises offered as a security, and the manager should forthwith transmit the same to the surveyor of the association, who should survey the premises and report to the directors, and if the directors were satisfied, they were to have such security examined and approved of in the manner pointed out in the said rule, and then 200*l.* should be advanced out of the funds of the association, upon a mortgage by the member of the property purchased by the appropriation or of other property, &c. That the 19th rule provided, that if after execution of a mortgage a member failed for six monthly nights to pay and observe all subscriptions, payments and regulations, then the directors should appoint a person to collect the rents and profits of the premises, and if insufficient, or the member refused to allow or to empower such collection, or if required, himself to collect and pay over the same, then the directors were empowered to sell the property, &c. The plea further alleged, that the causes of action were in respect of certain subscriptions and other payments, which were for more than six calendar months after the execution of the mortgage indenture due and owing by the defendant as a member; that the defendant had failed for six monthly nights to pay and perform his subscriptions and regulations; that the mortgaged premises were a sufficient security to the association for the monies advanced and required to be paid; and that if the directors had appointed a person to collect the rents and profits of the premises, there would have been sufficient to reimburse the plaintiffs all costs, charges and expenses, and all subscriptions and other payments due from the defendant. There was then an averment of readiness and willingness on the part of the defendant to permit the rents to be collected, &c., and a failure on the part of the directors and trustees to appoint any person for that purpose, or to require the defendant to collect them himself. Verification. Replication to the first plea, that the rules were duly certified, allowed and enrolled, and the first meeting of the society afterwards holden, before the defendant became a member. That by accident, mistake and oversight of the society, no arbitrators had ever been elected or appointed pursuant to the 33rd rule;

without this, that, &c.:—Held, on demurrer to the second plea and the replication, first, that the declaration shewed a good cause of action in the plaintiffs as trustees under the 6 & 7 Will. 4. c. 32. and 10 Geo. 4. c. 56. Secondly, that the proceeding by arbitration provided for by the 27th section of the 10 Geo. 4. c. 56, and the 33rd rule of the society was imperative to the exclusion of the right to bring an action, and therefore that the first plea was good. But, thirdly, that the replication was a sufficient answer to such plea, and was not open to the objection that the society was thereby taking advantage of its own wrong. Fourthly, that the second plea was no answer to the plaintiffs' right to maintain the action. *Reeves v. White*, 21 Law J. Rep. (N.S.) Q.B. 169; 17 Q.B. Rep. 995.

By the 32nd rule of a friendly society established in 1836 it was provided, that if any dispute should arise between any officers of the society, or between any other members and any officer, it should first be referred to the committee, and if their decision should not be satisfactory, then to arbitrators, pursuant to 10 Geo. 4. c. 56. s. 27. In 1839, a reserved fund consisting of subscriptions was established, and was regulated by a new rule called the 38th rule, which provided that every dispute should be referred to arbitration in the manner provided by the rule of the society. In 1850 this rule was expunged. The Friendly Societies Act, 13 & 14 Vict. c. 115. s. 22, enacts that if any dispute shall arise between the members or person claiming under or on account of any member of any society established under this act, and the trustees, &c., or committee, it shall be settled as the rules of the society shall direct; but if the dispute be such that, for the settlement of it, recourse must be had to a Court of equity, it may be referred to the Judge of the county court. An action having been brought in the county court by the committee of the society against the trustees to recover the amount of the reserved fund,—Held, that this was a dispute provided for by the 27th section of the 13 & 14 Vict. c. 115, and that it might be referred to arbitration under the 32nd rule of the society; that it was not a dispute requiring to be settled by a Court of equity; that the county court, therefore, had no jurisdiction, and a writ of prohibition ought to be awarded. *Grinham v. Card*, 21 Law J. Rep. (N.S.) Exch. 321; 7 Exch. Rep. 833.

F, a shareholder in a benefit building society, having had his shares advanced, mortgaged to the society certain leasehold houses to secure his future subscriptions and other payments; and in case of default, it was declared that the mortgagees might receive the rents or sell; and thereupon all such monies thereafter to become due from F, under the rules of the society, should be considered as a present debt. The rules of the society provided that it should continue till each member could receive 100*l.* per share; that each member receiving his shares in advance should pay a monthly sum as redemption money, during the continuance of the society, in addition to his monthly subscriptions; and that every advanced member desirous of satisfying his securities should be awarded the same proportion of profits as a non-advanced withdrawing member. The directors resolved that the society might be expected to terminate in eleven years from its com-

mencement; and that this term should be the basis on which to calculate the liabilities of members desirous of redeeming. In November 1852 the directors declared 12*l.* 10*s.* per share to be the amount of bonus or profit to be allowed to withdrawing members. F then claimed to redeem upon the terms of paying all the subscription, redemption and other monies payable by him to the society, and being allowed such bonuses upon his shares as, according to the rules and resolutions, were awarded to unadvanced members withdrawing:—Held (varying the decree below), that F was entitled to the same bonus per share as, at the time of his notice to redeem, would have been payable to an unadvanced member withdrawing; and that he was liable to pay, as a present debt, the subscription, redemption and other monies payable by members, during the longest period the society could possibly last. *Fleming v. Self*, 24 Law J. Rep. (N.S.) Chanc. 29; 3 De Gex, M. & G. 997; Kay, 518.

The provisions for arbitration of disputes between a friendly society and its members, in the 10 Geo. 4. c. 56. ss. 27, 28, incorporated into the Building Societies Acts by the 6 & 7 Will. 4. c. 32, do not apply to questions arising in a suit by a member against a building society for the redemption of a security given by him for his future contributions on his receiving his share in advance, because no means are provided for working out a decree for redemption, delivery of deeds, &c., and therefore the jurisdiction of a Court of equity is not ousted in such a case. *Ibid.*

(G) QUALIFICATION OF MEMBERS TO VOTE FOR MEMBERS OF PARLIAMENT.

The claimant, a member of a building society, purchased land of the yearly value of 6*l.* and mortgaged it to the trustees of the society for the amount of the purchase-money, which they had advanced to him. He was also a holder of three shares in the society. By the rules of the society he was bound to pay 1*s.* 6*d.* weekly for each share (11*l.* 14*s.* per annum). And by the mortgage, which was in accordance with the rules of the society, power was reserved to the trustees, on neglect or refusal to observe any of the regulations, &c. to sell the premises, &c. and receive the rents. By the mortgage a sum equal to 5*l.* per cent. as premium for prior advances was to be and was secured; and the sum fixed to be paid for incidental expenses was 6*s.* per annum, which was also secured. Of the 11*l.* 14*s.* per annum, 2*l.* 16*s.* was appropriated to the payment of interest on the money still due upon the mortgage, and for incidental expenses, and the remainder was taken in part discharge of the mortgage debt, and a receipt given from time to time:—Held, that the whole 11*l.* 14*s.* must be deducted from the annual value of the estate, and therefore that the claimant had not an estate of the value of forty shillings by the year, within the meaning of the 8 Hen. 6. c. 7. and the 6 & 7 Vict. c. 18. s. 74, and was not entitled to a vote for a knight of the shire. *Beamish v. the Overseers of Stoke*, 21 Law J. Rep. (N.S.) C.P. 9; 11 Com. B. Rep. 29.

(H) DUTIES AND LIABILITIES OF OFFICERS.

The members of a benefit society whose rules have been duly confirmed according to the provisions of

the statute 10 Geo. 4. c. 56. have no right to compel the secretary or other chief officer of the society to sign a notice pursuant to section 9. to convene a general meeting for the purpose of considering the question of altering the rules of the society, but such officers have under that section a discretionary power to give or withhold their signatures to any such notice. *Regina v. Bannatyme*, 20 Law J. Rep. (N.S.) Q.B. 210.

The Friendly Societies Act, 10 Geo. 4. c. 56. ss. 20, 22, has not the effect of increasing the responsibility of a treasurer of such a society beyond that of a bailee, in respect of the loss of money immediately after its receipt. *Walker v. the British Guarantee Association*, 21 Law J. Rep. (N.S.) Q.B. 257; 18 Q.B. Rep. 277.

A declaration on a policy of guarantee, whereby the defendants covenanted to indemnify the plaintiffs against any loss that might be occasioned by the acts or default of J J in the office of treasurer of a certain benefit building society, alleged that J J as such treasurer received 170*l.*, the monies of the society, and that he had not paid over the same monies to the bankers of the society, to the credit of the plaintiffs, within a short time after he received the same, viz., during the next day, or at any other time, as it was his duty to do according to the rules of the society and the directions of the trustees. Plea, that after J J had so received the monies, and before the time when he ought to or could have paid to the said bankers, he without any act or default, or any negligence, or want of due or proper care on his part, was robbed, by violence, of the whole of the said monies, by the same being feloniously and violently stolen, and carried away from his person, whereby he was unavoidably, without any act or default of his, prevented from paying the said monies to the said bankers. Upon this plea a verdict was found for the defendants:—Held, on motion for judgment *non obstante veredicto*, that the facts pleaded were a good defence to the action. *Ibid.*

(I) DISSOLUTION OF.

Under the 26th section of the 10 Geo. 4. c. 56, a friendly society may be dissolved with the consent in writing of five-sixths in value of the members without convening a general meeting as required by the 9th section for the alteration or repeal of any of the rules. *In re the Eclipse Mutual Benefit Association*, 23 Law J. Rep. (N.S.) Chanc. 279.

A petition cannot be presented under the 10 Geo. 4. c. 56, for the purpose of appointing a person to assign, in the name of a trustee, property belonging to a friendly society which has been dissolved. *In re the Eclipse Mutual Benefit Association*, 23 Law J. Rep. (N.S.) Chanc. 280; Kay, App. xxx.

Disputes arising in a friendly society consisting of several lodges, whose rules directed the expulsion of any brother who should for a given time neglect to pay his dues, all the members of one of the lodges refused to pay, and in consequence the lodge was expelled, but the legality of their expulsion was in question. The remaining members afterwards duly registered, but under a new name, appointed trustees:—Held, that for the purpose of holding the funds of the society, the members so registering were the society, and that the trustees were entitled to delivery by the grand master of the expelled

lodge, of funds in his hands. *Yeates v. Roberts*, 3 Drew. 170.

GAME.

The forms of convictions given in the schedule to the 11 & 12 Vict. c. 43. apply to all cases; and convictions drawn up in such of the forms as are applicable to the case are sufficient. *Regina v. Hyde*, 21 Law J. Rep. (N.S.) M.C. 94.

A conviction under the Game Acts, 1 & 2 Will. 4. c. 32. and 5 & 6 Will. 4. c. 20. s. 21, adjudged a pecuniary penalty, to be paid and applied according to law, following the words of Form I. 2. in the schedule to 11 & 12 Vict. c. 43. The Game Acts provided that one moiety of the penalty should be paid to the informer and that the other moiety should go to the overseers of the poor, and be paid to one of the overseers or to some other parish officer appointed by the Justice:—Held, that the conviction was sufficient. *Ibid.*

To constitute the offence of trespassing upon land in search or pursuit of game, under the 1 & 2 Will. 4. c. 32. s. 30, there must be a "bodily entering or being" of the person upon the land upon which the trespass is alleged to have taken place; and there may be a trespass within the act, though at the time the person be upon a highway. *Regina v. Pratt*, 24 Law J. Rep. (N.S.) M.C. 113.

Where, therefore, T P whilst on a highway, carrying a gun, by raising his hand to a dog that accompanied him sent the dog into a cover on one side of the highway, and immediately afterwards a pheasant flew across the highway, at which T P fired,—Held, that T P was properly convicted, under the 1 & 2 Will. 4. c. 32. s. 30, of a trespass in search of game upon land in the possession and occupation of G B, who was lord of the manor, and the owner of the land on both sides of the highway. *Ibid.*

A licensed dealer in game is not prohibited by the 1 & 2 Will. 4. c. 32. from entering into a contract made in the season, to deliver live game out of a mew or heading place at any time of the year. *Porritt v. Baker*, 10 Exch. Rep. 759.

GAMING.

[Suppression of betting houses, see stats. 16 & 17 Vict. c. 119. and 17 & 18 Vict. c. 38.]

- (A) WHAT IS.
- (B) WAGERING CONTRACTS.
- (C) SECURITIES.
- (D) RACING.
- (E) ACTION FOR MONEY LOST BY GAMING.

(A) WHAT IS.

A conviction which states that a keeper of a public house, licensed under the 9 Geo. 4. c. 61, has been "guilty of an offence against the tenor of his licence, that is to say, that he knowingly suffered a certain unlawful game, to wit, the game of dominoes, to be played in his house," is bad; as the game of dominoes is not itself unlawful, and playing at

dominoes does not necessarily amount to "gaming" within the meaning of the licence. *Regina v. Ashton*, 22 Law J. Rep. (n.s.) M.C. 1; 1 E. & B. 286.

(B) WAGERING CONTRACTS.

To a declaration for differences on the sale of railway shares, the defendant pleaded generally that the contract was by gaming (under 8 & 9 Vict. c. 109, s. 18). On demurrer, the pleas were held bad for vicious generality. *Grizewood v. Blane*, 21 Law J. Rep. (n.s.) C.P. 46; 11 Com. B. Rep. 538.

To an action for money paid by the plaintiff for the defendant's use at his request, it is no answer that the money was paid in discharge of claims against the defendant under wagering contracts, void by the statute 8 & 9 Vict. c. 109, s. 18. *Knight v. Cambers*, 24 Law J. Rep. (n.s.) C.P. 121; 15 Com. B. Rep. 562: s. p. *Jessop v. Lutroycbe*, 24 Law J. Rep. (n.s.) Exch. 65; 10 Exch. Rep. 614.

To an action for work done, commission, and money paid, the defendant pleaded that the plaintiff was a stock and sharebroker, and as such made contracts with divers persons for the defendant by way of gaming, contrary to the 8 & 9 Vict. c. 109, respecting the future market price of public and other stock, shares, scrip, and goods and chattels, whereby the defendant was to receive or pay the difference (as the case might be) between the price when the contracts were made and the price on a future day, as the plaintiff well knew; that the work done was in making the contracts; that the commission was claimed in respect of the same, and that the money was paid in discharging the differences:—Held, first, that the plea was no defence under the 8 & 9 Vict. c. 109, s. 18. Secondly, that it was no defence under the Stock-Jobbing Act, 7 Geo. 2. c. 8, as it did not shew that each contract related to the sale of public stock. *Knight v. Fitch*, 24 Law J. Rep. (n.s.) C.P. 122; 15 Com. B. Rep. 566.

Quære, per Jervis, C.J., whether the plea raised the defence under the latter act. *Ibid*.

(C) SECURITIES.

To an action against the acceptor of a bill of exchange, drawn by the plaintiff, the defendant pleaded that a bet was lost by the defendant to A B, and that the said bill of exchange was, at the request of A B, given and accepted by the defendant in consideration of the said bet, and to secure payment thereof, contrary to the statute, &c., and that there never was any other consideration for the acceptance of the said bill, and that the plaintiff at the time when he drew and the defendant accepted the same, had notice of the premises. The evidence was that the defendant had accepted a prior bill drawn by the plaintiff in consideration of the bet lost to A B, and that the bill sued upon was given in renewal of that prior bill. The jury found that the bill declared upon was given in consideration of the bet, and that the plaintiff had notice of it:—Held, that the plea was proved. *Hay v. Ayling*, 20 Law J. Rep. (n.s.) Q.B. 171; 16 Q.B. Rep. 423.

Held, also, that the plea was a good answer to the action under the 5 & 6 Will. 4. c. 41. *Ibid*.

It is no defence to an action against the acceptor of a bill of exchange that the bill was given for bets on horse-races made by the drawer as the acceptor's

agent, but paid by him without the acceptor's request. *Oulds v. Harrison*, 24 Law J. Rep. (n.s.) Exch. 66; 10 Exch. Rep. 572.

(D) RACING.

A person gratuitously undertaking the duties of steward of a horse race is not liable for negligent *nonfeasance* in not appointing a judge, unless it appears that he commenced to perform the duties of the office. *Balfe v. West*, 22 Law J. Rep. (n.s.) C.P. 175; 13 Com. B. Rep. 466.

(E) ACTION FOR MONEY LOST BY GAMING.

The enactment in section 18. of 8 & 9 Vict. c. 109, making void all contracts by way of wagering or gaming, applies to a wager made at a game in itself lawful, and the proviso in the same section does not except betting between two persons at the game of billiards, where no money is produced or staked at the time. *Parsons v. Alexander*, 24 Law J. Rep. (n.s.) Q.B. 277.

Where, therefore, to an action to recover a sum of money lost at the game of billiards, it was pleaded that the plaintiff and the defendant did game together by playing at billiards for money, and that the money sought to be recovered was won by the plaintiff from the defendant by such game, and it was proved that the plaintiff and the defendant had played at billiards at a public billiard-room, betting double or quits until the plaintiff had lost the said sum,—Held, that the plaintiff was not entitled to recover. *Ibid*.

A party who repudiates a wager before the result of it is ascertained, is not precluded from recovering, his deposit from the stakeholder by the 8 & 9 Vict. c. 109, s. 18, which avoids contracts by way of gaming or wagering, and prohibits the maintenance of actions for the recovery of money won upon any wager, or deposited in the hands of a stakeholder, to abide the event of any wager. *Martin v. Hewson*, 24 Law J. Rep. (n.s.) Exch. 174; 10 Exch. Rep. 737.

GAS.

[See LARCENY—LIMITATIONS, STATUTE OF.]

GOODS SOLD AND DELIVERED.

[See SALE.]

GRAMMAR SCHOOL.

[See SCHOOL.]

GRANT.

[See WATERCOURSE—WAY.]

GUARANTIE.

[As to sufficiency of the writing, See FRAUDS STATUTE OF. And see INDEMNITY.]

- (A) CONSTRUCTION OF.
- (B) CONSIDERATION—STATEMENT OF, AND EVIDENCE TO EXPLAIN.
- (C) LIABILITY ON.
 - (a) *Extent of.*
 - (b) *Discharge of.*

(A) CONSTRUCTION OF.

A declaration in assumpsit stated that before, &c. one W was indebted to the plaintiff in 236*l.* 14*s.*; that the plaintiff, according to the provisions of the Bankrupt Law Consolidation Act, 1849, had filed an affidavit in bankruptcy against W, and had caused a summons to be issued out of the Court of Bankruptcy, by which W was required to appear before the said Court, for the purpose of ascertaining whether he admitted the plaintiff's demand or had a good defence; and which summons was pending at the time of the defendants' promise and capable of being enforced; that in consideration that the plaintiff would withdraw the said summons out of the court, the defendants promised and guaranteed to pay the plaintiff the sum of 236*l.* 14*s.* Averment, that the plaintiff withdrew the summons out of the Court of Bankruptcy, of which the defendants had notice. Breach, non-payment of the 236*l.* 14*s.* Plea, that the defendants had not notice that the plaintiff had withdrawn the summons:—Held, on general demurrer, that the words "withdraw the summons" meant the taking some step whereby W might be exonerated from attending the Court, which must be by making some communication to him on the part of the plaintiff; or that it meant the taking some step in the Court of Bankruptcy; in either of which cases notice was not necessary, and therefore that the plea was bad. *Alhusen v. Prest*, 20 Law J. Rep. (N.S.) Exch. 440; 6 Exch. Rep. 720.

(B) CONSIDERATION—STATEMENT OF, AND EVIDENCE TO EXPLAIN.

Plaintiffs wrote to defendant: "We are doing business with B, and require a guarantee to the amount of 200*l.*, and they refer us to you." Defendant wrote in answer, "I have no objection to become security for B, and subjoin a memorandum to that effect." The memorandum subjoined was, "I hereby engage to guarantee to Messrs. Colbourn, iron-masters, 200*l.* for iron received from them, for B as annexed":—Held, that these three documents were to be read together, and that the words "We are doing business," taken with the rest, shewed that the consideration for the defendant's undertaking was that the plaintiffs should continue to supply B with goods; and that there was therefore a good consideration. *Per Jervis, C.J.*—If the last document alone had constituted the contract, parol evidence would have been admissible to construe the words "for iron received." *Colbourn v. Dawson*, 20 Law J. Rep. (N.S.) C.P. 154; 10 Com. B. Rep. 765.

The declaration alleged, that in consideration that

the plaintiffs, at the request of the defendant, would deliver certain iron to B on credit, the defendant promised to guarantee to the plaintiffs the price of the said iron to the amount of 200*l.*:—Held, that there was no variance; that the promise was to be looked at apart from the consideration; that assuming the guarantee to contain a promise to guarantee to the plaintiff the price of iron supplied, it also contained a promise to guarantee the price of iron to be supplied, and that the plaintiff was not bound to state the whole of the promise, but only the part for the breach of which he sued. *Ibid.*

A declaration in assumpsit, after alleging that A L had requested the plaintiff to sell him goods upon credit, and that the plaintiff had agreed to do so, provided the defendant would guarantee the price of the said goods; further stated, that before the said A L was indebted to the plaintiff for any goods or chattels, and at a time when no goods delivered by the plaintiff to A L on credit remained on credit, and when no money was due to the plaintiff from A L, the defendant signed the following guarantee:—"I hereby guarantee the payment of any sum or sums of money due to you from Mr. Andrew Little, of Richmond, the amount not to exceed at any time the sum of 100*l.*" The declaration then alleged the subsequent sale and delivery to A L of divers goods and chattels upon credit, to the amount of 100*l.*; and that although the time of credit and for payment had elapsed, and A L had not paid the amount when requested, of all which the defendant had notice, yet the defendant had not paid the said amount, &c.:—Held, upon demurrer, that a future supply of goods sufficiently appeared, from the terms of the guarantee itself, to be the consideration of the defendant's promise. And that, at all events, supposing the terms of the guarantee to apply equally to a past as to a future consideration, evidence of the circumstances of the parties at the time when the guarantee was made, was admissible to explain its meaning; and that they, as appeared from the declaration, shewed that a future consideration was meant. *Bainbridge v. Wade*, 20 Law J. Rep. (N.S.) Q.B. 7; 16 Q.B. Rep. 89.

(C) LIABILITY ON.

(a) *Extent of.*

The defendants had given the plaintiff a guarantee, which, after stating the consideration, was in the following form:—"We undertake and guarantee that the said sum of 400*l.* and interest shall be duly paid to you when the said acceptance arrives at maturity, in the proportion of 200*l.* each." This was signed by both the defendants:—Held, that they were not liable jointly for the whole amount. *Fell v. Goslin*, 21 Law J. Rep. (N.S.) Exch. 145; 7 Exch. Rep. 185.

The plaintiff and the defendants being members of the provisional committee of a projected railway company, for which expenses and debts had been incurred, entered into an agreement, which, after reciting that some of the debts had been paid, as mentioned in a schedule to the agreement, and that the debts claimed to be due and unpaid were set forth in a second schedule, stated that in consideration of a payment of 225*l.* by the plaintiff to the defendants, the defendants guaranteed that the sums mentioned in the first schedule had been paid, and

also that they would indemnify and save harmless the plaintiff from all claims expressly mentioned and referred to in the second schedule, and from all costs, damages and expenses which he might sustain or be put to by reason thereof, and at their own costs, charges and expenses defend him against all actions or suits which should be commenced or prosecuted against him for the recovery of any part or parts thereof. Subsequent to this agreement a member of the company obtained a winding-up order under the 11 & 12 Vict. c. 45. The plaintiff was adjudged a contributory, and by the final order was ordered to pay 496*l.* towards a call of 3,000*l.* required for the payment of one debt, included in the second schedule, and the costs and expenses incidental to the proceedings under the Winding-up Act. The plaintiff paid this sum, and sued the defendants on the above contract of indemnity. The defendants paid into court more than sufficient to cover the above debt:—Held, that the indemnity did not extend to the costs and expenses incidental to the proceedings under the Winding-up Act. *Tanner v. Woolmer*, 22 Law J. Rep. (N.S.) Exch. 259; 8 Exch. Rep. 482.

The plaintiff guaranteed that the defendant would upon demand from time to time pay to A what should be due. A demand was made upon the defendant by A, and upon non-payment a writ was issued against the plaintiff for the amount, the writ being the first notification to him of the amount being due and unpaid. He allowed judgment to go by default, and an execution was levied upon his goods:—Held, that he might recover against the defendant the costs of the writ at the suit of A, but not the costs of the subsequent proceedings. *Pierce v. Williams*, 23 Law J. Rep. (N.S.) Exch. 322.

The defendant, at the request of the plaintiff, became a shareholder and director of a gas company, on receiving from the latter the following guarantee:—"In consideration of your having, at my request, agreed to become a shareholder of the S Gas Company, and to be and act as a director, I hereby undertake to and agree to guarantee, indemnify and save you harmless from and against all losses, costs, charges, damages and expenses which you may bear, incur, sustain, or be put to by reason thereof or on account of your acting as such director":—Held, in an action against the defendant, that he was entitled to set off as money paid his expenses of travelling from the country to London to attend the meetings of the company as director. *Hutchinson v. Sidney*, 24 Law J. Rep. (N.S.) Exch. 25; 10 Exch. Rep. 438.

(b) *Discharge of.*

A creditor, who takes a guarantee, is not bound to disclose to the surety every fact within his own knowledge which might affect the surety or his willingness to enter into the contract; and such mere non-communication of facts will not, in the absence of actual fraud, affect the validity of the guarantee. *North British Insurance Co. v. Lloyd*, 24 Law J. Rep. (N.S.) Exch. 14.

A principal obtained from the plaintiffs a loan of 10,000*l.* for a certain period, on the deposit of shares, the principal agreeing to give further security or pay off a portion of the loan, in the event of the value of the shares becoming depreciated below a certain sum. At the period for repayment such deprecia-

tion had taken place, but the loan was renewed for a further period on the same terms, on the deposit of additional shares and the acceptance of B, the brother of the principal, for 2,000*l.* Before the expiration of the time, B applied to the plaintiffs to be released on obtaining the guarantee of the defendant and three other persons in 500*l.* each. The plaintiffs assented; and a guarantee was drawn up, not referring to B's acceptance, but reciting the consideration for the guarantee to be the original loan, and of the plaintiffs agreeing not to require any further security in the event of the depreciation of the shares, as provided for by the original agreement. The defendant had no notice of the transaction between the plaintiffs and B:—Held, that the defendant was, nevertheless, liable to the plaintiffs on the guarantee. *Ibid.*

The plaintiffs, bottle-manufacturers, appointed W M their agent for the sale of bottles on commission, and received the following guarantee signed by the defendant: "I hereby agree to guarantee my brother W M's intromissions as your agent in Leith to the extent of 500*l.*" The terms of sale between the plaintiffs and W M at the time of the guarantee were, that the monies received should be remitted from time to time, and an account of sales rendered at the end of each month, or when required, and an account current every three weeks. It was soon after agreed between the plaintiffs and W M that the account current should be rendered every six months; and subsequently, in pursuance of an agreement between them, W M from time to time gave his promissory notes to the plaintiffs, payable four months after date, for sums having no relation to the amount due from him, and the plaintiffs, as the notes became due, transmitted W M the difference between the money then in his hands and the amount of the notes. The defendant had no knowledge of and never inquired as to the original or subsequent terms of dealing:—Held (*Pollock, C.B. dissentiente*), that the alteration in the mode of accounting and paying did not discharge the surety. *Stewart v. McKean*, 24 Law J. Rep. (N.S.) Exch. 145; 10 Exch. Rep. 675.

GUARDIAN.

[See INFANT—PARENT AND CHILD.]

HABEAS CORPUS.

[See title BARON AND FEME, (B) (b).]

(A) WHEN AND BY WHOM GRANTED.

(B) APPLICATION FOR AND RETURN TO THE WRIT.

(A) WHEN AND BY WHOM GRANTED.

A prisoner who conducts in person an action in which he is plaintiff, is not entitled to a *habeas corpus* to bring him up to the Judge's Chambers to oppose a summons for leave to plead several matters, unless the Judge, in his discretion, thinks that there is an urgent necessity for his presence. *Ford v. Graham*, 10 Com. B. Rep. 369; 1 L. M. & P. C. 604.

A party in custody under a commission of rebellion issued by a Court of equity for not appearing to a suit is not a person in custody for a criminal or supposed criminal matter within the meaning of the Habeas Corpus Act, 31 Car. 2. c. 2. *Cobbett v. Slowman* (in error), 23 Law J. Rep. (N.S.) Exch. 144; 9 Exch. Rep. 633.

Upon an indictment charging felony committed within the jurisdiction of the Central Criminal Court, plea, not guilty, a prisoner was tried, convicted and sentenced to imprisonment. After sentence application was made to this Court for a writ of *habeas corpus* for his discharge, upon an affidavit shewing that the offence was not committed within the jurisdiction as alleged:—Held, that the record was an estoppel, and the writ was refused. *Ex parte Newton*, 24 Law J. Rep. (N.S.) C.P. 148; 16 Com. B. Rep. 97.

(B) APPLICATION FOR AND RETURN TO THE WRIT.

An application for a *habeas corpus ad respondendum*, to take a prisoner, in custody on a charge of felony, before Justices to answer to another charge of felony, must be made to a Judge at chambers and not to the Court. *Regina v. Isaacs*, 20 Law J. Rep. (N.S.) Q.B. 395; 2 L. M. & P. P.C. 255.

Where a return to a *habeas corpus* states that a prisoner is detained under civil process, it is competent to him to shew, by affidavit, that he was originally arrested on a Sunday. *Ex parte Eggington*, 23 Law J. Rep. (N.S.) M.C. 41; 2 E. & B. 717.

A judgment for debt was obtained in the county court against the defendant, who, as one of the Queen's priests in ordinary, was privileged from arrest on civil process. A judgment summons issued against him, under section 99. of the 9 & 10 Vict. c. 95, to which he did not appear, whereupon the Judge committed him for thirty-five days:—Held, that the commitment was in the nature of a qualified execution, and not of a punishment for contempt; and, therefore, that the defendant was entitled to be discharged by reason of his privilege; and that such privilege was not taken away by the 12 & 13 Vict. c. 101. s. 18. *Ex parte Dakins, in re Swann v. Dakins*, 24 Law J. Rep. (N.S.) C.P. 131; 16 Com. B. Rep. 77.

Held, also, that the proper mode of obtaining his discharge was by *habeas corpus* from one of the superior Courts. *Ibid.*

The return to the *habeas corpus* shewed that the defendant was legally detained under civil process:—Held, that he might by affidavit shew that he was privileged from arrest. *Ibid.*

HACKNEY CARRIAGE.

[Regulation and duties, licences and fares, see stats. 16 & 17 Vict. cc. 33, 127; 18 & 19 Vict. c. 78.]

The proprietor of a metropolitan public carriage employing a licensed conductor is not justified in writing on his licence, deposited with him pursuant to the 6 & 7 Vict. c. 83. s. 8, the ground on which he discharges the conductor. *Rogers v. Macnamara*, 23 Law J. Rep. (N.S.) C.P. 1; 14 Com. B. Rep. 27.

A declaration stated that the plaintiff had obtained a licence as a conductor of metropolitan stage carriages under the 13 & 14 Vict. c. 7. (which incorpo-

rated the provisions of the 6 & 7 Vict. c. 86), and that the defendant employed the plaintiff as a conductor, and the plaintiff thereupon delivered his licence to the defendant (under the 8th section of the 6 & 7 Vict. c. 86), and that the defendant, whilst the licence was in his possession, maliciously and wrongfully wrote in ink upon it, before he re-delivered it to the plaintiff on quitting his service, the words, "Discharged for being 1s. 4d. short," and re-delivered the licence with those words so written; and by reason of the premises the licence became defaced and damaged, whereby the plaintiff lost employment. Plea—that the plaintiff as such conductor received 12s. 3d. on behalf of the defendant; that it was his duty to account for that sum to the defendant; that he accounted for 10s. 11d., but did not account for or pay over the 1s. 4d. residue, and was short of the said sum of 1s. 4d.; that the plaintiff was dishonest and was discharged for being 1s. 4d. short: wherefore the defendant wrote the said words, &c.:—Held, that the declaration was good and the plea bad. *Ibid.*

HARBOUR.

A local act of parliament empowered certain harbour commissioners to levy, by way of rates, for every ton, or less quantity than a ton, and for every package and parcel of goods, wares, merchandise, &c. exported over the bar of the rivers B and L, a sum not exceeding 1d. for every ton, or less quantity than a ton, and for every package and parcel of goods, wares, &c. so exported. The trade of the port of L consisted of the exportation of tin plates, which were packed in wooden cases or boxes for shipment, and usually and on the occasion in question the boxes exported formed part of, and composed one entire quantity or shipment in one vessel (and generally under one bill of lading) to the same consignee, and at an uniform rate of freight on all the tin plates so shipped, such freight being paid on the quantity of tons weight:—Held, that the Commissioners were entitled to charge 1d. per box for each box of tin plates, and were not bound to charge 1d. per ton weight. *Jones v. Phillips*, 21 Law J. Rep. (N.S.) Exch. 6; 7 Exch. Rep. 85.

HEALTH.

[See title PUBLIC HEALTH.]

HIGHWAY.

[See title RATE.]

- (A) WHAT IS A HIGHWAY.
- (B) DEDICATION.
- (C) SURVEYOR.
- (D) LIABILITY TO REPAIR.
 - (a) *In general.*
 - (b) *Order of Justices to indict.*
 - (c) *Indictment.*
 - (d) *Evidence of.*
 - (e) *Costs.*
- (E) OBSTRUCTION OF.
- (F) DIVERTING AND STOPPING UP.

(A) WHAT IS A HIGHWAY.

In dealing with a local or private act of Parliament, the Court will incline against any construction calculated to annihilate or disturb public rights. *Campbell v. Lang*, 1 Macq. H.L. Cas. 451.

Semble—In general a public right of way means a right to the public of passing from one public place to another public place. And in this respect the laws of England and Scotland appear to be substantially the same. *Ibid*.

Semble—That the terminus of a public right of way need not itself be a public place, if it lead to a public place. *Ibid*.

Although a public way may pass through private property, it must have at each end a public terminus. *Young v. Cuthbertson*, 1 Macq. H.L. Cas. 455.

The terminus of a public way may be sufficient, although it have not in the ordinary sense an *exit*: it may be a *cul de sac*. *Ibid*.

But a mere private place, not admitting of a passage through or beyond it, cannot form the terminus of a public way. *Ibid*.

Upon evidence satisfactory and uncontradicted, shewing a public right of way as far back as the memory of living witnesses can be expected to extend, the jury may presume a previous enjoyment corresponding with that evidence. *Ibid*.

Non-user or obstruction of a public right of way may be evidence for the jury that the right does not exist,—but whether it can be evidence to shew that the right has been lost—*quære*. *Ibid*.

A public highway may, in point of law, exist over a place which is not a thoroughfare. *Bateman v. Bluck*, 21 Law J. Rep. (N.S.) Q.B. 406.

If a road has been dedicated to the public and used, but the necessary steps have not been taken, by notice, &c., under stat. 5 & 6 Will. 4. c. 50. s. 23. to make it repairable by the parish, it is still a highway in other respects; and an action is maintainable for obstructing it to the plaintiff's damage. *Roberts v. Hunt*, 15 Q.B. Rep. 17.

In an action for injury to the wife of the plaintiff through the negligence of the defendant in leaving an open vault or cellar on his own premises unfenced, whereby she fell in and was injured, the evidence was, that many persons were in the habit of going across the spot where the vault was, for the purpose of making a short cut from the street to the main road, by avoiding an angle; but that the owner of the premises, as often as he saw them, turned them back:—Held, no evidence to go to the jury of a "public way." *Stone v. Jackson*, 16 Com. B. Rep. 199.

(B) DEDICATION.

Public user of a road for some time is sufficient *prima facie* evidence of a dedication by an owner of the freehold to the public, and it is not necessary to shew by whom the dedication was made. *Regina v. Petrie*, 24 Law J. Rep. (N.S.) Q.B. 167; 4 E. & B. 737.

A road had been used by the public from 1829 to 1835, and in 1835 the defendants obstructed the passage of the public over a part of it. The land at the part obstructed was settled in 1822 upon the marriage of G W, the owner of the fee, in strict settle-

ment. The tenant for life, under a power in the settlement, granted, in 1823, a long building lease of land adjoining the part obstructed, to one of the defendants; and under a further power in the settlement, the reversion in fee expectant upon the determination of this lease was conveyed, in 1829, to L. The settlement also empowered the trustees and G W to sell; and G W, who was examined as a witness, stated that in 1829 all the settled property adjoining Rope Street had been conveyed away. The son of G W, to whom an estate of inheritance was limited by the settlement in 1822, attained the age of twenty-one in 1841. The learned Judge at the trial left it to the jury to say, whether there had been a dedication in 1829 by L, or by any other person in whom the fee then was, and declined to direct them to find by whom the dedication had been made; and the jury found that there had been a dedication in 1829 by L, or whoever was the owner in fee, and a verdict was entered for the Crown:—Held, discharging a rule for a new trial upon the ground of misdirection, that the case had been properly left to the jury. *Ibid*.

(C) SURVEYOR.

The defendant, as surveyor of the highways, had incurred large legal expenses in defending certain appeals against orders for stopping up highways, without the previous sanction of the parish. At a meeting of the vestry, where his accounts were gone into, the items for these expenses were objected to, and opposition was threatened to be made to his accounts before the Justices. The defendant ultimately offered to pay 50*l*. in discharge of the attorney's bill for costs, if no opposition were offered to the passing of his accounts before the magistrates. The vestry accepted the offer, and the plaintiff and other vestrymen signed a minute to the above effect. They also entered and signed a minute at the foot of the defendant's account, that the 50*l*. was to be paid to his successor in office, who happened to be the plaintiff. The accounts were passed without opposition, but the defendant did not pay the 50*l*. The plaintiff consequently sued him for it in the county court:—Held, that there was no evidence of any contract with the plaintiff alone to entitle him to maintain an action alone for the 50*l*.; that if the 50*l*. was to be treated as part of the balance of the public money in the hands of the outgoing surveyor, the method of recovering it was not by action, but by summary application under the statute 5 & 6 Will. 4. c. 50. s. 103. *Kilham v. Collier*, 21 Law J. Rep. (N.S.) Q.B. 65.

Semble—That the arrangement with the vestry was illegal as contrary to public policy. *Ibid*.

No action will lie against the county surveyor by an individual to recover damages for a personal or pecuniary injury resulting from the non-repair of a county bridge. *Mackinnon v. Penson* (in error), 23 Law J. Rep. (N.S.) M.C. 97; 9 Exch. Rep. 609.

(D) LIABILITY TO REPAIR.

(a) In general.

A public highway originally ran down to the sea at right angles to the shore, the land gently sloping to the water's edge. By the encroachments of the waves a portion of the land and road was swept away, so that there was left a cliff twenty feet high

above the beach, the road running to the edge, and there terminating abruptly:—Held, that as the substance of the road was gone beyond the edge of the cliff, there was no road beyond that point which the parish could be called upon to repair, and that they were not bound to provide any means of communication between the top of the cliff and the beach. *Regina v. the Inhabitants of Hornsea*, 23 Law J. Rep. (n.s.) M.C. 59; 1 Dears. C.C. 291.

When a road has been found to be a high road, on an indictment against a parish for not repairing it, the parish is not excused from putting it into good and substantial repair, by the circumstance that it is little used and has never been repaired with hard materials, that it passes into another parish which denies it to be a highway, and that it is of no use to repair the part in one parish until the liability of the adjoining parish has been determined. *Regina v. the Inhabitants of Claxby*, 24 Law J. Rep. (n.s.) Q.B. 223.

(b) *Order of Justices to indict.*

[See title CERTIORARI (A), (d).]

An indictment for non-repair of a highway was preferred by G against the parish at the Quarter Sessions in pursuance of an order of three Justices at a special sessions for highways. The parish pleaded, and the jury found, that the occupier of farm A was liable to repair *ratione tenure*. G applied for his costs of the prosecution under section 95. of the statute 5 & 6 Will. 4. c. 50, but the Sessions refused to give them, on the ground that G, one of the magistrates who made the order for preferring the indictment, was the owner of farm A. Before the order was given, G had summoned the surveyor of the parish before the special sessions. No question was made but that the road was a highway and out of repair. The surveyor simply denied the liability of the parish to repair it, but did not suggest who was liable, and thereupon L and the two other Justices signed the order:—Held, that when the surveyor of the parish simply denies the liability of the parish to repair a highway within it which is out of repair, it is imperative on the special sessions under section 95. of the Highway Act to order an indictment to be preferred. *Regina v. the Justices of Surrey*, 21 Law J. Rep. (n.s.) M.C. 195; 1 Bail C.C. 70.

Held, further, that the order for preferring the indictment was valid in this case, as L was not interested in the matter at the time the order was made, though he became so after the parish had pleaded; consequently, that G was entitled to his costs of the prosecution. *Ibid.*

(c) *Indictment.*

An indictment against a parish for non-repair of a highway, alleged "that from the time whereof the memory of man runneth not to the contrary, there was, and yet is, a common and ancient highway," &c.; and the only other allegation that it contained as to time was, that a part of the said highway, situate, &c. "on the 1st day of January in the 12th year aforesaid and continually afterwards, until the taking of this inquisition, was and yet is" out of repair, so that the liege subjects of the Queen could not during the time aforesaid, nor yet can go, return, pass, &c.:—Held, that the allegation of immemoriality might be

rejected as surplusage, and that without it sufficient appeared on the face of the indictment as to time, to support the liability charged. *Regina v. the Inhabitants of Turveston*, 20 Law J. Rep. (n.s.) M.C. 46; 16 Q.B. Rep. 109.

An indictment for non-repair of a highway by the township of W, alleged in the first count that "a certain part of a highway, situate in W, leading from, &c., and containing in length 1,356 yards, &c. in the township aforesaid, was ruinous and in decay," and that the inhabitants of the said township were liable to repair it. The second count alleged that the parish was divided into townships, whereof W was one, and that the inhabitants of W had immemorially repaired such and so many of the highways situate within it as would otherwise be repairable by the parish at large, and "that the said part of the same common highway hereinbefore mentioned to be ruinous," &c. as aforesaid, was a highway which but for the said prescription would be repairable by the said parish at large, and that by reason of the premises the inhabitants of W aforesaid ought to repair the same part of the said highway so being ruinous &c. as aforesaid, when and so often as it hath and shall be necessary," and that the defendants had not repaired the same. The defendants were found not guilty on the first count and guilty on the second:—Held, that the second count contained a sufficient reference to the first count, and that (after verdict) it sufficiently averred that the part of the road in question was out of repair, and that it was situate in the township of W. *Regina v. the Inhabitants of Waverton*, 21 Law J. Rep. (n.s.) M.C. 7; 17 Q.B. Rep. 562.

After a statute has been repealed it cannot be acted upon in respect of a proceeding under it, commenced before its repeal, and in this respect there is no valid distinction between matters of form and substance. Where, therefore, between the finding of an indictment for non-repair of a road and plea pleaded, the statute upon which alone the indictment could be supported was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the Court arrested the judgment. *Regina v. the Inhabitants of Denton*, 21 Law J. Rep. (n.s.) M.C. 207; 16 Q.B. Rep. 832; 1 Dears. C.C. 3.

(d) *Evidence of.*

An indictment for the non-repair of a highway charged the defendant as liable to repair by reason of his tenure of S P Field. He pleaded not guilty. On the trial, evidence was given on the part of the prosecution of the conviction in 1801 of one S, a former owner of S P Field, for the non-repair of the road in question, the liability being charged as arising in respect of the tenure of the S P Field. Proof was also given of repairs done since 1801 by the owners of the above-mentioned field. For the defendant, evidence was adduced of a certain agreement and award previous to 1801, which found in effect that the owner of S P Field was liable to repair the road, and directed that S should plead guilty to an indictment for non-repair *ratione tenure*. The jury convicted the defendant, but the Court reserved the question whether the usage or liability in respect of which the defendant was charged in the indictment was established:—Held, (*Platt, B. dissentiente*) that the question reserved must be taken

to mean whether there was evidence for the jury of the usage or liability charged in the indictment. *Regina v. Blakemore*, 21 Law J. Rep. (n.s.) M.C. 60.

Held, further, (*Platt, B. dissentiente*) that the conviction of S was conclusive evidence of liability against the defendant by way of estoppel. *Ibid.*

Upon the trial of an indictment against the inhabitants of the township of H, for the non-repair of a highway, a prior judgment of Quarter Sessions upon a presentment by a Justice under the 13 Geo. 3. c. 78. for non-repair of the same highway by H, was put in. The presentment alleged that the highway was in H, and that H was liable to repair it. It also appeared by the judgment that two of the inhabitants of H had appeared and pleaded guilty, and that a fine was imposed:—Held, conclusive evidence that the highway was in H, and that H was liable to repair it. *Regina v. the Inhabitants of Haughton*, 22 Law J. Rep. (n.s.) M.C. 89; 1 E. & B. 501.

The presentment did not state how the township was liable to repair:—Held, that although it might be bad for this reason on demurrer or error, yet, that having been submitted to by the defendants, they were conclusively bound by it. *Ibid.*

The fact of the fine imposed by the Sessions not being shewn to have been paid did not prevent the judgment from acting as an estoppel, no fraud being imputed. *Ibid.*

Evidence of reputation is admissible in questions relating to matters of public and general interest, notwithstanding that matters of private interest may also be involved in the inquiry. Therefore, on the trial of an indictment against the county of B for the non-repair of a bridge, to which they pleaded that A was liable *ratione tenuræ* to repair a portion of the bridge, evidence of reputation that A and his predecessors were liable to do the repairs to that part, was held to be admissible. *Regina v. the Inhabitants of the County of Bedford*, 24 Law J. Rep. (n.s.) Q.B. 81; 4 E. & B. 535.

Quære—whether an appeal under the 35th section of the Common Law Procedure Act, 1854, lies in the case of an indictment? *Ibid.*

(e) Costs.

The costs of an indictment against a parish for non-repair of a highway, ordered to be paid to the prosecutor by the Quarter Sessions, under section 95. of the 5 & 6 Will. 4. c. 50, are not recoverable by distress against the surveyor under section 103, but are to be paid out of the rate made and levied in pursuance of that act. *In re the Surveyors of the Highways of Tryddyn, ex parte Harrison*, 23 Law J. Rep. (n.s.) M.C. 45; 3 E. & B. 390.

It is the duty of the surveyors who are in office when such an order for costs is made, or of their immediate successors in office, to pay the costs out of any funds then in their hands, or, if they have none, to make a rate for the purpose of putting themselves in funds. *Ibid.*

On the trial, at the assizes, of an indictment against a parish for non-repair of a highway, which had been removed by *certiorari*, the Judge at Nisi Prius who tried the case made an order under the 5 & 6 Will. 4. c. 50. s. 96, in the terms of the section, for the payment of the costs of the prosecution

out of the rates of the parish, but without specifying any amount. Judgment was afterwards signed, and a side-bar rule obtained to tax the costs in the usual way:—Held, that the Judge's order was valid. *Regina v. the Inhabitants of Eardisland*, 23 Law J. Rep. (n.s.) M.C. 145; 3 E. & B. 760.

Held, also, (*Crompton, J. differing in opinion*), that in the case of an indictment removed by *certiorari*, the Judge at Nisi Prius is not required by the above section to ascertain and specify the amount of the costs, but that the proper mode of proceeding is by a side-bar rule, and taxation of the costs by the proper officer of the court from which the record is sent for trial. *Ibid.*

(E) OBSTRUCTION OF.

[See titles COMPANY, 1 (G) (f), *ante*, p. 156—PAVING.]

To entitle a person to proceed against a railway company for penalties for interfering with an existing public road, under the 8 & 9 Vict. c. 20. s. 57, as "a person having the management of the road," he must be clothed with some duty in respect of the public, *ejusdem generis* with that of "trustees, commissioners or surveyor." *Regina v. Wilson*, 21 Law J. Rep. (n.s.) Q.B. 281; 18 Q.B. Rep. 348.

Where, therefore, an owner in fee of the soil, having constructed a road and made a sewer under it in the usual manner, with which no communication could be made without his permission first obtained, dedicated the road to the use of the public, and afterwards repaired it at his own expense,—Held, that he was not entitled, under the above section, to proceed against a railway company who had cut through the road, for penalties for not restoring it, as required by the 56th section of the above act. *Ibid.*

(F) DIVERTING AND STOPPING UP.

The Highway Act (5 & 6 Will. 4. c. 50.) by section 84. enacts, that when the inhabitants, in vestry, deem it expedient that a highway should be stopped up or diverted, the chairman of the meeting shall by an order in writing direct the surveyor to apply to two Justices to view the same; provided that if any other party is desirous of stopping up, &c. any highway he is to require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if they agree to the proposal the surveyor is to apply to the Justices for the purposes aforesaid. By section 85, where it appears upon such view of two Justices made at the request of the surveyor as aforesaid, that any public highway may be diverted or turned so as to make it nearer or more commodious to the public, or that any highway is unnecessary, the Justices are to direct the surveyor to give certain public notices, and proof of the publication of such notices having been given to the satisfaction of the said Justices, and a plan having been delivered to them describing by metes and bounds the old and proposed new highways, the said Justices are to certify the fact of having viewed the highway, and that the proposed highway is nearer or more commodious to the public, with the reasons why; and this certificate is to be lodged with the clerk of the peace for the county, and read by him at the Quarter Sessions, and is to be there enrolled. Section 88. enables any party aggrieved, if such highway should

be ordered to be diverted or stopped up, to make his complaint thereof by appeal to the Quarter Sessions upon giving notice and grounds of appeal. By section 89, in case of such appeal the Justices at the said Quarter Sessions, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up is unnecessary, or whether the party appealing would be injured or aggrieved, are to impanel a jury, and if the jury find that the new highway is nearer or more commodious, or that the highway proposed to be stopped up is unnecessary, or that the appellant would not be aggrieved, the Sessions are to dismiss the appeal and make an order for diverting or stopping up the highway; but if the jury find otherwise, the Sessions are to allow the appeal and not make the order:—Held, that an appeal is given against the certificate of the Justices, and the Sessions have jurisdiction on such appeal to decide upon any substantial defect appearing on the face of the certificate, and are not limited to trying by a jury the three questions specified in section 89. *Regina v. the Justices of Worcestershire*, 23 Law J. Rep. (N.S.) M.C. 113; 2 E. & B. 447.

Held, also, that a certificate under the statute is defective if it does not state upon its face that all the particulars required by section 84, have been complied with. *Ibid*.

HUSBAND AND WIFE.

[See *BARON AND FEME*.]

IMPRISONMENT.

[See titles *ARREST—FALSE IMPRISONMENT—INSOLVENT—PRISONER*.]

INCLOSURE.

[See stats. 15 & 16 Vict. cc. 2. and 79; 16 & 17 Vict. c. 120; 18 & 19 Vict. cc. 14, 52. and 61; and see title *FEIGNED ISSUE*.]

(A) CONSTRUCTION OF ACTS.

(B) ALLOTMENT.

(a) *To the Lord of the Manor.*

(b) *To Commoners.*

(c) *In Lieu of Tithe.*

(C) AWARD OF COMMISSIONER.

(A) CONSTRUCTION OF ACTS.

An inclosure act reserved to the lord of the manor his rights to mines and minerals in certain lands, and also liberty to make ways along certain commons, and to do every act then or thereafter in use for working and carrying away the mines and minerals and quarries within and under the said commons, and also for carrying the "coals and produce of any other mines and minerals from or under any other lands":—Held, that this gave the lord power to convey coke along a railway which he had made on the commons, coke being a produce of a mine, and the word "other" meaning not other than coals, but

other than the mines and minerals mentioned in the former clause. *Bowes v. Ravensworth*, 24 Law J. Rep. (N.S.) C.P. 73; 15 Com. B. Rep. 512.

(B) ALLOTMENT.

(a) *To the Lord of the Manor.*

At the time of the passing of an inclosure act, the soil and freehold of the common land was vested in the lord of the manor, subject to certain rights of common, and he was also entitled to the coals and minerals, and unopened stone quarries, &c. under the said common lands, as part of the said freehold. The act did not recite the particular rights of the lord, but enacted, that certain allotments should be made to the commoners in lieu of their rights, and to him as lord of the manor, for his right "to and in the soil" of the said common lands, and also to and for the damage and injury he would sustain by being obliged to make satisfaction to the proprietors of the lands for digging coals or minerals; and it also enacted, "that if the lord should enter on any of the lands for the purpose of digging, getting, &c. 'any coals or other minerals,' he should make compensation for damage done," &c. There was no express reservation of the mines or minerals to him. The allotments were made pursuant to the act:—Held, that the lord of the manor for the time being was entitled to the mines and minerals under the land so inclosed, paying compensation to the owners of the allotments for any damage done by working the mines. *Micklethwait v. Winter*, 20 Law J. Rep. (N.S.) Exch. 313; 6 Exch. Rep. 644.

Held, also, that stones got from quarries are minerals. *Ibid*.

A, being the owner and in possession of a farm from 1833 to 1850, exercised the right of turning out on the waste of the manor the sheep levant and couchant upon that farm. In 1848 A became lord of the manor. Upon an inclosure of the wastes of the manor, under the 8 & 9 Vict. c. 118, A, who received an allotment in respect of his manorial rights, claimed besides to be compensated for "common of pasture or feeding or right of pasturage" in respect of the farm, and an issue was framed in those terms:—Held, that, assuming that a right of common of pasture appurtenant to the farm existed previously to A becoming lord of the manor, he would after that have an interest in respect of which he ought to be compensated, and which might be described in popular language in the terms of the issue. *Lloyd v. Earl Powis*, 24 Law J. Rep. (N.S.) Q.B. 145; 4 E. & B. 485.

(b) *To Commoners.*

The 8 & 9 Vict. c. 6, an Allotment Act, empowers deputies appointed under its provisions to make small allotments of land to resident freemen of L, to be held by them *so long as they shall be willing* to hold the same, and pay the rent, and conform to certain regulations. All the land is vested in the deputies as trustees; and they have the power to sell with the concurrence of a majority of a meeting of freemen occupiers:—Held, that the allottees have freehold estates which entitle them to vote for members of parliament, as their estate may continue for life, and is not determinable on the mere will of the grantors. *Beeson v. Burton*, 22 Law J. Rep. (N.S.) C.P. 33; 12 Com. B. Rep. 647.

(c) In Lieu of Tithes.

Debt for not setting out tithes. The plaintiff was originally lay impropriator of the tithes of certain fen lands in the parish of M, which were from 1816 down to the time of the action occupied by the defendant. An act for inclosing lands in the parish of M gave an option to the Inclosure Commissioners to make an allotment to the impropriator in lieu of these tithes. By their award, made in 1812, they stated that they had procured to be made an accurate survey and plan of the waste lands to be inclosed, and of the ancient inclosed lands (except the fen lands), and then proceeded to allot to the impropriator certain allotments in lieu of and as a compensation for all the tithes growing and renewing within M, and due unto him. A schedule and also a map or plan were annexed to the award, but neither comprised the defendant's lands or the fen lands. From 1816 to 1828 the defendant had paid no tithes to the plaintiff in respect of his land, but for a period of twenty years from 1828 the defendant had either paid tithes in kind or compounded for them to the plaintiff. In 1841, on an Assistant Tithe Commissioner being sent down with a view of awarding a sum to be paid as a commutation of the tithes of the parish of M, the defendant claimed that his lands were exempt from tithes by virtue of the Inclosure Act and award; but the Tithe Commissioner decided that his lands were not thereby exempted:—Held, that the perception of the tithes for twenty years gave the plaintiff no title to them under the statute 3 & 4 Will. 4. c. 27. Held, secondly, that the decision of the Assistant Tithe Commissioner was not conclusive against the exemption, since s. 90. of the Tithe Commutation Act, the 6 & 7 Will. 4. c. 71, took away his jurisdiction if the tithes had been extinguished by virtue of the Inclosure Act, and that he could not give himself jurisdiction by deciding that they were not so extinguished. Held, lastly, that though the award professed to give the allotment in lieu of all the tithes in M, yet as the Commissioners had an option whether they would extinguish all the tithes, and as there was evidence on the face of the award, maps, and survey, that the fen lands were not taken into consideration, it was a question for the jury whether the award in reality awarded any compensation to the plaintiff for the tithes on the defendant's land. *Bunbury v. Fuller* (in error), 23 Law J. Rep. (N.S.) Exch. 29; 9 Exch. Rep. 111.

(C) AWARD.

A local inclosure act, after providing for the appointment of Commissioners, and the allotment of certain lands, enacted "that two awards should be made by J C (one of the Commissioners) within six years from the passing of the act," and pointed out the mode in which J C's place was to be filled up by election:—Held, that the clause as to the making of the award was directory only, and where the award was made after the six years that the allotment was not, therefore, nugatory. *Doe d. Roberts v. Mostyn*, 21 Law J. Rep. (N.S.) C.P. 173; 12 Com. B. Rep. 268.

Held, also, that an award made after J C's death by a person who had acted in the same capacity, was sufficient, without proof of his having been

formally appointed to succeed J C in the mode specified by the act—following *Doe d. Nanny v. Gore*. Ibid.

INCUMBERED ESTATES ACT.

The Commissioners, under the statute 12 & 13 Vict. c. 77 (Incumbered Estates Act), made an order in Ireland against a party for payment of money, or in default for commitment. The party was served with, but disobeyed, the order, and removed into England, out of the jurisdiction of the Irish Court. Application was made, under the provisions of the same statute, to the Court of Chancery in England, to have the order enrolled, and the same being permitted, that Court made an order at once, unconditionally, for an attachment. *In re Keogh's Estate*, 23 Law J. Rep. (N.S.) Chanc. 547; 5 De Gex, M. & G. 73.

INDECENT EXPOSURE.

If a man indecently expose his person in a public omnibus in the sight and view of several passengers travelling therein, in such a manner that any one coming in might see the exposure, he is guilty of a misdemeanour, and indictable for a nuisance at common law. *Regina v. Holmes*, 22 Law J. Rep. (N.S.) M.C. 122; 1 Dears. C.C. 207; 3 Car. & K. 360.

If an indictment for such a nuisance fail to conclude *ad commune nocumentum*, the omission is cured by the statute 14 & 15 Vict. c. 100. s. 24. Ibid.

INDEMNITY.

[Annual act for, see stats. 16 & 17 Vict. c. 14. and 18 & 19 Vict. c. 49—titles CONTRACT—GUARANTIE—PRINCIPAL AND SURETY.]

CONSTRUCTION AND EXTENT.

B & P, being the owners of an unexpired term of seventy-two years in certain premises, let them for twenty-one years to G, with the usual covenants for repairs, payment of rent, &c., and afterwards assigned the reversion to B. G had previously assigned the remainder of the term of twenty-one years to the plaintiff, with a similar covenant of indemnity, who assigned it to the defendant, with a like covenant. B brought an action in respect of rent due and want of repair against G, who suffered judgment by default, and afterwards brought an action against the plaintiff for the amount so paid by him and his costs. The plaintiff defended the action unsuccessfully, and became liable to pay G the amount of the judgment by default, together with G's costs of that judgment, and also the costs of the action. The plaintiff then brought an action against the defendant before he had paid to G the amount recovered by G:—Held, first, that the plaintiff was entitled to recover the amount of the rent, the repairs, and G's costs of the judgment by default, but not his own costs of defending the action brought against him by G. Secondly, that the plaintiff was entitled to recover, although he had not paid G at the commencement of the action. Thirdly, that G had taken the proper course in

suffering judgment to go by default. *Smith v. Howell*, 20 Law J. Rep. (N.S.) Exch. 377; 6 Exch. Rep. 730.

The plaintiff and the defendants being members of the provisional committee of a projected railway company, for which expenses and debts had been incurred, entered into an agreement, which, after reciting that some of the debts had been paid, as mentioned in a schedule to the agreement, and that the debts claimed to be due and unpaid were set forth in a second schedule, stated that in consideration of a payment of 225*l.* by the plaintiff to the defendants, the defendants guaranteed that the sums mentioned in the first schedule had been paid, and also that they would indemnify and save harmless the plaintiff from all claims expressly mentioned and referred to in the second schedule, and from all costs, damages and expenses which he might sustain or be put to by reason thereof, and at their own costs, charges and expenses defend him against all actions or suits which should be commenced or prosecuted against him for the recovery of any part or parts thereof. Subsequent to this agreement a member of the company obtained a winding-up order under the 11 & 12 Vict. c. 45. The plaintiff was adjudged a contributory, and by the final order was ordered to pay 496*l.* towards a call of 3,000*l.* required for the payment of one debt, included in the second schedule, and the costs and expenses incidental to the proceedings under the Winding-up Act. The plaintiff paid this sum, and sued the defendants on the above contract of indemnity. The defendants paid into court more than sufficient to cover the above debt:—Held, that the indemnity did not extend to the costs and expenses incidental to the proceedings under the Winding-up Act. *Tanner v. Woolmer*, 22 Law J. Rep. (N.S.) Exch. 259; 8 Exch. Rep. 482.

A covenant by the defendant that the debts of a certain firm into which the plaintiff was about to be admitted as partner did not exceed a specific sum, and that if they did the defendant would pay on demand of the plaintiff the sum by which the debts might exceed the specific amount,—Held, to be a covenant for an unliquidated sum. *Walker v. Broadhurst*, 23 Law J. Rep. (N.S.) Exch. 72; 8 Exch. Rep. 889.

Held, also, that it was properly left to the jury to say what loss the plaintiff had sustained by a breach of the covenant by the defendant. *Ibid.*

Declaration, in assumpsit, alleged that defendant issued a *fi. fa.* on a judgment against M, which the sheriff delivered to plaintiff, his officer, to execute; and plaintiff, at defendant's request, seized goods, believing them to be M's; whereupon G claimed them, and gave notice to the sheriff not to sell them; and, in consideration of the premises, and that plaintiff, at the request of defendant, would pay no attention to the claim or notice, and would proceed to a sale, defendant promised plaintiff to indemnify him for so doing; that plaintiff did thereupon pay no attention, &c., and sold the goods, and levied, and, at defendant's request, delivered the balance to defendant; that afterwards G, by reason of the premises, impleaded plaintiff together with the sheriff in the county court, in trespass on tort, for seizing and selling, and recovered against plaintiff and the sheriff the value of the goods, damages and costs;

which plaintiff, being liable (as defendant knew) to indemnify the sheriff, paid to G, but defendant did not indemnify. On special demurrer,—Held, a good declaration, for that consideration sufficiently appeared; and it was no objection that the plaintiff's disregard of the claim was not shewn with sufficient certainty to have been otherwise than an illegal act, or that plaintiff, consistently with the allegations, might have sold in the mere performance of his duty; or that it was not sufficiently shewn that G recovered solely by being entitled to the goods seized, and not by any irregularity in plaintiff's acts, or how much damage accrued from the selling, and how much from the seizing; or that the action in the county court was against the sheriff together with plaintiff. *Elliston v. Berryman*, 15 Q.B. Rep. 205.

INDIA.

[See EAST INDIA COMPANY.]

INDICTMENT.

[See 14 & 15 Vict. c. 100. Also titles AMENDMENT—CERTIORARI.]

- (A) INDICTABLE OFFENCE.
- (B) VENUE.
- (C) JOINDER OF OFFENCES.
- (D) REFERENCE TO FORMER COURT.
- (E) PARTIES' NAMES—IDEM SONANS.

(A) INDICTABLE OFFENCE.

To sustain an indictment against a clergyman for refusing to marry persons who have obtained a registrar's certificate for that purpose, they must have presented themselves to him to be married at some time when he could legally have married them. *Regina v. Moorhouse*, 3 Car. & K. 167.

Whether this is in any case an indictable offence, or is merely an ecclesiastical matter, *quære*. *Ibid.*

If indictable, *semble*, that it must be averred in the indictment that the parties were persons who could lawfully marry. *Ibid.*

(B) VENUE.

Two carmen of a railway company were sent with a waggon from the station in Middlesex to a place in Kent. On their arrival they took some oats, which had been put into nose-bags and carried in the waggon during the journey, and which were intended for the horses' food, and sold them there for their own profit:—Held, that the carmen might be tried in Middlesex for the larceny of the oats in the county of Kent, under the provisions of the statute 7 Geo. 4. c. 64. s. 13. *Regina v. Sharp*, 24 Law J. Rep. (N.S.) M.C. 40; 1 Dears. C.C. 415.

(C) JOINDER OF OFFENCES.

It is no ground in arrest of judgment after conviction for a felony that the indictment also contains a count for a misdemeanour. *Regina v. Ferguson*, 24 Law J. Rep. (N.S.) M.C. 61; 1 Dears. C.C. 427.

(D) REFERENCE TO FORMER COURT.

An indictment for non-repair of a highway by the township of W, alleged in the first count that "a certain part of a highway, situate in W, leading from, &c., and containing in length 1,356 yards, &c. in the township aforesaid, was ruinous and in decay," and that the inhabitants of the said township were liable to repair it. The second count alleged that the parish was divided into townships, whereof W was one, and that the inhabitants of W had immemorially repaired such and so many of the highways situate within it as would otherwise be repairable by the parish at large, and "that *the said part of the same common highway* hereinbefore mentioned to be ruinous, &c. as aforesaid, was a highway which but for the said prescription would be repairable by the said parish at large, and that by reason of the premises the inhabitants of W aforesaid ought to repair *the same part of the said highway so being ruinous, &c. as aforesaid*, when and so often as it hath and shall be necessary," and that the defendants had not repaired the same. The defendants were found not guilty on the first count and guilty on the second:—Held, that the second count contained a sufficient reference to the first count, and that (after verdict) it sufficiently averred that the part of the road in question was out of repair, and that it was situate in the township of W. *Regina v. The Inhabitants of Waverton*, 21 Law J. Rep. (N.S.) M.C. 7.

(E) PARTIES' NAMES—IDEM SONANS.

Where an indictment for larceny described the prosecutor as Darius C, and the prosecutor in evidence stated that his name was Trius C,—Held, that it was a question of fact for the jury, and not of law for the Court, whether the two words were *idem sonantia*. *Regina v. Davis*, 20 Law J. Rep. (N.S.) M.C. 207; 2 Den. C.C. 231.

INFANT.

[See title SEDUCTION.]

- (A) MAINTENANCE.
- (B) ADVANCEMENT.
- (C) SALE AND DISPOSITION OF PROPERTY.
- (D) LIABILITY.
 - (a) *Contracts*.
 - (b) *Torts*.
- (E) GUARDIAN.
 - (a) *Appointment of*.
 - (b) *Payments and Allowance to*.
 - (c) *Liability of*.
- (F) CUSTODY OF.
- (G) WARD OF COURT.
- (H) ACTIONS.

(A) MAINTENANCE.

A petition was presented by an infant who had for some years been entitled to property amounting to 290*l.* per annum. The petitioner had been maintained by his father, who had incurred a large debt for the purpose, and was unable any longer to maintain his son. The petition stated that the father had been resident for many years in India, and it asked

for a sum of 300*l.* for past maintenance:—Held, that the father having resided out of the country, and being unable to apply to the Court before, was a special circumstance which would enable the Court to grant the sum required for past maintenance. *Carmichael v. Hughes*, 20 Law J. Rep. (N.S.) Chanc. 396.

A testator gave all his estate to trustees, upon trust, out of the rents and proceeds to pay an annuity to his wife, and, subject thereto, upon trust, to convey all his said estate unto and equally between his children as they severally attained the age of twenty-one, and in the mean time to pay to his wife, or otherwise apply the rents and proceeds of the respective shares and interests of his children for or towards their respective maintenance, education and advancement; but in case of the decease of any of his children under twenty-one, then, upon trust, to convey and transfer the shares of those so dying under that age to those who attained twenty-one. The trustees had paid the proceeds of the estate to the testator's wife for the maintenance of the children:—Held, that the children were not entitled to any account of the surplus beyond what had been required for their maintenance. *Browne v. Paull*, 20 Law J. Rep. (N.S.) Chanc. 75; 1 Sim. N.S. 92.

A testator constituted his widow guardian of his two children then living with him (one a boy, being the child of another woman), and he gave her 4,000*l.* "to be used for her own and the children's benefit, as she should in her judgment and conscience think fit." This (as was held) gave the widow a discretion as to the application of the income between the three objects, which this Court would not controul if *bond fide* exercised. Soon after the testator's death the maternal relations of the boy removed him from the widow's custody. The widow married again, and appointed one-eighth of the capital to the boy and the remainder to her own child. The Court, notwithstanding the opposition of the widow, who offered to take the boy back, directed 30*l.* a year to be allowed out of the income of the 4,000*l.* for his education. *Hart v. Tribe*, 19 Beav. 149.

The maternal uncle of an infant in a suit conducted at his risk had recovered 3,000*l.*, which was in court in the suit, for the benefit of the infant. The infant's father was dead, and his mother, who was living apart from her second husband, was with the infant, whose age was fourteen, in indigent circumstances at New York, and refused to allow him to be brought to this country. The uncle, by petition, asked to be appointed guardian with an allowance for maintenance to commence on the infant's arrival in England. The Court appointed the mother and uncle the guardians, and after consideration of the circumstances at chambers, refused to make any allowance for maintenance. *Lockwood v. Fenton*, 1 Sm. & G. 73.

(B) ADVANCEMENT.

The whole of a small legacy and its accumulations, were paid out of court to the solicitor of an infant who had no other property, upon his undertaking to apply it in discharging a sum claimed for past maintenance and for a prospective outfit, and, after deducting the costs, to pay any remaining balance to the infant at majority. *In re Welch*, 23 Law J. Rep. (N.S.) Chanc. 344.

(C) SALE AND DISPOSITION OF PROPERTY.

A receiver of the rents of real estates descended on an infant appointed on petition, without suit. *In re Leeming and In re Gascoyne*, 20 Law J. Rep. (N.S.) Chanc. 550.

The conveyancing counsel having certified that the title to a proposed purchase of land, though not a good title of sixty years, was a safe holding one, and the purchase appearing in other respects desirable and for the benefit of an infant, it was sanctioned by the Court. *In re the Sheffield and Rotherham Rail. Co.*, 1 Sm. & G. App. iv.

The guardian of an infant authorized by the Court under 1 Will. 4. c. 65. s. 17. to grant leases of the infant's estate for terms of years exceeding the minority, when beneficial to the infant and approved by the Court. *Anstey v. Hobson*, 1 Sm. & G. 505.

(D) LIABILITY.

(a) Contracts.

[As to realty, see stat. 18 & 19 Vict. c. 43. For necessities, see title LIMITATIONS, STATUTE OF. For railway calls, see title COMPANY, 1—(F) (e), ante, p. 161.]

Where, in an action of contract against two, one of the defendants pleaded never indebted, and the other never indebted and infancy, and the plaintiff joined issue on all the pleas except that of infancy, as to which he entered a *nolle prosequi*.—Held, that the plaintiff had thereby admitted that there never was any joint binding contract, and that he ought to be nonsuited. *Boyle v. Webster*, 21 Law J. Rep. (N.S.) Q.B. 202; 17 Q.B. Rep. 950.

The defendant having, whilst an infant, accepted a bill of exchange, was applied to after he became of age, on behalf of the holder, and then wrote to him as follows:—"Your brother tells me you are very uneasy about the 500*l.* bill drawn by Mr. P. upon me. Pray make yourself easy about it, as I will take care that it is paid, and Sir Henry P. comes to England in June".—Held, *per Parke, B. and Alderson, B.*, that this was not a ratification to take the case out of the statute 9 Geo. 4. c. 14; but *per Platt, B. and Martin, B.*, that it was a ratification. *Mawson v. Blanc*, 23 Law J. Rep. (N.S.) Exch. 342; 10 Exch. Rep. 206.

Semble, a contract of sale by an infant is absolutely void, and is no answer to an action of trover subsequently brought by the infant to recover the value of the goods. *Latt v. Booth*, 3 Car. & K. 292.

(b) Torts.

A declaration alleged that the defendant requested the plaintiff to lend him a sum of money, and falsely, fraudulently and deceitfully represented to the plaintiff that the defendant had attained the age of twenty-one years; and that the plaintiff, confiding in the truth of the said representation and pretence, did lend the defendant a sum of money, &c., whereas the defendant had not at the time of his making the said representation and pretence attained the age of twenty-one, but was an infant under that age, as the defendant at the time of his making the said representation well knew, and that the defendant refused to pay the said loan, &c., whereby the plaintiff had been damaged, &c. The

Court permitted the defendant under the Common Law Procedure Act, 15 & 16 Vict. c. 76. s. 80, both to demur to this declaration and to plead, first, not guilty; and, secondly, a traverse that the plaintiff confided in the alleged fraudulent representation upon an affidavit of the defendant's attorney, which stated that he was advised and believed that the defendant had, under the circumstances aforesaid, just ground to plead not guilty to the declaration, and also a traverse that the plaintiff confided in the alleged fraudulent representation; and that he was also advised and believed that the declaration would be held bad on demurrer. *Price v. Hewitt*, 8 Exch. Rep. 146.

(E) GUARDIAN.

(a) Appointment of.

A petition by infants for the appointment of a guardian ought to be presented by them by their next friend. *In re Russell's Estate*, 20 Law J. Rep. (N.S.) Chanc. 384.

The Court will not appoint a mother to be the guardian of her children without having some information as to the family of the father. *In re Cook*, 20 Law J. Rep. (N.S.) Chanc. 392.

The Court directed a reference to appoint a guardian to an infant, and approve of proper maintenance, to be inserted in the decree, upon the hearing of a suit, without any petition being presented. *Cross v. Brown*, 20 Law J. Rep. (N.S.) Chanc. 560; 2 Sim. N.S. 53, *nom. Cross v. Beavan*.

Two infants having been sent to England for their education, by their father, who was resident in India, the Court appointed a guardian of the children, to act for the father during his absence abroad, notwithstanding that their mother was residing in this country. *In re Thomas*, 22 Law J. Rep. (N.S.) Chanc. 1075.

A deed appointing a guardian of the person and estate of an infant is well executed within the 12 Car. 2. c. 24. s. 8, although the guardian herself was one of the attesting witnesses to the deed. *Morgan v. Hatchell*, 24 Law J. Rep. (N.S.) Chanc. 135; 19 Beav. 86.

A guardian attesting the deed by which she is appointed is a credible witness to support the appointment. *Ibid*.

Uncle and aunt appointed guardians of the person of an infant on petition without suit or reference, no allowance being asked. *In re Neale*, 15 Beav. 250.

The order of a foreign Court appointing a guardian of an infant, the child of a British subject, will be recognized in this Court with the respect due by the comity of nations to the order of a foreign Court, but it does not confer on the appointee the character of guardian in this country. *In re Dawson, Dawson v. Jaz*, 2 Sm. & G. 199.

(b) Payments and Allowance to.

Shares of infants in a testator's estate under 20*l.* each, ordered to be paid at once to the persons maintaining them. *Farrance v. Viley*, 21 Law J. Rep. (N.S.) Chanc. 313.

The Court will not give a direct benefit out of an infant's income to his father. *In re Stables*, 21 Law J. Rep. (N.S.) Chanc. 620.

A scheme by which an infant (whose father was

living) was to be articulated to a solicitor, and to live with an uncle residing in the same place, was approved of by the Court; and the uncle was appointed to act in the nature of a guardian to the infant, and have an allowance out of his income. An application that an allowance might be made to the father, who lived at a distance, and was in very narrow circumstances, was refused. *Ibid*.

An infant's legacy of small amount paid to the father under special circumstances. *Walsh v. Walsh*, 1 Drew. 64.

A widow on the death of her husband entered into possession of the small real and personal property he had left, and out of its rents and carrying on his trade maintained herself and his five infant children, the three eldest of whom were his children by a former marriage. Shortly after the husband's death a bill was filed in the names of all the children by the maternal grandfather of the three eldest as their next friend, for a declaration of the rights of the infants, and for accounts and for the appointment of guardians and of a receiver. The infant plaintiffs by their next friend presented a petition in the cause containing imputations against the widow of improper treatment by her of the infants, and asking the appointment of guardians and a receiver. The Court directed a reference to the Master, who by his report approved of the widow and her co-executor as the guardians of all the children, and found that the whole income ought to be allowed for their maintenance. The Court on petition confirmed this report, and directed that the receiver should pay all the income of the property to the widow for the maintenance of the children, thereby leaving all parties just in the same position as they had been in before the suit was instituted, and the costs of all the proceedings were ordered to be paid by the next friend, and all further proceedings were stayed until further order. *Anderton v. Yates*, 5 De Gex & S. 202.

(c) Liability of.

A testamentary guardian is a trustee, and therefore the Statute of Limitations is inapplicable to accounts as between him and his ward. *Mathew v. Brise*, 14 Beav. 341.

(F) CUSTODY OF.

The father of an infant agreed to let it live with its uncle, who was to maintain and educate it until it was enabled to provide for itself, and the father promised not to take the child away from the uncle, and to pay a certain sum monthly for its support. The agreement was acted on for some months:—Held, that notwithstanding the agreement, the father was at liberty to revoke his consent to the child's living with its uncle, and that the Court, on the child being brought up on *habeas corpus*, was bound to deliver it to its father. *Regina v. Smith, in re Boreham*, 22 Law J. Rep. (n.s.) Q.B. 116; 1 Bail C.C. 132.

The Court granted a writ of *habeas corpus*, at the instance of the father of an infant between seven and eight years of age, commanding the mother (from whom the applicant was divorced) and her father to bring the infant into court without any previous demand. *Ex parte Witte*, 13 Com. B. Rep. 680.

In 1836, H., a British subject, intermarried with E., a native of France, and the parties resided in

Paris. There are five children of the marriage, who were all born in France. In 1853 the husband and wife separated, and the former came to reside in England. The wife continued in France, and retained two of the children, against the wishes of the husband; and in 1853 she instituted, in this country, a suit for divorce. In November 1853 a bill was filed, in the name of the infant children, against the father and mother, to make the children wards of Court. A motion was made that the mother might be ordered to deliver up the two children to the custody of the father:—Held, upon appeal, confirming the decision of the Court below, that the Court had jurisdiction to make the order, notwithstanding the children were born abroad, and that they and their mother were resident abroad; and it was ordered accordingly. *Hope v. Hope*, 23 Law J. Rep. (n.s.) Chanc. 682; 4 De Gex, M. & G. 328; 19 Beav. 237.

In the divorce suit, G & C acted as solicitors for the wife:—Held, that an order directing that service of the bill and notice of motion on G & C should be deemed good service on the mother, was rightly made. *Ibid*.

(G) WARD OF COURT.

An infant ward of Court enlisted in the East India Company's service, and was about to be sent to the East Indies, but at the instance of the guardian, the Court, after notice to the East India Company and the officer in command of the recruits, ordered his discharge. *Rochford v. Hackman*, 23 Law J. Rep. (n.s.) Chanc. 261; Kay, 308.

Upon E B, a ward of Court, being inveigled into an unsuitable marriage, the Court ordered a settlement to be made of her property for the purpose of excluding the husband; and in default of issue of E B, a general power of appointment, except in favour of the husband, was, by the settlement, given to her. The settlement was executed by E B after she attained twenty-one; but it contained no conveyance of the property by her. E B died without issue, having executed the power of appointment in favour of W W. The will of J F, the testator in the cause, under which E B's property was derived, had vested it in trustees, who were thereby directed to convey it to uses and upon trusts in favour of E B and her children, with remainders over. These trustees were not parties to the settlement which had been executed, and the legal estate remained in them:—Held, that the claim of W W under the appointment could not be supported. *Field v. Moore*, 24 Law J. Rep. (n.s.) Chanc. 161; 19 Beav. 176.

This Court will not give effect to its orders if imperfectly carried out, so as to deprive the heir-at-law of estates he would not have been entitled to, if the instrument which the Court, by its order, had sanctioned had been executed with all legal formalities. *Ibid*.

The marriage of a female infant who is a ward of Court by being party to a suit concerning property in which she is interested, is a contempt on the part of the husband if contracted without leave, and such contempt gives the Court jurisdiction over both parties, and it may refuse to part with any portion of the property of the wife during the joint lives even upon the application of both, and whether the wife

at the time of consent is of age or not. In cases of this description the Court exercises its jurisdiction with a view to what is most for the benefit of the ward and her children. *Martin v. Forster*, 24 Law J. Rep. (N.S.) Chanc. 519.

Previously to a ward of Court attaining her majority proposals of marriage were made, and the draft of the settlement was submitted to the Master for his sanction. The Master objected to the terms proposed, and the parties consequently postponed the marriage till the ward attained twenty-one, when a settlement was executed, and the marriage took place. This was in the year 1811. After the marriage a petition was presented to the Court for its sanction to the settlement, and an order was made accordingly, but it was taken by consent, and the wife was not separately examined. A bill was now filed, praying that the settlement might be reformed, on the ground that an absolute interest in the property ought to have been given to the wife in the events which had happened:—Held, that the power of the Court over the property of the ward did not cease upon her attaining twenty-one; and that the settlement, under the circumstances of this case, ought to be altered so as to give an absolute interest to the wife, who had survived her husband without having children. *Money v. Money*, 24 Law J. Rep. (N.S.) Chanc. 684; 3 Drew. 256.

In 1839 A B married a ward of Court without its sanction:—Held, in 1852, that, notwithstanding the lapse of time, the Court possessed the same power over the parties which it would have had on an application shortly after the marriage, and which it possessed in every case of the marriage of a ward of Court without the sanction of the Court, subject nevertheless to the due protection of the rights and interests of the persons who have come into *esse* since that period. *Cave v. Cave*, 15 Beav. 227.

A marriage settlement, the husband being adult and the wife a minor, is binding on the former though not on the latter. *Ibid*.

In 1839 A B married a ward of Court, without leave. Articles were executed both before and after the marriage. In 1840 a reference was made to approve of a settlement, but nothing was done thereon. In 1850 the parties executed a settlement of the wife's real estate without the sanction of the Court. In a suit instituted by the wife to annul the articles and confirm the settlement:—Held, that in 1852 the power of the Court was not affected by the lapse of time; that the parties coming to the Court had given it authority to do what was right, and that a reference must be made to the Master to report as to the propriety of the settlement of 1850, and whether it ought to be varied, and to approve of a settlement of the wife's personal estate. *Ibid*.

Generally, upon the marriage of a ward of Court without leave, the marriage being found valid, the party in contempt having executed the settlement and paid the costs, is discharged. *Field v. Brown*, 17 Beav. 146.

A B was committed for contempt for marrying a ward. After the marriage had been found valid, but before a settlement had been executed, he was discharged upon his undertaking to abstain from any intercourse. After the settlement had been executed the Court held, that it would be contrary to principle either to compel the continuance of the

undertaking or to make an order to the same effect. *Ibid*.

The terms of the settlement of a small fund belonging to a ward embodied in the order. *Wright v. King*, 18 Beav. 461.

The almost invariable modern practice, in the case of a marriage with a ward of Court without consent, is to exclude the husband altogether from taking any interest in her property. *Wade v. Hopkinson*, 19 Beav. 613.

Disinclination of the Court to sanction the marriage of an infant ward, where it is impossible for him, by reason of his infancy, to settle his real estate so as to go along with his title and to make provision for younger children. *Honywood v. Honywood*, 20 Beav. 451.

It is a contempt of Court to remove an infant ward of Court out of the jurisdiction, even where he has enlisted in the army without leave of the Court, by sending him with the regiment on foreign service. *Harrison v. Goodall*, Kay, 310, note (a).

A ward of Court having so enlisted, and having been sent to Ireland, upon petition of his guardian for discharge of the infant, the Court, concurring with the guardian in thinking that, under all the circumstances of the case, it was better for the infant to remain in the army, ordered the petition as to that part of it to stand over, with liberty to apply, and that the guardian should continue as such; but that the allowance previously made for the infant's maintenance should be discontinued, and provided for the expenses of the guardian in the matter out of the income which had been till then applied for the infant's maintenance. *Ibid*.

Although the Court will, under special circumstances, allow an infant ward to go out of the jurisdiction, yet it will not compel the removal of an infant ward out of the jurisdiction. *Dawson v. Jay*, 3 De Gex, M. & G. 764.

An infant being a British subject and also an American citizen, and having lost both father and mother, was brought over to England from the United States, where her property was situated, by a paternal aunt, with whom she resided. An application was then made by a maternal aunt, who had been appointed her guardian by the Court in America, to have the custody of the infant delivered to her, with the view of taking the infant back to America. The Lord Chancellor refused to interfere, being of opinion that he had no right to make such an order, even if on other grounds he had thought proper to accede to the application. *Ibid*.

(H) ACTIONS.

[Appearance, see title PRACTICE—Plea of infancy, see *Roberts v. Bethell*, title BILLS AND NOTES, (D) (e), and *Cooper v. Parker*, title ACCORD AND SATISFACTION, *ante*, p. 2.]

INFERIOR COURT.

[Actions on judgments of, see title ACTION—Non-Liability to be rated, see RATE; Poor-Rate—Admiralty Court, see title SHIP AND SHIPPING. Foreign Attachment, see title ATTACHMENT. Ecclesiastical Courts, see EXECUTION—PRACTICE. And see titles COSTS—PROHIBITION.]

(A) COUNTY COURTS.

(a) *Jurisdiction, in general.*(b) *Judges.*(1) *Liabilities.*(2) *Rights, Powers and Duties.*(c) *Bailiffs.*(d) *Causes of Action within the Jurisdiction.*(1) *In general.*(2) *Residence of Parties.*(3) *Abandonment of Excess.*(4) *Where Title to Lands or Hereditaments comes in question.*(5) *Bills of Exchange.*(6) *Arbitrations.*(7) *Legacies.*(8) *Though Cause of Action not arise in the District.*(e) *Interpleader Summons.*(f) *Recovery of Possession of Tenements.*(g) *Practice.*(1) *Form of Pleadings.*(2) *Particulars.*(3) *Jury.*(4) *Nonsuit.*(5) *New Trial.*(6) *Judgment Summons and Commitment for Non-payment of Debt.*(h) *Appeal from.*(1) *In what Cases it lies.*(2) *Statement of Case and Practice thereon.*(3) *Costs on.*

(B) BOROUGH COURTS.

(C) COURT BARON.

(D) STANNARIES.

(E) REMOVAL OF CAUSES.

(A) COUNTY COURTS.

[See titles CERTIORARI—REPLEVIN.]

(a) *Jurisdiction, in general.*[See *Lavey v. Regina*, title PERJURY. And see title COSTS, (B) (c).]

A writ of trial from the superior courts cannot be directed to a Judge of a county court under the statute 3 & 4 Will. 4. c. 42. s. 17, as a county court is not a court of record within the meaning of that statute. *Owens v. Breese* (in error), 20 Law J. Rep. (N.S.) Exch. 359; 6 Exch. Rep. 916; 2 L. M. & P. P.C. 486.

By a local act, passed before the County Courts Act, rates for cleansing and sewerage of the town of Birkenhead may be recovered by action "in any of Her Majesty's courts of record at Westminster." By the County Courts Act (9 & 10 Vict. c. 95. s. 58.) all pleas of personal actions under 20l. may be holden in the county court:—Held, that the county court had jurisdiction to hear a plaintiff brought to recover a sum under 20l. due in respect of a rate under the local act. *In re Stewart v. Jones*, 22 Law J. Rep. (N.S.) Q.B. 1; 1 E. & B. 22.

The Nuisances Removal and Diseases Prevention Act, 1848 (11 & 12 Vict. c. 123.) gives power to Justices to order the owner or occupier of premises to remove any nuisance therein, and if such order be not complied with by such owner or occupier, the

guardians of the poor may enter the premises to remove the nuisance. By section 3. all costs and expenses incurred in obtaining such order or in carrying the same into effect, shall be deemed to be money paid for the use and at request of the owner or occupier of the premises in respect whereof such costs and expenses shall have been incurred, and may be recovered by the guardians as such in any county court, or, if they think fit, before two Justices:—Held, that this provision overrides section 58. of the 9 & 10 Vict. c. 95, and that the county court has jurisdiction to hear a plaintiff for such costs and expenses, notwithstanding that a question of title to land arises in it. *Regina v. Harden*, 22 Law J. Rep. (N.S.) Q.B. 299; 2 E. & B. 189.

Where a party is charged in a county court with a liability arising from his being the owner of land, and he disclaims being the owner of that land, this raises a question of title within the 9 & 10 Vict. c. 95. s. 58. *Ibid.*

(b) *Judges.*(1) *Liabilities.*

By the 9 & 10 Vict. c. 95. s. 18. it shall be lawful for the Lord Chancellor, or, where the whole district is within the Duchy of Lancaster, for the Chancellor of the said duchy, if he shall think fit, to remove for inability or misbehaviour any Judge already appointed or hereafter to be appointed. By an instrument under the hand and seal of the Chancellor of the duchy, W R was removed from his office of county court Judge on the ground of inability or misbehaviour:—Held, that this instrument was not absolutely conclusive, but that it was open to the party removed to shew that he had no notice of the charges against him, or no opportunity of being heard in his defence, or that no evidence was adduced to support the charges, or that the complaints against him were not of such a nature as amounted to inability of misbehaviour within the meaning of the act; but where he had a fair opportunity of being heard, and where the charges, if true, amounted to inability or misbehaviour in his office, and evidence had been given in support of them, the Chancellor was held to be the sole judge of the weight of the evidence, and this Court would not question the appointment of a successor by *quo warranto*. *Ex parte Ramshay*, 21 Law J. Rep. (N.S.) Q.B. 238; 18 Q.B. Rep. 173.

An instrument removing a county court Judge from office need not set out all the proceedings instituted in order to the removal, with the specific charges shewing inability or misbehaviour, or the evidence adduced to support those charges. *Ibid.*

If it be drawn up in the words of the act of parliament it will be presumed, until the contrary is proved, that the Chancellor has duly exercised his jurisdiction. *Ibid.*

To obtain a criminal information the applicant should apply to the Court in the first instance, and before he has elected to take another course of proceeding. The Court, therefore, discharged a rule for a criminal information against a county court Judge for misconduct in his office, where it appeared, from the affidavits, that the applicant had addressed a memorial to the Lord Chancellor, stating the misconduct complained of, and praying for an inquiry

into the conduct of the Judge, though the Lord Chancellor had declined to interfere. *Regina v. Marshall*, 24 Law J. Rep. (N.S.) Q.B. 242; 4 E. & B. 475.

(2) *Rights, Powers and Duties.*

[Right to notice of action, see title ACTION, (C) (a).]

In an action in a county court the plaintiff retains the common law privilege of electing to be nonsuited, at any time before the Judge gives his verdict. *Robinson v. Lawrence*, 21 Law J. Rep. (N.S.) Exch. 36; 7 Exch. Rep. 128; 2 L. M. & P. P.C. 673; and see *Stancliffe v. Clarke*, post, (g) (2).

(c) *Bailiffs.*

[Right to notice of action, see title ACTION, (C) (a).]

If an action be brought in the superior courts against the high bailiff of a county court, in respect of a claim to goods and chattels taken in execution of the process of the court, and the jury give less than 20*l.* damages, section 139. of the statute 9 & 10 Vict. c. 95. deprives the plaintiff of costs, unless the Judge certify that the action was proper to be brought in such superior court; and the plaintiff is not entitled to costs under section 128, for the case falls within the exception in that section. *Mann v. Backerfield*, 20 Law J. Rep. (N.S.) Q.B. 265; 2 L. M. & P. P.C. 55.

On the plaintiff proceeding to tax his costs, it was admitted before the Master, that the defendant was the high bailiff, and no objection was then taken that the defendant had not applied to enter a suggestion, and the Master declined to tax the costs:—Held, that the objection of the want of proof that the defendant was high bailiff, and of the want of a suggestion, could not be taken on a motion to review the Master's decision. *Ibid.*

In trespass, three defendants, who were execution creditors, pleaded, first, not guilty; secondly, not possessed; and other defendants, who were bailiffs of the county court, pleaded, first, not guilty; secondly, not possessed; thirdly, no notice of action; fourthly, that the action was not commenced within three calendar months. It appeared that R had made a deed of assignment to the plaintiff of the goods in a certain house, to hold upon trust to permit and suffer R to hold the goods and premises until demand of payment of money which should become due, and with further trusts to sell if the money should not be paid. The execution creditors obtained judgment against R in the county court, and execution issued, and the goods mentioned in the assignment were seized. The plaintiff proved the seizure and sale, by the production of the writ, with the levy indorsed by the bailiff. The jury found that the assignment was not *bona fide*, that the bailiffs had been indemnified by the other defendants, and that the bailiffs acted *bona fide*, believing that they were acting under the authority of the County Courts Act. A verdict was entered for the plaintiff on the first issue, for all the defendants on the second, and for the defendants who were bailiffs on the third and fourth issues:—Held, that a right to the present possession of the goods passed under the assignment, sufficient to entitle the plaintiff to maintain trespass. That where a sheriff or bailiff sets up a claim to goods taken in execution by him as against a third party, he must shew a judgment

against the execution creditor, and that his production of the writ of execution alone is not sufficient for this purpose. That the question was properly left to the jury whether the bailiffs acted *bona fide*, believing they were authorized by the County Courts Act; and that the circumstance of the indemnity being given to the bailiffs did not necessarily negative the *bona fides* of their conduct. *White v. Morris*, 21 Law J. Rep. (N.S.) C.P. 185; 11 Com. B. Rep. 1015.

The 148th (interpleader) Rule of Practice of the county courts provides that where the claim to any goods taken in execution is dismissed, the costs of the bailiff shall be retained by him out of the amount levied, unless the Judge shall otherwise order. The high bailiff having taken goods under a *fi. fa.* against B at the suit of A, which were claimed by C, the bailiff got an interpleader summons, and on the hearing C's claim was dismissed; the bailiff then paid into court the amount of the levy, without deducting his costs:—Held, that even if he were entitled to deduct the costs of the interpleader proceedings from the proceeds in his hands, he could not, after paying them over, recover the amount of them from A the execution creditor. *Bloor v. Huston*, 24 Law J. Rep. (N.S.) C.P. 26; 15 Com. B. Rep. 266.

Quære—whether the 148th rule entitles the bailiff to deduct the costs of the interpleader, as against the execution creditor, where the claimant fails to make out his claim. *Ibid.*

(d) *Causes of Action within the Jurisdiction.*

[See titles COSTS, (B) (c)—DETINUE.]

(1) *In general.*

A carrier and wharfinger, residing at Swindon, in Wiltshire, agreed in writing with M, who resided in Surrey, to barge timber from Swindon Wharf to London, at any wharf there, at 16*s.* per ton, to include all charges, except wharfage. It was necessary to haul the timber from the place where it lay to be loaded on board the barges, and at times when the horses of M were not on the spot the carrier provided horses, and hauled the timber. A plaint was afterwards brought in the county court for the district of Swindon against M for 50*l.*, the balance of account claimed by the carrier, including two items, amounting to 1*l.* 16*s.*, for hauling:—Held, that the hauling of the timber and the carriage of it to London constituted but one cause of action; and that, as such cause of action did not arise until the delivery of the timber in London, the Judge of the Swindon County Court had no jurisdiction to try the plaint under the 9 & 10 Vict. c. 95. s. 60. *Barnes v. Marshall*, 21 Law J. Rep. (N.S.) Q.B. 388; 13 Q.B. Rep. 785.

The plaintiff, by leave of the Judge of the county court of L, issued a plaint against the defendant, who resided out of the district, for a breach of a contract for the sale of corn, stating by his particulars that he claimed 4*l.* "for damages sustained by the plaintiff in the defendant not delivering a cargo of Indian corn, bought by him from the defendant by a contract in writing." The contract was contained in the following letter from the defendant's agent to the plaintiff, written in L: "We have this day sold you, per account of I. & Co., the cargo of

Galatz Indian corn, per *Thane of Fife*, now at Queenstown, at the price of 27s. per quarter, including cost, freight, and insurance to a safe port of the United Kingdom. Payment, cash in exchange for shipping documents and policy of insurance." The plaintiff ordered the cargo to be delivered at Drogheda in Ireland, and afterwards demanded in L the shipping documents, offering to pay the price:—Upon a motion for a prohibition, the Court prohibited the plaintiff from proceeding upon the breach of the contract in not delivering the cargo at Drogheda, leaving it open to him to proceed upon amended particulars for a breach in not handing over the shipping documents at L. *In re Walsh v. Ionides*, 22 Law J. Rep. (N.S.) Q.B. 137; 1 E. & B. 383.

Where in a plaint in a county court the plaintiffs' particulars of demand stated a debt originally of 57L, and admitted that the defendant was entitled to a set-off of 15L, but no evidence was offered to shew that the parties had agreed to treat the amount of the set-off as a part payment.—Held, that the county court had no jurisdiction to try the cause, nor could the plaintiff give that Court jurisdiction by offering at the trial to abandon the excess of his claim above 50L. *Awards v. Rhodes*, 22 Law J. Rep. (N.S.) Exch. 106; 8 Exch. Rep. 312.

(2) Residence of Parties.

Where the plaintiff in an action in a superior court, resided at Inverness, more than twenty miles from the defendant, but had been in the habit for some years of coming to London and residing for some months in Golden Square, for the purposes of his business, within the jurisdiction of a county court and less than twenty miles from the defendant, and was residing there during the whole time of the action.—Held, that the plaintiff did not "dwell" in Golden Square within the meaning of the 128th section of the 9 & 10 Vict. c. 95, but at Inverness; and that therefore the superior court had concurrent jurisdiction with the county court under that section. *Macdougall v. Paterson*, 21 Law J. Rep. (N.S.) C.P. 27; 11 Com. B. Rep. 755; 2 L. M. & P. P.C. 681.

Semble—that if the plaintiff dwells at two places, one of them less and the other more than twenty miles from the defendant, the superior courts have concurrent jurisdiction. *Ibid*.

Where one of several plaintiffs dwells beyond twenty miles from the defendant, the superior courts have concurrent jurisdiction with the county court, under the 9 & 10 Vict. c. 95. s. 128, and the plaintiffs will be therefore entitled to costs under the 13 & 14 Vict. c. 61, notwithstanding less than 20L is recovered. *Hickie v. Salomo*, 21 Law J. Rep. (N.S.) Exch. 271; 8 Exch. Rep. 59.

H was a surgeon, apothecary and accoucheur, residing at C, in the district of county court A. He daily attended to patients requiring his advice residing in the district of county court B:—Held, that he carried on his business within the jurisdiction of county court B, within the meaning of section 128. of the statute 9 & 10 Vict. c. 95. *Mitchell v. Hender*, 23 Law J. Rep. (N.S.) Q.B. 273.

He was also a partner in a mine on the cost-book principle in the district of county court B. He never attended to the mine personally, but the business

was conducted by an agent. *Semble*—that H did not carry on the business of a miner within the jurisdiction of county court B, within the meaning of the statute, which contemplates personal attendance. *Ibid*.

Under the 128th section of the 9 & 10 Vict. c. 95, which gives the county court a concurrent jurisdiction with the superior courts in cases where the plaintiff dwells more than twenty miles from the defendant, this distance is to be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access. *Lake v. Butler*, 24 Law J. Rep. (N.S.) Q.B. 273.

(3) Abandonment of Excess.

Where a plaint is brought in a county court to recover 50L. in respect of a cause of action to a greater amount, the excess being abandoned, pursuant to 9 & 10 Vict. c. 95. s. 63, the abandonment need not appear upon the plaint or particulars of demand, although such is the most reasonable course. Where, therefore, at the hearing the excess was abandoned, and a minute made by the Judge of the abandonment, it was held, on motion for a prohibition, that he had jurisdiction to give judgment and grant execution for 50L. *Isaacs v. Wylde*, 21 Law J. Rep. (N.S.) Exch. 46; 7 Exch. Rep. 163.

Where there is an abandonment of the excess above 50L. of a plaintiff's claim in a county court, with a view to give the Court jurisdiction, under the 9 & 10 Vict. c. 95. s. 63. and the 13 & 14 Vict. c. 61. s. 1, such abandonment must be the act of the plaintiff himself or of some person authorized by him, and not that of the county court Judge. *In re Hill v. Swift*, 24 Law J. Rep. (N.S.) Exch. 137; 10 Exch. Rep. 726.

The Court issued a prohibition where a county court Judge, of his own authority, and without the plaintiff's consent, amended the particulars with a view, by reducing the plaintiff's demand below 50L, to give the county court jurisdiction. *Ibid*.

Per Alderson, B., where a case comes before a county court which has not jurisdiction to try it, and such jurisdiction is given by the act of the plaintiff only, the plaintiff ought to pay the costs of the opposite party up to the time of trial. *Ibid*.

(4) Where Title to Lands or Hereditaments comes in Question.

[See title PROHIBITION.]

A railway company, by their special act, were entitled to charge a certain toll on carriages passing along their line. A coal-owner having requested the company to convey along their line for him some coal-trucks loaded with coals, the company refused to do so except on payment by him of the charge for the conveyance of the coals, and a further charge for the bringing back of the empty trucks. The coal-owner declined to pay the latter charge beforehand, and sued the company in the county court for the damages occasioned by their refusal to carry his coals. On the trial the plaintiff contended that the company were not entitled to charge the toll beforehand, and also that coal-trucks were not carriages within the meaning of the act. The company urged that the county court Judge had no jurisdiction, as the title to a toll was in question. The Judge gave judgment for the plaintiff. The company having

applied for a writ of prohibition.—Held, that the title of the company to take toll was not in question, and that the Judge had jurisdiction to determine whether the company were justified in making that particular charge; and also to say whether the coal-trucks fell under the denomination of “carriages” in respect of which a toll was payable. *Hunt v. the Great Northern Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 349; s. r. and s. c. 10 Com. B. Rep. 900; 2 L. M. & P. P.C. 268.

The title to an incorporeal hereditament is in question when either its existence or the right to it is disputed. *In re Adey v. the Deputy Master of the Trinity House*, 22 Law J. Rep. (N.S.) Q.B. 3: s.c. nom. *Regina v. Everett*, 1 E. & B. 273.

The Ramsgate Harbour Act (32 Geo. 3. c. lxxiv.) imposed certain “rates and duties” on the owners of vessels entering or passing the harbour. A vessel having passed the harbour on her outward and also on her homeward voyage, a claim for two payments under that act was made upon the owner in respect of each voyage. He made both payments under protest, and sued in the county court for the money paid in respect of the last voyage, on the ground that the act did not entitle the trustees to a second payment under these circumstances.—Held, that these rates and duties were tolls, and that the title to a toll was in question, within the meaning of the 9 & 10 Vict. c. 95, s. 58. *Ibid.*

A tenant, sued for use and occupation of premises by the landlord of whom he took them on lease, is at liberty to shew that the latter’s title expired during the tenancy, even though the tenant continued to enjoy or occupy the premises for the whole term, without being subjected to any eviction from the real owner; and if the tenant sets up such a defence when so sued in a county court, that Court has no longer any jurisdiction to decide the cause, as title to land has come in question. *Mountney v. Collier*, 22 Law J. Rep. (N.S.) Q.B. 124; 1 E. & B. 630.

Under the 119th and 121st sections of the 9 & 10 Vict. c. 95, a county court has jurisdiction to try an action of replevin for an alleged illegal distress for rent, although the title to the premises, in respect of which the rent distrained for was due, appears to be in dispute; the steps necessary for the removal of the action under the 121st section not having been taken. *Regina v. Raines*, 22 Law J. Rep. (N.S.) Q.B. 223; 1 E. & B. 855.

The amount paid for carrying into force an order of two Justices to abate a nuisance, under statute 11 & 12 Vict. c. 123, may, under the provisions of section 3, be recovered in the county court from the owner of the premises where the nuisance existed, though title to land comes in question. *Regina v. Harden*, 22 Law J. Rep. (N.S.) Q.B. 299; 2 E. & B. 189.

Semble—that title comes in question if the party sued, as owner of land, denies that he is owner. *Ibid.*

The county courts are not precluded by the exception in the 58th section of the 9 & 10 Vict. c. 95. from trying a disputed custom. Therefore, they have power to try a custom for the occupier of a wharf, on a public navigable river, to cause vessels coming to his wharf to unload to overlap the adjoining wharf of another. *Davis v. Walton*, 22 Law J. Rep. (N.S.) Exch. 25; 8 Exch. Rep. 153.

A plaintiff having been brought in a county court for a trespass in removing the plaintiff’s goods from two rooms of a house which the defendant occupied, it appeared that the question in dispute was, whether the plaintiff had let the whole house to the defendant, or had reserved to himself the two rooms in which the alleged trespass was committed.—Held, that this was a question of title to a corporeal hereditament, and that, therefore, the county court Judge had no jurisdiction to hear the plaintiff. *In re Chew v. Holroyd*, 22 Law J. Rep. (N.S.) Exch. 95; 8 Exch. Rep. 249.

Where the right of a person as the parish clerk of a chapelry to recover, in a plaint in a county court, the ancient customary yearly sum of 4*d.* from each householder throughout the chapelry, was *bonâ fide* disputed, both in respect of the validity of the plaintiff’s appointment to the office of clerk and his right as such clerk to the payment claimed.—Held, that the title to an incorporeal hereditament was in question within the meaning of the exception in section 58. of the 9 & 10 Vict. c. 95, and that the county court had no jurisdiction to try the plaintiff. *In re Stephenson v. Raine*, 23 Law J. Rep. (N.S.) Q.B. 62; 2 E. & B. 744.

A summons was taken out in the county court by A against B, to recover lands under statute 9 & 10 Vict. c. 95, s. 122. On application for a prohibition by B, it appeared that B held, as a tenant to C in his lifetime, two farms, C being leaseholder of the one and tenant in fee of the other. C died, and A produced a will by which he was devisee of all C’s real estate, and appointed executor. A proved the will, and gave B notice to quit. B *bonâ fide* disputed the validity of the will.—Held, that the restriction contained in section 58, as to the jurisdiction of the county court when title to corporeal hereditaments comes in question, applies to proceedings under section 122. That title to the leasehold could not here come in question, inasmuch as the probate was conclusive that the title to that was in A. But that title to the freehold did come in question. And the prohibition went as to the freehold farm, and was refused as to the leasehold. *Kerlin v. Kerkin*, 3 E. & B. 399.

To entitle a plaintiff to costs under 13 & 14 Vict. c. 61, s. 13, on the ground that the action, which was in trespass to realty, could not have been brought in a county court, as the title to land was in question, he must shew not merely that title might have come in question, as *ex. gr.*, that the defendant had pleaded not possessed; but that, at the trial, the title was really and *bonâ fide* in dispute. *Latham v. Spedding*, 20 Law J. Rep. (N.S.) Q.B. 302; 17 Q.B. Rep. 440; 2 L. M. & P. P.C. 378.

(5) Bills of Exchange.

The plaintiff, who resided at N, drew there a bill of exchange on the defendant, who resided at L. The latter accepted the bill at L and sent it to the plaintiff at N, who there indorsed it over. The bill was dishonoured at maturity, and the plaintiff paid the amount to the indorsee, and then by leave of the Judge sued the defendant on it in the county court of N.—Held, that as the defendant accepted the bill in L, the whole cause of action did not arise in N; and therefore that the Judge of the county court of N had no jurisdiction to try the cause.

Wilde v. Sheridan, 21 Law J. Rep. (N.S.) Q.B. 260; 1 Bail C.C. 56.

(6) *Arbitrations.*

[See title PERJURY.]

A plea that plaintiff sued defendant in a county court, and that they mutually referred the action and all matters in difference therein, is proved by an order of reference made by the Judge of the county court, by consent of the plaintiff and the defendant. *Roper v. Levy*, 21 Law J. Rep. (N.S.) Exch. 29; 7 Exch. Rep. 55; 2 L. M. & P. P.C. 621.

(7) *Legacies.*

A testator bequeathed his property to C M and J Wilson, their executors, &c., in trust for certain purposes, and the residue of his property he bequeathed to the same parties, upon trust, as to one-sixth part, to pay the same equally between the four children of his sister. He then appointed C M and J Wilson executors and trustees of his will. He afterwards added a codicil, whereby he appointed S E an executor of his will, in the room of C M deceased, and to act in conjunction with the other "executor in his said will." The plaintiff's late wife was one of the four children of the testator's sister; and the plaintiff as her administrator brought an action in the county court, to recover from the defendant, J Wilson, "a fourth part of the sixth share of the residue," and the action in the county court was described in those terms in the summons and in the particulars of demand. A motion for a prohibition after sentence having been made on the ground that the bequest amounted to a trust and not to a legacy, and, therefore, was not within the jurisdiction of the county court,—Held, that this was a legacy to the plaintiff within the meaning of the act, and not a legacy to the executors in trust; and, therefore, that the county court Judge had jurisdiction. *Pears v. Wilson*, 20 Law J. Rep. (N.S.) Exch. 381; 6 Exch. Rep. 833.

Quære—whether a prohibition can be granted where there is no defect apparent on the face of the proceedings. *Ibid.*

Dictum—a Judge of a county court is bound in all cases to set out the facts on the proceedings so that his jurisdiction may appear, and in the above case the Judge ought not merely to have set out the summons, but to have shewn sufficiently that this was a legacy within the meaning of the County Courts Act, 9 & 10 Vict. c. 95. s. 65. *Ibid.*

A testator by his will made the following bequest:—"Likewise, should my executors think proper, to my man-servant, whom I call Sam, I give 20*l.*, conditional on his continuing to conduct himself faithfully in all respects." At the time of the making of his will, and at his death, the testator resided at Margate, within the jurisdiction of the County Court of Kent. The executors renounced probate, and administration was granted to the defendant by the Prerogative Court of the Archbishop of Canterbury in London. A plaintiff was brought in the County Court of Kent against the defendant, as administrator, to recover the amount of the legacy:—Held, that the letters of administration were an essential part of the cause of action, and as, therefore, the whole cause of action did not arise within the district of the County Court of Kent, that Court

had no jurisdiction to hear the plaintiff under the 60th section of the 9 & 10 Vict. c. 95. *In re Fuller v. Mackay*, 22 Law J. Rep. (N.S.) Q.B. 415; 2 E. & B. 573.

Quære—whether the bequest was one in respect of which the 65th section of the 9 & 10 Vict. c. 95. gave a county court jurisdiction. *Ibid.*

When a plaintiff is brought in a county court for a legacy, and the executor, the defendant, shews that he has paid for the testator debts exceeding the amount of the assets, and the plaintiff contends that the executor has been guilty of a *devastavit*, and on that account seeks to charge him with assets, the county court Judge has jurisdiction to try the question of the *devastavit*. *Winch v. Winch*, 22 Law J. Rep. (N.S.) C.P. 104; 13 Com. B. Rep. 128.

Devise by a testator to his son of certain freehold and leasehold estates and chattels as follows: "On condition of my son paying the following sums, viz. (*inter alia*), I will, order and direct him to pay unto his mother the sum of 4*s.* a week weekly and every week during her natural life"—Held, that this was not a claim of a legacy within the 65th section of the County Courts Act, 9 & 10 Vict. c. 95, but of a debt; and an action having been brought in the county court, the Court granted a *certiorari*. *In re Longbottom v. Longbottom*, 22 Law J. Rep. (N.S.) Exch. 74; 8 Exch. Rep. 203.

(8) *Though Cause of Action not arise in the District.*

Where goods were ordered in O by a tradesman residing there of the traveller of a manufacturer residing at M, who delivered the goods in M to the tradesman's agent,—Held, that an action for the price of the goods could not be brought in the M County Court, as section 60. of the 9 & 10 Vict. c. 95, which empowers a county court Judge to issue a summons where the cause of action arises in his district, applies only to cases where the whole cause of action arises there, and consequently did not give the Judge of the M district any jurisdiction, as the order for the goods, a material part of the cause of action, was given in O. *Borthwick v. Walton*, 24 Law J. Rep. (N.S.) C.P. 83; 15 Com. B. Rep. 501.

In an action in the County Court of Gloucestershire, to recover 20*l.* offered as a reward for the apprehension and conviction of a felon who was apprehended by the plaintiff in Gloucestershire, but convicted in Herefordshire,—Held, that as in order to give the county court Judge jurisdiction, it was necessary that the whole cause of action should arise within his jurisdiction, and the conviction formed part of cause of the action, the county court Judge had no jurisdiction, and a prohibition ought to issue. *Hernaman v. Smith*, 24 Law J. Rep. (N.S.) Exch. 175; 10 Exch. Rep. 659.

(c) *Interpleader Summons.*

Certain parties claimed, as their own, goods which had been seized in execution, as the defendant's goods, under a judgment of the county court. On an interpleader summons being taken out in the county court, the claimants stated, as the particulars of their claim, that "the goods were assigned to us by an indenture, dated, &c., and made between the defendant and ourselves." The county court Judge held the particulars insufficient, refused to allow the parties to go into their claim, and made an order

adjudicating the goods to be the property of the execution debtor:—Held, that the particulars of claim were sufficient; that the county court Judge was wrong in refusing to consider the claim, and a *mandamus* to him to hear and adjudicate upon it was granted. *Regina v. Richards*, 20 Law J. Rep. (n.s.) Q.B. 351; 2 L. M. & P. P.C. 263.

The goods on G's premises having been seized in execution on a judgment against him in a county court, H put in the following claim in respect of them: I give you notice, that by a certain indenture, dated, &c. between G of the one part and me of the other part, reciting, &c., G did grant, convey, and assign unto me all the household goods, furniture, personal estate, and effects whatsoever of him the said G then or at any time thereafter during the continuance of the said security about his houses, brewery and premises, &c. I do hereby claim all and singular the goods and chattels mentioned and intended to be assigned by the deed, and which were in the possession of G upon the execution of the said deed, and which said goods and chattels, or some part thereof, have been seized and taken possession of by you by virtue of a certain writ, &c. On the hearing of the interpleader summons, the county court Judge held that the notice and particulars of claim were insufficient for want of an inventory specifying which of the goods and chattels seized by the bailiff were claimed by H, and consequently refused to adjudicate upon the claim. The Court made absolute a rule for a *mandamus* calling upon the county court Judge to proceed upon the interpleader summons, and to hear and determine upon the claim. *Regina v. Stappylton*, 21 Law J. Rep. (n.s.) Q.B. 8; 1 E. & B. 766.

The Court has no jurisdiction to hear an appeal from the decision of a Judge of a county court on an interpleader proceeding in respect of goods taken in execution to satisfy a judgment of that Court. *Fraser v. Fothergill*, 23 Law J. Rep. (n.s.) C.P. 53; 14 Com. B. Rep. 295.

Whether the Court has power to give costs on striking out such an appeal—*quære*. *Ibid*.

Where a county court Judge decides that the particulars of a claim in an interpleader summons are not sufficient according to the rules made under the County Courts Act, and refuses on that account to hear the claimant, a prohibition lies to stay the further proceedings under the execution, if the particulars ought to have been held sufficient. *In re Hardy v. Walker*; and *Ex parte M'Fee*, 23 Law J. Rep. (n.s.) Exch. 57; 9 Exch. Rep. 261.

A claimant, in the particulars delivered, in pursuance of the 145th rule, was described as of 24, Elizabeth Street, Islington, whereas his true address was 20, Elizabeth Terrace, Islington:—Held, that the address was sufficiently set forth; and that the county court Judge was not justified in dismissing the summons. *Ibid*.

No appeal lies from the decision of a county court Judge on an interpleader proceeding arising out of a claim to goods taken in execution to satisfy a judgment of the county court. *Beswick v. Boffey*, 23 Law J. Rep. (n.s.) Exch. 89; 9 Exch. Rep. 315.

The 148th (interpleader) Rule of Practice of the county courts provides that where the claim to any goods taken in execution is dismissed, the costs of the bailiff shall be retained by him out of the amount

levied, unless the Judge shall otherwise order. The high bailiff having taken goods under a *fi. fa.* against B at the suit of A, which were claimed by C, the bailiff got an interpleader summons, and on the hearing, C's claim was dismissed; the bailiff then paid into court the amount of the levy, without deducting his costs:—Held, that even if he were entitled to deduct the costs of the interpleader proceedings from the proceeds in his hands, he could not, after paying them over, recover the amount of them from A, the execution creditor. *Bloor v. Huston*, 24 Law J. Rep. (n.s.) C.P. 26; 15 Com. B. Rep. 266.

Quære—whether the 148th rule entitles the bailiff to deduct the costs of the interpleader, as against the execution creditor, where the claimant fails to make out his claim. *Ibid*.

(f) Recovery of Possession of Tenements.

[See *Kerkin v. Kerkin*, ante, (d) (4).]

The Judge of a county court has no jurisdiction, under the County Court Act, 9 & 10 Vict. c. 95. s. 122, to grant possession of a house and premises to a party who is the owner of them and claims to be landlord, when the occupier is in possession, under an agreement for purchase, so that the relation between the parties is not the ordinary relation of landlord and tenant. *Banks v. Rebbeck*, 20 Law J. Rep. (n.s.) Q.B. 476; 2 L. M. & P. P.C. 453.

Where a plaintiff was brought in a county court by a landlord against his tenant, to recover possession of certain premises which had been let at the annual rent of 50*l.*, and no fine paid, but it appeared that the value of the premises exceeded 50*l.* a year,—Held, upon motion for a prohibition to the Judge of a county court (*Crompton, J. differing from the rest of the Court*), that the 122nd section of 9 & 10 Vict. c. 95. gave the county court jurisdiction to decide the point. *In re Harrington v. Ramsay*, 22 Law J. Rep. (n.s.) Q.B. 460; 2 E. & B. 669.

In cases of ejectment under the 9 & 10 Vict. c. 95. s. 122, the county courts have jurisdiction where the annual rent of the premises does not exceed 50*l.*, no fine having been paid, although the annual value does exceed 50*l.* *In re Harrington v. Ramsay*, 22 Law J. Rep. (n.s.) Exch. 326; 8 Exch. Rep. 879.

Quære—whether the power of appeal, given by the 13 & 14 Vict. c. 61. s. 14. extends to proceedings under the 9 & 10 Vict. c. 95. s. 122. *Ibid*.

Semble—a prohibition can be moved for after an appeal. *Ibid*.

(g) Practice.

[See County Court Orders, 20 Law J. Rep. (n.s.) i—xxiv.]

(1) Form of Plaintiff.

Where the bailiff of a county court entered two complaints, one for 5*l.* for an assault, and the other for 5*l.* as a fine under the 9 & 10 Vict. c. 95. s. 114. for assaulting him in the execution of his duty, the assault complained of being the same in both complaints,—Held, that these were two distinct complaints, the latter being only an informal mode of claiming the fine; and that, therefore, the complaints were not removable by *certiorari*. *In re Box v. Green*, 23 Law J. Rep. (n.s.) Exch. 219; 9 Exch. Rep. 503.

(2) *Particulars.*

A plaintiff in a county court alleged that the defendant's wife assaulted the wife of the plaintiff, and maliciously caused her to be wrongfully charged with stealing a shawl, and to be conveyed through the streets and to be locked up and detained in custody in a police cell, and further caused the plaintiff to be bound with a surety in a recognizance for his wife's due appearance to await any indictment; whereby the plaintiff was put to 10*l.* expenses in clearing his wife from the said malicious assault and charge. On the case coming on to be heard before the Judge of the county court, the defendant objected that this was a plaintiff for a malicious prosecution, and consequently not within the jurisdiction of the Court. The Judge said that he had jurisdiction, heard the case, and gave judgment for the plaintiff for 10*l.* The defendant applied for a prohibition on affidavits which stated these facts, and also averred that there was no other assault found to have been proved, nor was judgment given for any other assault than that comprised in the alleged giving the plaintiff's wife into custody. The Court granted the prohibition, on the ground that this was substantially a proceeding for a malicious prosecution, and not within the jurisdiction of the county court, although the plaintiff in terms charged an assault. *Jones v. Currey*, 20 Law J. Rep. (N.S.) Q.B. 438; 2 L. M. & P. P.C. 474.

The plaintiff's particulars in a plaintiff in a county court alleged that the defendant had deepened the bed of a river, and thereby varied the level, whereby the plaintiff had been deprived of his accustomed head of water at his mill. It appeared in evidence that the defendant had formerly deepened the bed of the stream, for which the plaintiff recovered damages in an action; that the defendant then erected on his own land a dam, which while it remained kept up the head of water as of old; that the defendant afterwards removed the dam, on which the water fell, and the plaintiff brought the present action. The county court Judge, thinking the particulars were not full enough to meet the evidence as to the loss of the water, directed an amendment under rule 104. of the County Court Rules, and inserted the words "and unlawfully lowered the dam" before the word "whereby" in the particulars. It was objected that the Judge by rule 104. could only amend in case of a variance between the allegations and proof, that there was no variance here, and that consequently the amendment was improper. The court of appeal, though they deemed the amendment unnecessary, held that the Judge, who considered that there was a variance, had under the circumstances authority to make the amendment at his discretion. *Cannon v. Johnson*, 21 Law J. Rep. (N.S.) Q.B. 164.

The plaintiff took a public house of the defendant on the terms (among others) that the plaintiff would purchase all his beer of the defendant, and he gave to the defendant the promissory note of himself and a surety for 50*l.*, which sum was to be the liquidated damages in case of breach. The note was not to be put in force unless the plaintiff broke his agreement. The defendant indorsed the note over, and the indorsees sued on it and compelled the plaintiff to pay the amount. The plaintiff there-

upon brought a plaintiff in the county court against the defendant. The summons and particulars stated, that the plaintiff was brought "for money paid by the plaintiff for and on account of the defendant to A B and C upon a judgment obtained by them in this court as indorsees of a promissory note of the plaintiff and one W, made payable to the defendant or his order, but for which promissory note the plaintiff or W never received from the defendant any value or consideration." On the trial before a jury the defendant proved that the plaintiff had ceased to buy his beer of the defendant after February 1850. The plaintiff offered evidence to shew that since Christmas 1849 the defendant had sent bad beer. This was objected to, but received. The defendant then applied to the county court Judge to nonsuit the plaintiff. This he refused to do, as the plaintiff declined to be nonsuited. The jury found for the plaintiff, and the defendant appealed. The case which was stated by the Judge set out his direction to the jury (although it did not appear that any dissatisfaction had been expressed by the appellant respecting it at the trial), and concluded by submitting to the Court of Appeal the questions whether the Judge was entitled to nonsuit the plaintiff without the consent of the latter, and whether the evidence as to the quality of the beer was admissible under the summons:—Held, that the county court Judge had no power of nonsuiting the plaintiff without his consent. *Stanchiffe v. Clarke*, 21 Law J. Rep. (N.S.) Exch. 129; 7 Exch. Rep. 439.

Held, also, that the summons and particulars sufficiently described the ground of action, as the defendant could not be misled by them, and that the evidence as to the quality of the beer was admissible under them. *Ibid.*

The plaintiff's particulars of demand in a plaintiff in a county court were: first, for unlawfully entering the plaintiff's premises and seizing cattle under colour of a distress; second, for unlawfully selling three other cattle not distrained; third, for not having the cattle so sold appraised before selling them; fourth, for continuing on the plaintiff's premises and proceeding to sell the plaintiff's cattle after an abandonment of the distress. The notice of action stated that the plaintiff would bring his plaintiff against the defendant for having, on the 11th of March, entered his premises and seized three heifers there, and for having continued there several days, and also for that defendants, against the plaintiff's will, on the 17th of March, did seize, sell and remove from the plaintiff's premises three heifers belonging to him:—Held, that the plaintiff was entitled to go into evidence in support of the fourth item in the particulars, as it was one for which no notice of action was necessary, or, if necessary, the notice given was large enough to apply to it. *Howard v. Remer*, 23 Law J. Rep. (N.S.) Q.B. 60; 2 E. & B. 915.

(3) *Jury.*

When a cause is heard before a county court Judge without a jury, and a new trial is afterwards granted generally at the instance of the plaintiff, the latter may demand to have the case tried by a jury on the second occasion. *Regina v. Harwood*, 22 Law J. Rep. (N.S.) Q.B. 127; 1 Bail C.C. 144.

(4) *Nonsuit.*

[See *Robinson v. Lawrence*, ante, (b) (2), and *Stancliffe v. Clarke*, ante, (2).]

A plaintiff in a county court has a right to elect to be nonsuited at the latest moment before the Judge has pronounced his judgment, or, when there is a jury, before they have delivered their verdict. *Outwaite v. Hudson*, 21 Law J. Rep. (N.S.) Exch. 151; 7 Exch. Rep. 380.

The Judge of a county court may nonsuit a plaintiff in all cases in which a Judge of a superior Court may do so. *Robinson v. Lawrence*, 21 Law J. Rep. (N.S.) Exch. 36; 7 Exch. Rep. 128; 2 L. M. & P. P.C. 673.

(5) *New Trial.*

The discretionary power to grant a new trial, given by the County Courts Act, 9 & 10 Vict. c. 95, s. 89, is not interfered with by the 141st of the county court rules, made under section 12. of the 12 & 13 Vict. c. 101, which is merely a directory rule of practice. Therefore, notwithstanding the omission to give the seven days' notice required by such rule, the Judge has jurisdiction to entertain an application for a new trial. *In re Carter v. Smith*, 24 Law J. Rep. (N.S.) Q.B. 141; 4 E. & B. 696.

Upon an appeal from the decision of a county court, in an action for dilapidations, the case, without saying what the evidence given was, stated that the Judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises, with the particulars in their hands, and would therefore be able to judge whether and to what extent the plaintiff had made out his case, the Court directed a new trial. *Smith v. Douglas*, 16 Com. B. Rep. 31.

Quære—whether a Judge of a county court, having once heard and disposed of an application for a new trial, can at a subsequent court re-hear the matter and grant a rule? *Mossop v. the Great Northern Rail. Co.*, 16 Com. B. Rep. 580.

(6) *Judgment Summons and Commitment for Non-Payment of Debt.*

[See *Ex parte Dalbins*, title ARREST, (C).]

An order on a judgment summons under the 98th and 99th sections of the 9 & 10 Vict. c. 95, by which the Judge of a county court ordered a party to pay a debt (previously recovered) by instalments, or on default to be committed to prison, is bad; because the party is entitled to a summons to shew cause against the committal—Confirming *Ex parte Kinnang*, 16 Law J. Rep. (N.S.) Q.B. 257; 4 Com. B. Rep. 507. *Abley v. Dale*, 20 Law J. Rep. (N.S.) C.P. 33; 10 Com. B. Rep. 62; 1 L. M. & P. P.C. 626.

The discharge by the Insolvent Court of a person against whom judgment for a debt has been obtained in a county court, does not satisfy the judgment, and the judgment remaining "unsatisfied" within the meaning of the 98th section of the County Courts Act (9 & 10 Vict. c. 95), the party may be proceeded against by summons under that section, and may be committed by the Judge under the provisions of section 99. *Abley v. Dale*, 22 Law J. Rep. (N.S.)

C.P. 233; 11 Com. B. Rep. 378; 2 L. M. & P. P.C. 433.

It is no bar to further proceedings on a judgment obtained in a county court, that the judgment debtor has been discharged by the Insolvent Court under a petition presented after the date of the judgment; and such judgment may still be enforced by a judgment summons under the 9 & 10 Vict. c. 95, s. 98. *Ex parte Christie*, 24 Law J. Rep. (N.S.) Q.B. 144; 4 E. & B. 714.

A discharge by the Insolvent Court after judgment for a debt recovered against the insolvent in the county court does not satisfy the debt; and the debtor having been after such discharge imprisoned for forty days, under a warrant on a judgment summons, by virtue of the 98th and 99th sections of the 9 & 10 Vict. c. 95, is not entitled to be discharged under the 1 & 2 Vict. c. 110, s. 90. The application for the discharge should be made to the Judge of the county court; and his decision, refusing to allow the discharge, is final, and the superior Courts will not grant a *habeas corpus*. Confirming *Abley v. Dale*, and distinguishing *Ex parte Dalbins*. *Ex parte Somers, in re George v. Somers*, 24 Law J. Rep. (N.S.) C.P. 185; 16 Com. B. Rep. 539.

A warrant of commitment, under the 9 & 10 Vict. c. 95, s. 105, for non-appearance on a judgment summons, issued six months after the order of commitment, is regular, although by the rules of the county court a warrant is current but for two months. *Ex parte O'Neill*, 20 Law J. Rep. (N.S.) C.P. 69; 10 Com. B. Rep. 57; 1 L. M. & P. P.C. 737.

An order by the Judge of a county court, on a judgment summons on a defendant to pay a sum on a future day or to be imprisoned for thirty days, is bad. *Deus v. Ryley*, 20 Law J. Rep. (N.S.) C.P. 264; 11 Com. B. Rep. 434.

The clerk of a county court is a mere ministerial officer, acting under section 102. of the 9 & 10 Vict. c. 95, and is not liable in trespass for imprisonment under a warrant reciting a bad order. *Ibid.*

Minutes of proceedings in the county court made under the 9 & 10 Vict. c. 95, s. 111, or a copy of them, cannot be contradicted by the evidence of the Judge. *Ibid.*

The clerk of a county court, against whom an action of trespass is brought, may give special matter in evidence under a plea of "not guilty by statute," by virtue of the 13 & 14 Vict. c. 61, s. 19. *Ibid.*

The case of *Andrews v. Marvis*, 1 Q.B. Rep. 3; 10 Law J. Rep. (N.S.) Q.B. 225, distinguished. *Ibid.*

A defendant in a county court having received a summons and failing to appear, was ordered verbally to pay the debt and costs *forthwith*, and between six and seven on the same day was served with an order of the county court, whereby it was "ordered that the defendant do pay the same (the sum adjudged) to the clerk of the court, at his office in Droitwich, forthwith," &c.; "attendance at the office from ten till four o'clock." The defendant in the county court not having paid the sum adjudged, his goods were subsequently taken in execution:—Held, that the order to pay was a judgment similar to a judgment in the superior courts; that it did not require service, and therefore that the execution was regular. *Ely v. Moule*, 20 Law J. Rep. (N.S.) Exch. 29; 5 Exch. Rep. 918.

Semble—that an order for payment made by a county court Judge, and afterwards varied as to the time of payment, ought to be served upon the party liable to pay. *Ibid.*

No action lies against the clerk of a county court for not preparing, or for negligently preparing, a notice to a defendant of an order against him to pay a debt by instalments, which order was made by the Judge at the time of delivering judgment; such order being part of the judgment, and not requiring service—confirming *Ely v. Moule*, 20 Law J. Rep. (N.S.) Exch. 29; 5 Exch. Rep. 918. *Robinson v. Gell*, 21 Law J. Rep. (N.S.) C.P. 155; 12 Com. B. Rep. 191.

The 131st General Rule made by the county court Judges under the 12 & 13 Vict. c. 101. s. 12. directs that warrants of commitment shall bear date on the day on which the order for commitment was made, and shall continue in force for three calendar months and no longer:—Held, that a person arrested under a warrant within three calendar months after its date, may be detained in custody after the expiration of the three months. *Hayes v. Keene*, 21 Law J. Rep. (N.S.) C.P. 204; 12 Com. B. 233.

Under the 103rd section of the 9 & 10 Vict. c. 95, the Judge of a county court has power upon a judgment summons, to commit as often as a new default rendering the judgment debtor liable to imprisonment is made, though each default be of the same kind. *In re Boyce*, 22 Law J. Rep. (N.S.) Q.B. 393; 2 E. & B. 521.

The return to a writ of *habeas corpus* for the discharge of a judgment debtor set out two warrants of commitment, of different dates, made by the Judge of the County Court of Brentford. The warrants, in precisely the same terms, recited the judgment recovered in the county court, a subsequent order to pay by instalments and default made, and that a judgment summons had been issued; and then stated that the defendant having appeared and been examined, and it appearing to the satisfaction of the Judge that the defendant had, since the said judgment recovered against him, and still had sufficient means to satisfy the said judgment, but refused and neglected to pay the same, it was ordered that he be imprisoned for forty days. The prisoner's detention was justified under the last warrant:—Held, that it was to be presumed that a new default in non-payment had been made, upon which the last warrant was granted, and that the imprisonment, therefore, was legal. *Ibid.*

A obtained judgment in the county court against the plaintiff, who was ordered to pay the debt and costs by a specified day to the clerk of the court. The money not being paid, a summons was issued under the 9 & 10 Vict. c. 95. s. 98, calling upon the plaintiff to attend and shew cause why he had not paid. The plaintiff did not attend as required by the summons, and upon proof of its personal service upon him, the Judge, under section 99, ordered him to be committed for seven days, or until he should be sooner discharged by due course of law. Under this order the clerk of the court issued to the bailiff a warrant of commitment, upon which the amount of debt and costs was indorsed, and under which the plaintiff was arrested. Before his arrest, but after the issuing of the warrant, the plaintiff paid

the debt and costs to A, who wrote a letter to the clerk of the court informing him of that fact. The plaintiff having sued the clerk and bailiff of the court for false imprisonment,—Held, that the action could not be supported, as the order and warrant were regularly issued, and were in force at the time of the arrest, and were not superseded by the payment to A and the notice to the clerk of the court. *Davis v. Fletcher*, 22 Law J. Rep. (N.S.) Q.B. 429; 2 E. & B. 271.

(h) Appeal from.

(1) In what Cases it lies.

No appeal will lie from the decision of a county court where the amount sought by the plaintiff to be recovered is under 20*l.* *Blowers v. Rackham*, 20 Law J. Rep. (N.S.) Q.B. 397.

The defendant was a clerk to the plaintiffs, under an agreement for a salary of 140*l.* a year, determinable by three months' notice, or on payment of three months' salary. The plaintiffs discovering that the defendant had written letters reflecting on them, and communicating information which he had received in his capacity of clerk, dismissed him, without notice or salary. They subsequently sued him in the county court to recover 30*l.* which he had received to their use. The defendant admitted the receipt of the 30*l.*, but relied as a defence, by way of a set-off, on a claim for 35*l.* for three months' salary, for having been dismissed without notice. The plaintiffs contended that the defendant's conduct justified their dismissing him without notice or salary. The Judge ruled, that the plaintiffs were not justified in dismissing him without his salary, and allowed the set-off:—Held, on a case stated, that although there were no sufficient grounds for depriving the defendant of his salary, yet as the dismissal was not a wrongful dismissal, but an event contemplated by the agreement, the three months' salary became, on the dismissal, a debt to the defendant, and was a proper subject of set-off. *East Anglian Railways Co. v. Lythgoe*, 20 Law J. Rep. (N.S.) C.P. 84; 10 Com. B. Rep. 726.

Held, also, that the Court above would not review the judgment of the county court Judge on a question of fact; or, if the judgment given by him were right, consider whether the reasons he assigned for it were valid in law. *Ibid.*

Quære—per Maule, J., whether any appeal will lie from the decision of a county court, except in cases in which a jury has been summoned to decide on the facts. *Ibid.*

Semble—that on an appeal from a county court, the Court will not entertain an objection as a ground of appeal which has not been taken in the court below. *Forke v. Smith*, 21 Law J. Rep. (N.S.) Q.B. 53.

The defendant, against whom judgment had been recovered in a county court on the 17th of January, gave the plaintiff notice of appeal on the 22nd of January, and the next day entered into a bond with a surety conditioned to pay the costs of the appeal, whatever the event might be, and the amount of the judgment in case the appeal were dismissed. On the following day, the defendant withdrew the notice of appeal, and gave the plaintiff another notice of appeal, which included additional grounds of appeal. It was objected that as the first notice had been

withdrawn, the bond was no security for the costs of the second appeal on the amount of the judgment, and that consequently the Court had no jurisdiction to entertain the appeal. The Court held, that they had jurisdiction to hear the appeal, and after argument directed judgment to be entered for the appellant with costs, notwithstanding the terms of the bond by which the appellant had bound himself to pay the costs of the appeal whatever the event might be. *Daniels v. Charsley*, 21 Law J. Rep. (n.s.) C.P. 87; 11 Com. B. Rep. 739.

Quære—whether the power of appeal extends to proceedings under the 9 & 10 Vict. c. 95. s. 122? *Harrington v. Ramsay*, 22 Law J. Rep. (n.s.) Exch. 326; 8 Exch. Rep. 879.

The superior Courts have no jurisdiction under the 13 & 14 Vict. c. 61. s. 14, to hear an appeal from a decision of the county court upon an interpleader summons. *Fraser v. Fothergill*, 23 Law J. Rep. (n.s.) C.P. 53; 14 Com. B. Rep. 295; s. p. *Beswick v. Boffey*, 23 Law J. Rep. (n.s.) Exch. 89; 9 Exch. Rep. 315.

No appeal lies from the decision of a county court Judge in an action for an amount exceeding 50*l.* brought before him by consent under sect. 17. of the 13 & 14 Vict. c. 61. *Groves v. Janssens*, 23 Law J. Rep. (n.s.) Exch. 91; 9 Exch. Rep. 481.

An appeal lies from a county court if the claim be for a sum above 20*l.*, and not exceeding 50*l.* though the verdict be for an amount under 20*l.* *Harris v. Dreesman*, 23 Law J. Rep. (n.s.) Exch. 210; 9 Exch. Rep. 485.

No appeal lies from a county court, though the plaint be for above 20*l.* and for unliquidated damages, if the nature of the cause of action be such that the Judge cannot lawfully give damages to the amount of 20*l.* *Mayer v. Burgess*, 24 Law J. Rep. (n.s.) Q.B. 67; 4 E. & B. 655.

(2) Statement of Case and Practice thereon.

A plaint for breach of covenant was tried by a jury in a county court, and a verdict found for the plaintiff. An appeal was brought upon the ground that the Judge had improperly received certain evidence. The Court expressing an opinion that the evidence had been improperly received, application was made on the part of the defendant to have judgment entered for him. The Court held that, under the stat. 13 & 14 Vict. c. 61. s. 14, they had no power to set aside the verdict of the jury, and to direct judgment to be entered for the defendant, and that they could do no more than direct a trial. *Jonas v. Adams*, 20 Law J. Rep. (n.s.) Q.B. 397.

Where an appeal is made against the determination of a county court in point of law, the case stated for the opinion of the court of appeal should separate the facts and law. *Cawley v. Funnell*, 20 Law J. Rep. (n.s.) C.P. 197; 12 Com. B. Rep. 291.

Though questions as to fact as well as of law are in contest before the Judge of the county court without a jury, an appeal will lie if the court of appeal can see from the facts of the case as stated that the Judge, in order to arrive at his judgment, must have decided a question of law in a particular way. *Ibid.*

Semble—that no appeal will lie if the decision of the county court Judge can be supported by any view of the facts stated in the case, which does not render

it necessary to conclude that he has determined the particular point of law in the way complained of as erroneous. *Ibid.*

On the hearing of a county court appeal, it cannot be taken as an objection to the jurisdiction of the court of appeal, that the notice of appeal does not contain any statement of the grounds of dissatisfaction with the decision of the county court Judge, as required by rule 151. of the County Court Rules. *Cannon v. Johnson*, 21 Law J. Rep. (n.s.) Q.B. 164.

The functions of the court of appeal are not limited to answering the questions put in the case, but the Court have power to look at the direction of the Judge set out in the case, and if that is erroneous, to order a new trial. *Standiffe v. Clarke*, 21 Law J. Rep. (n.s.) Exch. 129; 7 Exch. Rep. 439.

A county court Judge, in settling a case for an appeal, directed that a certain document should be inserted, and he signed the rough draft upon the understanding that the document was to be set forth in the fair copy. The draft was also sealed with the seal of the county court. The Judge afterwards refused to sign the fair copy containing the document, he then considering that he was *functus officio* by having signed the improper draft:—Held, that the Judge was not *functus officio*, but that he ought to sign and send up the perfect case. *Figg v. Wilkinson*, 23 Law J. Rep. (n.s.) Exch. 5; 9 Exch. Rep. 475.

A county court Judge, after settling a draft case for an appeal, signed it on the understanding that the plaintiff was to furnish to the defendant, the appellant, a copy of a certain document, which was to be set out in the case, and that then the Judge would sign the fair copy of the case. The draft case was also sealed with the seal of the county court. Three days afterwards the plaintiff sent the document to the defendant, who immediately inserted it in the case and sent two copies of the complete case to the rule office of this court within three days from the day that he had got the document and perfected the case, but more than three days after the draft case had been signed. The Judge when applied to refused to sign the fair case, thinking that he had no power to do so, and the appellant thereupon entered the draft case signed by the Judge, with the document appended to it, as the case to be heard on appeal. The respondent contended that the Court had no jurisdiction to hear the appeal, on the ground that if the draft case were considered the case the copies had not been sent to the rule office within three days, pursuant to rule 163. of the New County Court Rules, and that there was no signed case at all unless the signed draft case were the case:—Held, that, as the respondent had assented to the Judge's signing the draft case provisionally, the case as against him was not to be considered as signed and sealed until the day on which the document was inserted; and that, as on that view the service of the copies was in due time, the Court had jurisdiction to hear the appeal. *Figg v. Wilkinson*, 23 Law J. Rep. (n.s.) Exch. 129; 9 Exch. Rep. 475.

(3) Costs on.

The defendant, against whom judgment had been recovered in a county court on the 17th of January, gave the plaintiff notice of appeal on the 22nd of January, and the next day entered into a bond with

a surety conditioned to pay the costs of the appeal, whatever the event might be, and the amount of the judgment in case the appeal were dismissed. On the following day, the defendant withdrew the notice of appeal, and gave the plaintiff another notice of appeal, which included additional grounds of appeal. It was objected, that as the first notice had been withdrawn, the bond was no security for the costs of the second appeal on the amount of the judgment, and that consequently the Court had no jurisdiction to entertain the appeal. The Court held, that they had jurisdiction to hear the appeal, and after argument directed judgment to be entered for the appellant with costs, notwithstanding the terms of the bond by which the appellant had bound himself to pay the costs of the appeal whatever the event might be. *Daniels v. Charsley*, 21 Law J. Rep. (N.S.) C.P. 37; 11 Com. B. Rep. 739: s. p. *Robinson v. Lawrence*, 21 Law J. Rep. (N.S.) Exch. 36; 7 Exch. Rep. 128.

On appeal from the county courts into the Court of Exchequer the appellant will have costs, if the decision below be reversed. *Hunt v. Wray*, 21 Law J. Rep. (N.S.) Exch. 37.

But this rule is not inflexible. *Outhwaite v. Hudson*, 7 Exch. Rep. 380.

And see *Mountney v. Collier*, 22 Law J. Rep. (N.S.) Q.B. 126, n.; 2 E. & B. 100.

(B) BOROUGH COURTS.

A declaration stated that the plaintiffs in the court of record at Manchester recovered against G a debt of 50*l.*, and sued out a *fi. fa.* directed to the defendant as the officer for executing the process of that court; that the defendant did not levy, but neglected and refused, and afterwards falsely returned *nulla bona*. The second plea set out the record in *Joule v. G.* which stated that the action was in debt for goods sold; that the plaintiffs demanded 50*l.*, whereby an action had accrued to the plaintiffs to demand and have from the defendant the said sum of 50*l.*, and that it was considered that the plaintiffs should recover their said debt, and also 6*l.* 15*s.* 8*d.* as damages and costs. The last plea stated that no notice of action had been given under the local act of parliament establishing the said court of record. Demurrer. Replication to the second plea, that the debt sought to be recovered was 50*l.*, and that no damages were sought to be recovered or were recovered, except such damages as were necessary for enabling the plaintiffs to recover their costs. Demurrer. The defendant was appointed serjeant-at-law, under the local act, and was bound by that act to execute civil process, and it was enacted that in all actions "for anything done in pursuance of this act" notice of action should be given to the defendant. Another section of the local act provided that the said court of record should "have authority to try actions of assumpsit, covenant and debt," &c. and "trespass or trover," "provided the sum or damages sought to be recovered shall not exceed 50*l.*."—Held, first, that the last plea was good; that the defendant was entitled to notice of action, part of the cause of action being for a *mis-feasance* in making a false return. *Quære*—whether in case of a mere *non-feasance* on the part of the defendant, notice of action would have been necessary. Secondly, that the replication was good, the cause of action being within

the jurisdiction of the inferior court. That the word "sum" in the act of parliament meant "debt"; and that the action was substantially for 50*l.* debt only, the damages being merely nominal for the purpose of carrying costs. *Joule v. Taylor*, 21 Law J. Rep. (N.S.) Exch. 31; 7 Exch. Rep. 58.

(C) COURT BARON.

The Court Baron of the Honour of Pontefract was an immemorial court, and the lord had power to grant replevins and hold pleas in replevin, and also to hold pleas in all personal actions arising within the jurisdiction up to 40*s.* By the 17 Geo. 3. c. xv. the jurisdiction was extended to 5*l.*, but there was a proviso that all plaintiffs in replevin should be had and be proceeded in and be removable in the same manner as if the act had not passed. By the 2 & 3 Vict. c. lxxxv. s. 1, after reciting the 17 Geo. 3. c. xv, it was enacted that "the present jurisdiction and practice of the Court Baron of the Honour of Pontefract shall (with certain exceptions) cease and determine, and thenceforth the said court shall be constituted and be a court of record, under the name of the Court of the Honour of Pontefract." The 4th section extended the jurisdiction of the Court to 15*l.* The 56th section enacted, that six months after the passing of any general act for the recovery of small debts, the operation of which should interfere with the powers given to the said Court by this act, "every clause, matter, or thing in the act contained which shall extend or be construed to extend to give to the court hereby appointed any local or separate jurisdiction shall cease and determine." The act did not specifically mention replevins. By the 9 & 10 Vict. c. 95. s. 5. (the County Courts Act) power was given to the Queen in Council to order that any court holden for the recovery of debts under the provisions of certain acts, specified in Schedules A and B, should be held as a county court, with power to alter or vary the districts; and it provided, "that from and after the time mentioned in any such orders the act or acts under which such court is now constituted, so far as the same relate to the establishment or jurisdiction or practice of a court for the recovery of small debts or demands, shall be repealed, but not so as to revive any act thereby repealed;" and the 6th section enacted that as soon as a court should be established under the aforesaid powers, "every act of parliament, heretofore passed, so far as the same respectively relate to or affect the jurisdiction and practice of the court so established or ordered to be holden as a county court, shall be repealed." By the 119th and 120th sections, actions of replevin are directed to be brought without writ in the courts held under the act, and the plaintiffs are to be entered in the court holden for the district. The 2 & 3 Vict. c. lxxxv. was specified in Schedule A, and an order was duly made establishing a county court for the district included within the jurisdiction of the Court of the Honour of Pontefract as modified by that act:—Held, in the absence of evidence that any replevins had ever been issued from the Court Baron of the Honour of Pontefract, except in cases in which there was jurisdiction to try the plaintiffs, that after the constitution of the new county court no replevin could be issued from the court baron. *Semble*—There may be a franchise of granting replevins independently of the franchise of

trying the plaintiffs. *Hellawell v. Eastwood*, 20 Law J. Rep. (N.S.) Exch. 154; 6 Exch. Rep. 295.

(D) STANNARIES.

[Amendment Act, 18 & 19 Vict. c. 32.]

(E) REMOVAL OF CAUSES.

[See Reg. Gen. Hil. term, 1853, rr. 115, 116, and 117, 22 Law J. Rep. (N.S.) xvi; 1 E. & B. App. xxi. Also for the cases title CERTIORARI, (A) (a).]

INFORMATION.

To obtain a criminal information the applicant should apply to the Court in the first instance, and before he has elected to take another course of proceeding. *Regina v. Marshall*, 24 Law J. Rep. (N.S.) Q.B. 242; 4 E. & B. 475.

The Court, therefore, discharged a rule for a criminal information against a county court Judge for misconduct in his office, where it appeared, from the affidavits, that the applicant had addressed a memorial to the Lord Chancellor, stating the misconduct complained of, and praying for an inquiry into the conduct of the Judge, though the Lord Chancellor had declined to interfere. *Ibid*.

INJUNCTION.

[At law, see stats. 15 & 16 Vict. c. 76. s. 262. and 17 & 18 Vict. c. 125. ss. 79, 80, 81, and 82. And in cases of railway traffic, 17 & 18 Vict. c. 31. s. 4.]

(A) SPECIAL INJUNCTION.

(a) *When granted or decreed.*

- (1) *In general.*
- (2) *To protect a Legal Right.*
- (3) *Trade Marks.*
- (4) *Nuisances.*

(b) *When refused or dissolved.*

(B) TO RESTRAIN PROCEEDINGS AT LAW.

- (a) *Before Verdict.*
- (b) *To stay Judgment or Execution.*

(C) BREACH OF.

(D) PRACTICE.

- (a) *Application for Injunction.*
- (b) *Dissolving the Injunction.*
- (c) *Amendment of Bill.*
- (d) *Costs.*

(A) SPECIAL INJUNCTION.

(a) *When granted.*

- (1) *In general.*

L'E, an officer, retired from the army, in consequence of which his commission became saleable. Being indebted to the plaintiff in the sum of 500*l.*, he gave him a letter to Messrs. Cox, army agents, requesting them to pay the balance of the price of his commission to the plaintiff, who sent the letter, with another of his own, to Messrs. Cox, requesting payment, but they had not then received any money. The plaintiff having heard that an ensign had been

gazetted, again applied for payment, and he received a letter informing him that the ensign gazetted was not in succession of L'E, but that after the 14th of June, he might draw on Messrs. Cox for 408*l.* 10*s.* 11*d.*, the balance arising from the sale of the commission. In the mean time M S obtained a foreign attachment from the Lord Mayor's Court against L'E for 500*l.*, due on a bill of exchange, and attached the monies, &c. of L'E in the hands of Messrs. Cox. The plaintiff then filed this bill, and upon an application for an injunction to restrain Messrs. Cox from parting with the money,—Held, that Messrs. Cox had recognized the plaintiff's demand, and that it amounted to an appropriation of the money to arise from the sale of the commission; and an injunction was granted. *L'Estrange v. L'Estrange*, 20 Law J. Rep. (N.S.) Chanc. 39; 13 Beav. 281.

In cases of equitable waste in respect of ornamental timber, a court of equity confines its protection to timber proved to have been planted or left standing for ornament; and if the settlor of the property has defined a standard of beauty or ornament, the Court will interfere to prevent its being impaired. Therefore, where property was settled by deed to the use of trustees and successive tenants for life, with power to cut timber thereby expressed to be then standing and not being ornamental to the mansion-house or the pleasure grounds attached thereto, or any of the views or prospects of the same, of which timber it was thereby declared enough should always remain to preserve the beauty of the place unimpaired, the Court, on the motion of the tenants for life in remainder, granted an injunction to restrain the tenant for life in possession from cutting certain timber which the evidence shewed could not be cut without impairing the beauty of the place as it stood at the date of the settlement; but ordered the plaintiffs to give security to the tenant for life in possession for any loss or damage which he might sustain by reason of his being restrained from completing his contracts for the sale of such timber; and offered the latter a reference to the Master to inquire what timber could be cut without impairing the beauty of the place as aforesaid. Observations on the effect of acquiescence of co-plaintiff in matter complained of. *Marker v. Marker*, 20 Law J. Rep. (N.S.) Chanc. 246; 9 Hare, 1.

By a local act of parliament the Commissioners thereby appointed were authorized to construct certain reservoirs and other works for supplying the town of S with water, and to do all things necessary for that purpose; and to levy rates for erecting and maintaining the works, and in otherwise carrying the act into execution. The supply of water being insufficient, the Commissioners were desirous of extending their works.—Held, that they were not justified in applying the monies so raised in defraying the expenses of an application to parliament for another act to extend their powers; and an injunction was granted to restrain them from so doing. *The Attorney General v. Andrews*, 20 Law J. Rep. (N.S.) Chanc. 467.

The plaintiff, by virtue of a grant from the Crown, made 36 Hen. 8., claimed, as lord of the man or of C, to be entitled to the beach or shore of the sea between high and low water mark. The defendants, the surveyors of highways, took the stones to mend

the highway of the parish. Upon a bill filed by the plaintiff against them, the defendants put in their answer, denying the right claimed by the plaintiff, and insisting upon their right to take the stones by custom, and also by prescription, and also under the Highways Act, 5 & 6 Will. 4. c. 50; and upon a motion to dissolve the injunction obtained by the plaintiff,—Held, that the rights claimed by the plaintiff were legal, and must be decided by an action; that the Court must consider which of the two parties was likely to sustain most injury; that, notwithstanding the want of distinct evidence respecting injury, the Court, to prevent a possible mischief, would grant an injunction, and give the plaintiff leave to bring an action, but it refused to say that he must do so. (*Cloves v. Beck*, 20 Law J. Rep. (n.s.) Chanc. 505; 13 Beav. 347.)

Bill filed by certain shareholders in the Oxford, Worcester and Wolverhampton Railway Company to restrain the directors from applying the funds of the company in carrying out an agreement entered into by the directors with the London and North-Western Railway Company under which a narrow-gauge rail was to be laid down, and the line when completed to be worked by the North-Western Company. The Court was of opinion that the agreement was invalid, for although the directors had power under their act of parliament to lay down narrow-gauge rails, they had no power to allow the line to be worked by another company. A case was, however, directed to try the validity of the agreement at law. An injunction was granted in the mean time on the ground that irreparable injury would be done if the money of the company were expended in laying down rails in pursuance of an invalid agreement. (*Benon v. Rufford*, 20 Law J. Rep. (n.s.) Chanc. 537; 1 Sim. N.S. 550.)

Upon the plaintiffs entering into the usual undertaking to bring actions against the defendants, an injunction was granted to restrain foreign owners of foreign vessels whilst in this country from infringing a patent within the limits of the grant, unless and until they obtained proper licences from the owners of the patent, where the invalidity of the patent had been *bonâ fide* twice unsuccessfully contested at law in an action brought by the patentee, and once in an action, against him and the assignees of the patent, under a writ of *sci. fa.* to repeal the grant of the letters patent. (*Caldwell v. Van Vliessen*, *Same v. Verbeck*, *Same v. Rolfe*, 21 Law J. Rep. (n.s.) Chanc. 97; 9 Hare, 415.)

A party who has a secret in a trade and employs persons under contract express or implied, or under a duty express or implied, can restrain by injunction such of those persons as have gained a knowledge of the secret from setting it up against the employer. (*Morison v. Moat*, 21 Law J. Rep. (n.s.) Chanc. 248; affirming 20 Law J. Rep. (n.s.) Chanc. 513; 9 Hare, 241.)

Mdlle. J W agreed in writing with L that, for certain considerations therein expressed, she would sing and perform at his theatre for a specified period; and that, during her engagement with L, she would not sing elsewhere without his licence in writing. Afterwards, J W contracted with G to sing and perform at his theatre during the period specified in her engagement with L. Upon bill by L, praying simply that J W might be restrained from singing and per-

forming elsewhere than at his theatre during the period specified, the Court granted an injunction accordingly. (*Lumley v. Wagner*, 21 Law J. Rep. (n.s.) Chanc. 898; 1 De Gex, M. & G. 604; 5 De Gex & Sm. 485.)

Where a contract contains covenants to do certain acts, and also to abstain from doing certain other acts, the Court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction to specifically perform the affirmative covenants—(*Kemble v. Kean* (6 Sim. 333) and *Kimberley v. Jennings* (6 Sim. 340: s.c. 5 Law J. Rep. (n.s.) Chanc. 115) disapproved of. *Ibid.*)

But in such cases the Court will decline to interfere where the jurisdiction cannot be beneficially exercised, as in *Collins v. Plumb* (16 Ves. 454), or where its exercise would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the Court cannot specifically perform—(*Hills v. Croll* (2 Phill. 60: s.c. 14 Law J. Rep. (n.s.) Chanc. 444) *Ibid.*)

In a suit for the administration of the estate of a testator domiciled in England, and having real and personal estate both in England and Scotland, an injunction will be granted, after a decree, to restrain a Scotch corporation having large real estates in England from continuing proceedings in the Court of Session, in Scotland, to obtain payment of a debt which the company claimed against the testator as their agent; and that, though by the articles of partnership the company were entitled to a preferable lien upon the shares of the testator in the company. (*Maclaren v. Stainton*, 22 Law J. Rep. (n.s.) Chanc. 274; 16 Beav. 279.)

Service of the notice of motion at the office in London is, for the purposes of the corporation, a good service, where it is admitted that at the head office in Scotland the corporation had notice. *Ibid.*

A company was empowered by act of parliament to make and maintain a canal; the act provided that it should be lawful for the owners of lands within the distance of twenty yards from the canal to make a communication by pipes, &c. between the water therein and any steam-engine, and to draw such quantities as should be sufficient to supply the engine with cold water, for the sole purpose of condensing steam used for working such steam-engine, and for no other purpose; and power was given to the Commissioners under the act to finally settle any dispute. The defendants, who were owners of two mills, used the water from 1830 to 1847 for generating as well as condensing steam in their engines, and upon an action by the company for an infringement of the act, they recovered 1s. damages. A bill was then filed by the company to restrain the millowners from continuing to use the water as before:—Held, as to the first mill, that the company could not restrain the defendants from using the water as they had encouraged its construction; but that as to the second mill, it was evident that the company intended to compel an adherence to the act, and an injunction was granted to restrain the defendants from taking any water from the canal other than for condensing steam, except by licence of the plaintiffs, and from taking water for making *saw* (a preparation of flour and water, used for stiffening cotton) and cleansing the boiler, except as aforesaid, in either of the mills;

and as the suit succeeded as to the new mill, and failed as to the old mill, no costs were given on either side. *The Rochdale Canal Co. v. King*, 22 Law J. Rep. (n.s.) Chanc. 604; 16 Beav. 630.

Although an injunction *ex parte* will not be granted to stay waste, yet an interim order will be given with leave to discharge it, where the object of the application is to preserve property during litigation. *Anwyl v. Owens*, 22 Law J. Rep. (n.s.) Chanc. 995.

An old woman was induced, without consideration, to transfer her stock into the name of another, who, by his answer, swore that there had been a gift of it to him subject to a trust for the transferor for life. An injunction to restrain the transfer and receipt of the dividends was continued. *Custance v. Cunningham*, 13 Beav. 363.

A contract was entered into between a canal company and the plaintiffs, the owners of paper mills, as to the mode of enjoyment of the waters by which both were supplied. The company did acts in violation of the contract:—Held, that it was no answer upon a bill for a perpetual injunction, to say that the acts proposed would not be injurious, or even to prove that they were beneficial to the plaintiffs; and the Court, although no evidence was given of any actual damage done, made a decree for a perpetual injunction. *Dickenson v. the Grand Junction Canal Co.*, 15 Beav. 260.

On the principle of protecting property pending litigation, the Court will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a defendant claiming to be a purchaser for valuable consideration without notice under it. *Greenslade v. Dare*, 17 Beav. 502.

The Court will restrain a tenant from pulling down a house and building another which the landlord objects to. *Smyth v. Carter*, 18 Beav. 78.

Upon the purchase of a steam vessel, it was agreed among the purchasers that two of them should be the ship's husbands, and should not be removed except on certain grounds specified in the agreement. The ship's husbands thus appointed obtained a charter-party for her, and they privately stipulated for a weekly payment by way of commission for themselves, in addition to the weekly sum payable by the terms of the charter-party. In the month of May following, the captain, who was a part owner, had a conversation with a clerk of the charterers, in which an observation of the latter led him to suspect that there was some underhand bargain, but the subsequent part of the conversation removed the suspicion. In October he acquired correct knowledge of what had been done, and together with the other part owners, except the ship's husbands, gave the ship's husbands notice of dismissal. The ship's husbands denied the right to dismiss them, and they possessed themselves of some of the machinery of the ship, which was at the engineers for repairs. The other part owners, therefore, filed their bill and moved for an injunction to restrain the ship's husbands from interfering with her sailing by detention of the machinery, and for a receiver of the machinery:—Held, that the application was not too late; and on its appearing that a decree of possession could not be obtained in the Court of Admiralty by reason of the plaintiffs being in possession of the hull, or, at all events, could not be obtained in time to enable the vessel to fulfil her engagement,—held,

that the Court of Chancery had jurisdiction upon motion to appoint a receiver of the machinery, and to direct possession of it to be delivered to him, and an order was made accordingly, the captain being appointed receiver *ad interim*. *Brenan v. Preston*, 2 De Gex, M. & G. 813.

When under an agreement containing mutual grants the plaintiffs had been put in possession of what was granted to them, and enjoyed it for several years, while the defendants took no steps to require the performance of the stipulation for their benefit, but allowed the time to expire within which it should have been performed, the Court granted an injunction to restrain the defendants from disturbing the plaintiffs' enjoyment. *The Great Northern Rail. Co. v. the Lancashire and Yorkshire Rail. Co.*, 1 Sm. & G. 81.

Bill by one of the next-of-kin against the executors and one of the legatees in a will fraudulently obtained by them from a person of unsound mind, praying for an account, and for an injunction and receiver pending a suit in the Ecclesiastical Court to recall the probate:—Held maintainable in this court, and demurrer for want of equity overruled. *Dimes v. Steinberg*, 2 Sm. & G. 75.

A railway company having acquired a legal right to and possession of land, and constructed their railway over the same under the provisions of their act, another railway company, to whom the legislature had given power to purchase the same land for the purpose of their undertaking, was restrained by injunction from exercising such power pending the trial of the legal question of the effect of such conflicting powers. *The Manchester, Sheffield and Lincolnshire Rail. Co. v. the Great Northern Rail. Co.*, 9 Hare, 284.

As to the effect of two acts of parliament conferring on different companies the right of purchasing compulsorily according to the provisions of the Lands Clauses Consolidation Act the same plot of land—*quære*. *Ibid*.

An agreement that a certain judgment debt and interest thereon should be paid to the plaintiff out of any monies which might be recovered by the defendant in respect of certain claims which he had against third parties:—Held, to create a valid equitable charge upon these monies when recovered. *Riccard v. Prichard*, 1 Kay & J. 277.

The defendant having recovered the monies so due to him in an action, and the same having been paid into the Court of Common Pleas, the Court of Chancery, in a suit by the judgment creditor to establish his equitable charge on the fund, granted an injunction to restrain the defendant from receiving it until he should have paid the judgment debt and interest, and the costs of the suit. *Ibid*.

Where the defendant had obstructed the passage of smoke from flues used by the plaintiffs for several years, but their right to which was doubtful, by placing tiles upon the top of the chimney-pots, a mandatory injunction was granted upon interlocutory motion to compel him to remove the tiles. *Hervey v. Smith*, 1 Kay & J. 389.

Certain music publishers having adapted original words to an old American air, which was rearranged, gave to the song so composed the name of 'Minnie,' and procured it to be sung by Madame Anna Thillon, a popular singer, at M. Jullien's

concerts in London, and when it had by that means become a favourite song, they published it with a title-page containing a picture of the singer who had brought the song into notice, and the words "Minnie, sung by Madame Anna Thillon and Miss Dolby at Jullien's Concerts, written by George Linley," &c. —Held, that the publishers by these means had obtained a right of property in that name and description of their song, which a Court of equity would restrain any person from infringing. *Chappell v. Sheard*, 2 Kay & J. 117.

Another music publisher subsequently published the same melody with different words, and upon the title-page they placed a similar portrait of Madame Anna Thillon, with the words "Minnie Dale, sung at Jullien's Concerts (and always encored) by Madame Anna Thillon, the music composed by H. S. Thompson," this song having never in truth been sung by Madame Anna Thillon at Jullien's Concerts:—Held, that this was a palpable attempt to induce the public to believe that the song so published was the same as that of the first publishers, and at their suit an injunction was granted on interlocutory application to restrain this or any other similar infringement of their right to the name and description of their song. *Ibid.*

Seemle—That such a suit should be instituted without delay after discovering the infringement. *Ibid.*

(2) To protect a Legal Right.

The plaintiff was in the enjoyment of ancient lights. There had been a building adjoining his with a wall alleged to have been 12 feet high, and not interfering with his light. The defendant was about to pull down the ruins of this wall and rebuild it 30 feet high, which he alleged was the original height. The plaintiff's evidence as to the original height was more precise than the defendant's. The defendant said he never intended to build beyond the original height. The plaintiff proved that he threatened to build much beyond the 12 feet. An injunction had been obtained, and the defendant never moved to dissolve it. At the hearing a decree for a perpetual injunction was granted without requiring the plaintiff to try his right at law. *Potts v. Levy*, 2 Drew, 272.

(3) Trade Marks.

In an alleged infringement of a right to trade marks, the Court must ascertain whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable, and the resemblances such as are obviously intended to deceive the purchaser. *Taylor v. Taylor*, 23 Law J. Rep. (N.S.) Chanc. 255.

The Court will restrain the imitation for the purposes of sale of a trade mark where such imitation may be used for fraudulent purposes, notwithstanding that there may be no proof of any actual injury suffered by the plaintiff. *Farina v. Silverlock*, 24 Law J. Rep. (N.S.) Chanc. 632; 1 Kay & J. 509, varied on appeal.

It is not necessary to shew that the imitation of the trade mark was made or sold with the intention of committing fraud, or that any fraudulent use has been made of it. If the defendant puts it in the

power of other persons to commit a fraud, that alone is a sufficient ground for restraining him, without waiting till the whole fraud has been brought to a completion. *Ibid.*

The plaintiff, Thomas Holloway, sold a medicine as "Holloway's Pills." The defendant, Henry Holloway, commenced selling pills as "H. Holloway's Pills," but in boxes, &c. similar to the plaintiff's, and with a view of passing off his pills as the plaintiff's. He was restrained by injunction. *Holloway v. Holloway*, 13 Beav. 209.

In cases of alleged colourable imitations of trade marks, the Court has not to consider whether manufacturers could distinguish between the articles, but whether the public would probably be deceived by the alleged spurious imitation. *Shrimpton v. Lought*, 18 Beav. 164.

The plaintiffs, who represented the original patentees of an article, the patent for the manufacture of which had expired, continued to use labels on their goods printed from the original blocks belonging to the patentees, on which labels the goods were described as patented. The defendants adopted and issued labels closely resembling those of the plaintiffs; and under such circumstances, although the description of the plaintiffs' goods on their labels as being patented had ceased to be strictly true, the Court granted an injunction restraining the defendants from using labels bearing an inscription appearing to designate the goods contained therein as being manufactured by the plaintiffs. *Edlesten v. Vick*, 11 Hare, 78.

(4) Nuisances.

A was entitled to a house and pleasure-grounds in the country. B purchased a piece of land, about an acre in extent, situated at a distance of less than 100 yards from A's house, and commenced burning bricks made of the clay taken from the ground so purchased:—Held, that A was entitled to an injunction to restrain B from continuing to burn bricks. *Walter v. Selfe*, 20 Law J. Rep. (N.S.) Chanc. 433; 4 De Gex & Sm. 315.

The plaintiff, in the year 1817, became the lessee of a dwelling-house, which formerly constituted part of a large mansion, the other part of which was also occupied as a dwelling-house till the year 1848, when it was purchased on behalf of a Roman Catholic community, who converted the lower rooms into a chapel, and erected a bell at the top of the house, which bell was rung at various times every day, commencing at five o'clock in the morning. Subsequently a chapel capable of containing 400 persons was built in front of the house so adjoining to the plaintiff's house, and a belfry was erected containing six large-sized bells. These bells were also rung very frequently. The plaintiff brought an action against the defendant, who was priest of this Roman Catholic chapel, on the ground that the bells were a nuisance, and recovered 40s. damages. The bells were afterwards rung only on Sundays for five periods of five minutes each. The plaintiff filed his bill for an injunction to restrain the ringing:—Held, upon demurrer for want of equity, that a bill might be filed by an individual alleging a private nuisance, although the nuisance might at the same time be public. *Soltan v. De Held*, 21 Law J. Rep. (N.S.) Chanc. 153; 2 Sim. N.S. 133.

Held, also, that the plaintiff, having brought his action for damages in respect of the ringing of bells, though to a greater extent than was subsequently practised, need not commence a fresh action for every modified form of bell-ringing; but that if the plaintiff had not obtained a verdict at law, that was no ground of demurrer to a bill for an injunction. The demurrer was therefore overruled. *Ibid*.

The demurrer being overruled, the plaintiff moved for an injunction to restrain the ringing of these bells, which was granted so far as they occasioned an annoyance to the plaintiff or his family. *Ibid*.

Injunction granted before a trial at law to restrain the burning of bricks, not then already burning in clump, on ground within sixty yards from the plaintiffs' houses, and from continuing, after a certain day, to burn such as were then burning, upon evidence of ill consequences suffered by some of the plaintiffs and their families from the noxious effects of the operation, the plaintiffs undertaking to proceed with the action at the assizes about to take place, and to abide any order the Court might make as to damages to the defendant. *Pollock v. Lester*, 11 Hare, 266.

A railway company became, by conveyance from a canal company, the owner of a canal, with lands acquired from several owners, for the formation of a reservoir from which to supply water to the canal, the rights of fishing and sporting over the reservoir, and for no other purpose, being reserved to the former owners. The company projected and had a regatta with aquatic sports on the reservoir; they ran cheap trains and thereby congregated a large concourse of persons who trespassed on the park surrounding the mansion-house of a lady, and adjoining the reservoir, and injured her right of fishing and sporting over the greater part of the reservoir. Notwithstanding the remonstrance of the lady, the company announced a second regatta. Upon motion on behalf of the lady in a suit by her against the company, the latter undertaking not to hold another regatta for a limited period, the Court permitted the plaintiff to try her right at law against the company. On a trial at law, the jury not agreeing, were discharged; but on a second trial, a verdict was given for the plaintiff, with nominal damages. Their undertaking having expired, the company announced another regatta on the reservoir. The plaintiff again moved for an injunction:—Held, that the regatta was a nuisance to the plaintiff's property, and an injunction was granted to restrain them from holding the regatta; and the Court directed an issue to try whether the company could use the reservoir for any other purpose than to supply their canal with water. *Bostock v. the North Staffordshire Rail. Co.*, 3 De Gex & Sm. 584.

Whether, where land has been obtained by act of parliament expressly for one purpose, it can be used for any other purposes—*quære*. *Ibid*.

A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the defendants to execute works in the church which would be injurious to himself, and praying an injunction. The plaintiff did not allege any right of property in a particular pew, but did allege that he was a parishioner, and that he was in the habit of attending divine service in the parish church. *Quære*—whether this is a

private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens. *Woodman v. Robinson*, 2 Sim. N.S. 204.

A bill was filed by a married woman in respect of her separate property, alleging a nuisance by reason of a noisy trade, which destroyed her rest and depreciated the value of her property. The evidence as to the nuisance was conflicting, and no action had been brought:—Held, that the nuisance, if there was one, was not irremediable, but capable of compensation by damages, and there could be no injunction till the right was established at law. And *semble*, that in respect of the mere personal nuisance the wife could not sue alone; and that as to mere depreciation of her property, she could not maintain a bill, as that would not amount to nuisance. *White v. Cohen*, 1 Drew. 312.

(b) *When refused or dissolved.*

The plaintiff alleging a title to a piece of land, moved to restrain a railway company from taking possession of the land which they had given no notice to the plaintiff to take, and for which they had offered him no compensation. The company set up an adverse title to the land, which they had purchased from a third party, and paid for:—Held, that where a mere question of title was in dispute, and where it was not shewn that the plaintiff might not obtain by action of ejectment all that he was entitled to, a bill filed on that footing alone would not entitle the plaintiff to an injunction. *Webster v. the South-Eastern Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 194; 1 Sim. N.S. 272.

A Scotchman, who was resident and carried on trade in England, became bankrupt here, and subsequently succeeded to real estate in Scotland. The assignees under the bankruptcy possessed themselves of this real estate, as part of the estate to be administered under the bankruptcy, and they perfected their title according to the rules of the Scotch law. Mr. R, who alleged himself to be a creditor of the bankrupt, commenced an action in the Court of Session in Scotland against him, which was dropped, and another was brought against the assignees for the recovery of a dividend upon his claim, equal to the dividend paid and to be paid to the creditors under the bankruptcy, and in the latter action arrested the rents of the real estates in Scotland of which the assignees had so possessed themselves so as to prevent them from dealing with that property. The assignees filed a bill against R for an injunction to restrain him from proceeding with the action in the Court of Session:—Held, overruling the decision of the Court below (where the injunction had been granted on the ground that the Court had jurisdiction to restrain the proceedings), that the injunction could not be sustained. *Pennell v. Roy*, 22 Law J. Rep. (N.S.) Chanc. 409; 3 De Gex, M. & G. 126.

Upon motion for an injunction to restrain a railway company from entering into an agreement which would prevent them from carrying out a contract previously entered into with the plaintiffs' company, the Court refused the injunction, upon the ground that there was a reasonable doubt as to the validity of the original contract, and that less inconvenience would be caused to the plaintiffs by refusing the injunction than to the defendants by granting it. *The Shrewsbury and Chester Rail. Co. v. the*

Shrewsbury and Birmingham Rail. Co., 20 Law J. Rep. (N.S.) Chanc. 574; 1 Sim. N.S. 410.

The defendants were mill-owners on the banks of a canal; and having used the water of the canal for generating as well as condensing steam in their steam-engine, the canal company brought an action against them, on the ground that the defendants had no power under the Canal Act to use the water for any other purpose than that of condensing steam. When the action was tried, the plaintiffs recovered only 1s. damages. The defendants threatened to continue using the water as before, and the plaintiffs moved for an injunction to restrain them:—Held, that the plaintiffs having once established their right at law, it was not necessary for them, although nominal damages only were recovered, to bring further actions; but the injunction was refused, on the ground that the plaintiffs had acquiesced for many years in the conduct pursued by the defendants. *The Rochdale Canal Co. v. King*, 20 Law J. Rep. (N.S.) Chanc. 675; 2 Sim. N.S. 78.

The plaintiff had occupied for many years a manufactory for worsted spinning on a stream, and claimed a right of having the water come to his works in a pure state. The defendant erected dye-works on the same stream, by which the water was polluted. The plaintiff brought an action against the defendant and recovered a farthing damages, and now applied for an injunction to restrain the defendant from a continuous infringement of his rights:—Held, that a person may by long user acquire a right to the water of a stream free from pollution, though he may have no proprietorship in the stream, and may acquire a right to pour polluted matter into a stream as against all new comers: that a person having established his right at law is not, as a matter of course, entitled to an injunction, particularly where the injunction would not restore the plaintiff to the right he has established, and where the act complained of may be compensated by pecuniary damages: that in this case the evidence proved that, owing to the increase of polluting matter poured into the stream from other sources than that of the defendant's works, the plaintiff never could be reinstated in his original rights: that the damage might be compensated by money; and that the plaintiff had been guilty of such an amount of acquiescence as would disentitle him to an injunction. Injunction refused. *Wood v. Sutcliffe*, 21 Law J. Rep. (N.S.) Chanc. 253; 2 Sim. N.S. 163.

Where a vendor has executed a legal assignment of property to a purchaser, the Court of Chancery will not, on the application of the latter, interfere by injunction, to restrain the former from illegally distraining upon the tenants of the property assigned, for alleged arrears of rent accrued since the assignment. *Drake v. West*, 22 Law J. Rep. (N.S.) Chanc. 375.

A trader manufactured a particular article which he denominated "Burgess's essence of anchovies." His son manufactured the same article, and sold it under the same designation. The father moved for an injunction; but the Court held, that the father had not acquired such an exclusive right in the use of the name or title as to prevent the use of it, without fraud, by the son, and therefore, refused the motion, with costs, affirming the decision of one of the Vice Chancellors. *Burgess v. Burgess*, 22 Law J.

Rep. (N.S.) Chanc. 675; 3 De Gex, M. & G. 896.

The Inclosure Commissioners, under the General Inclosure Act, 8 & 9 Vict. c. 118, having made provisional orders and being about to confirm the valuer's report, pursuant to a local act, a bill was filed by parties alleging certain particular lands in the report to be lands not subject to inclosure, praying an injunction. Upon the evidence it appeared that the lands were commonable, and the Court held, affirming a decision of the Court below, that it had no authority to interfere by injunction to restrain the Commissioners from making their award. *Turner v. Blamire*, 22 Law J. Rep. (N.S.) Chanc. 766: affirming 1 Drew. 402.

A company was incorporated by act of parliament for supplying the town of S with gas. Afterwards a joint-stock company, registered under the 7 & 8 Vict. c. 110, was formed for the same purpose, and, with the permission of the Board of Surveyors of Highways of S, (5 & 6 Will. 4. c. 50.) commenced to break up the streets for the purpose of laying down their pipes. Upon information and bill by the former company against the joint-stock company, charging a public nuisance and private damage, the Court refused to restrain the latter company from proceeding with their works, upon the ground that the damage was trivial and temporary; *Knight Bruce, L.J. dissentiente. The Attorney General v. the Sheffield Gas Consumers Co.*, 22 Law J. Rep. (N.S.) Chanc. 811; 3 De Gex, M. & G. 304.

The same principles will guide the interference of the Court by injunction in the case both of public and private nuisance: namely, the inadequacy of the legal remedy for injury to property. *Ibid.*

Whether the legislature, by not placing gas companies within the exception of the 2nd section of the 7 & 8 Vict. c. 110, contemplated that gas companies, incorporated under the provisions of that act, might lawfully, with the permission of the board of surveyors of highways and other local authorities, break up streets and highways for the purpose of laying down their pipes—*quære. Ibid.*

On motion, by the manufacturer and seller of an unpatented article invented by his father and called after his own name, and known as "Flavell's Patent Kitchener," the Court refused an injunction to restrain a defendant from selling similar articles under the same name and description, but reserved the motion for six months, with liberty for the plaintiff to bring an action at law. *Flavell v. Harrison*, 22 Law J. Rep. (N.S.) Chanc. 866; 10 Hare, 467.

The Court also refused to restrain the defendant from using the name of the plaintiff in selling the above articles (not representing them to be of the plaintiff's manufacturing) upon the ground that the plaintiff had been aware of the fact for four months previously to filing this bill. *Ibid.*

A was entitled to a bond into which B had entered to secure the payment of a sum of money. The two persons were on the most intimate terms. B was about to marry, and A being informed of that fact, told him and others "I will not distress you about the bond—I have given it up—I shall never enforce it;" but on being requested to give up the bond in fact, she said, "No, I will be trusted, but he may rely on my word." B married. A afterwards married, and her husband and herself put

the bond in suit. B filed a bill for an injunction to restrain them from proceeding, alleging that he had married on the faith of the promises made by B:—Held, reversing the decree of the Master of the Rolls, that he was not entitled to an injunction, for that what passed between the parties was neither a legal contract nor a misrepresentation of facts, but only an expression of intention, the performance of which could not be enforced.—*Lord St. Leonards dissentiente. Jorden v. Money*, 23 Law J. Rep. (N.S.) Chanc. 865; 5 H.L. Cas. 185: 21 Law J. Rep. (N.S.) Chanc. 531, 893; 2 De Gex, M. & G. 318; 15 Beav. 372.

The bill filed by B alleged that a part of the consideration for A's promise was the absolute conveyance by B's father to A of a house in India, which house he had only previously transferred to her by a voluntary conveyance:—Held, that the Statute of Frauds did not apply to this case. *Ibid*.

The trustees of a turnpike road which passed over a hill were empowered to lower it when necessary. They applied to restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road. The Court, however, held that it had no authority to interfere, and refused the application. *Cunliffe v. Whalley*, 13 Beav. 411.

A, a shareholder in a company, having held 500 shares, and as he alleged forfeited 490, brought an action against the company for service for a given sum. The company pleaded, but did not plead any set-off, and afterwards withdrew the pleas. A entered up judgment and took out execution against B, one of the directors, who obtained time on giving a promissory note. He alleged that at the time he gave it he did not know that A was a shareholder or had forfeited shares; and he alleged that A was indebted on his 500 shares in more than the sum claimed, but he had signed a return under the Registration Act, stating among other things, that A had held 500 shares and forfeited 490:—Held, that he had no equity to restrain an action brought by A on the promissory note. *Hammond v. Ward*, 3 Drew. 103.

A bill was filed by a solicitor against a person employed as his occasional clerk, and in that character receiving and paying monies for him, and claiming against him a sum for services, the master having paid from time to time monies to and for the clerk. The bill prayed an injunction to restrain an action brought by the clerk for the balance of the account:—Held, that this was not such an account as to require the interference of equity, and the injunction was refused. *Fluker v. Taylor*, 3 Drew. 183.

Where a policy of life insurance had been effected, as part of a family arrangement, to secure the wife and children of the insured a sum of money, and the husband, in breach of the condition of a bond which he had executed, omitted on one occasion to pay the premium on the policy, whereby the insurance dropped, but afterwards revived it, the Court—under the circumstances, and being of opinion that the manner in which the object and intention of the insurance and the bond had been described to the husband in a correspondence on the subject, had misled him, and that he was mistaken as to the consequences of the omission to pay the premium—restrained an action on the bond in respect of such

breach, upon the terms of the husband paying the costs. *Shearman v. McGregor*, 11 Hare, 106.

A plaintiff complained of works intended to be executed by the defendants, churchwardens of his parish, which he alleged, in the way in which it was proposed to execute them, constituted a nuisance; much negotiation took place, in the course of which the defendants shewed a continued acquiescence in the suggestions made by the plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion. On the day following the service of the notice of motion, the defendants, in order to avoid litigation, passed a resolution at a vestry, at which the plaintiff was present, that the works should be wholly abandoned. After that the plaintiff brought on his motion:—Held, without going into the question whether there would be any nuisance, that under the circumstances the motion was useless and improper; and it was refused with costs. *Woodman v. Robinson*, 2 Sim. N.S. 204.

Persons obtaining from the legislature power to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the legislature has sanctioned, and to proceed only in the mode which the legislature has pointed out; but (except in a proceeding at the instance of the Attorney General) any one seeking the assistance of a Court of equity to restrain the violation of such a contract with the legislature is bound to shew that he has a private interest in the matter. Therefore, where a waterworks act empowered a company to divert the water of a stream (without limit as to quantity) by means of an open channel filled with limestones, and they were diverting it by means of a culvert,—Held, that another company, who were entitled to the water of a stream into which the diverted stream had flowed were not entitled to an injunction to restrain a violation of the terms of the act as to the mode of diversion. *The Mayor, &c. of Liverpool v. The Chorley Waterworks Co.*, 2 De Gex, M. & G. 852.

The dismissal of a bill does not prejudice the right to file another for the same purpose under a different state of circumstances. *Ibid*.

A broad gauge railway company were shareholders in a mixed gauge railway company, who by their act were bound to construct their line throughout on the broad gauge, and as to part on the narrow gauge also. In March 1852 they filed a bill, stating that the mixed gauge railway company were about to construct the line throughout on the narrow gauge, although their funds were insufficient to enable them to do so, and also to comply with their act as to laying down the broad gauge; the bill sought an injunction to restrain the opening of any part of the narrow gauge line, and the further construction of that gauge until the broad gauge was complete. In April 1852 the injunction was refused. From that time contests were carried on in parliament between the two companies, ending in the rejection of certain bills solicited by the mixed gauge company. From August 1852 to January 1853 a correspondence was carried on between them as to traffic arrangements. In January 1853 the broad gauge company insti-

tuted a new suit, seeking an injunction to restrain the opening the mixed gauge railway company of any portion of the line upon the narrow gauge before the broad gauge was completed. In the same month they moved for an injunction in the new suit, and also appealed from the refusal of the injunction in April 1852.—Held, that both motions were too late. *The Great Western Rail. Co. v. the Oxford, Worcester and Wolverhampton Rail. Co.*, 3 De Gex, M. & G. 341; 5 De Gex & Sm. 437.

Principles on which the Court acts in refusing applications, either original or by way of appeal, on the ground of laches. *Ibid.*

Effect of objection in excluding laches. *Ibid.*

A railway company, authorized by their special act to construct a main line with a branch, had nearly completed their main line and had taken no steps towards commencing the branch.—Held, that the remedy for not commencing the branch, if any, was by mandamus, and a demurrer by the company for want of equity was allowed to an information, at the relation of residents in the neighbourhood, seeking an injunction to restrain the company from completing the main line until the proper steps should be taken towards commencing the branch line. The injunction was asked at a period when a mandamus could not be obtained for five months, but the Court held this to be no sufficient reason for granting the injunction. *Attorney General v. the Birmingham and Oxford Junction Rail. Co.*, 4 De Gex & Sm. 490.

Whether the Court would have granted the relief asked, if the proceeding had been by bill by a shareholder or an aggrieved landowner—*quære*.

Whether at the hearing an injunction can be granted which the bill or information did not seek—*quære*.—*Ibid.*

(B) TO RESTRAIN PROCEEDINGS AT LAW.

(a) Before Verdict.

An auctioneer having been employed to sell the property of a lunatic by the agent of the committee, an action was afterwards brought by the personal representative of the lunatic against the auctioneer, for the monies received by him as the produce of the sale. The defendant pleaded equitable pleas of set-off under the Common Law Procedure Act, and the plaintiff at law replied. The defendant at law then filed a bill for an injunction, setting up the same case as in his defence at law, and alleging complicated accounts.—Held, that there was nothing to shew that these accounts could not be taken at law, and that the pleas must be considered as shewing a good defence at law under the Procedure Act. Injunction refused. *Farebrother v. Welchman*, 24 Law J. Rep. (N.S.) Chanc. 410; 3 Drew. 122.

The plaintiff held certain premises as tenant of the defendants. The defendants brought an action against the plaintiff in respect of rent and dilapidations. The plaintiff applied to the common law Court for leave to plead an equitable plea under the Common Law Procedure Act. Permission was refused, and the plaintiff then filed his bill and moved for an injunction to restrain the action, upon the same grounds as those contained in his plea, namely, that there was an agreement for the surrender of the lease. The injunction was granted, but upon the terms of the plaintiff paying into court the amount

for which the action was brought. *Magnay v. the Mines Royal Co.*, 24 Law J. Rep. (N.S.) Chanc. 413; 3 Drew. 130.

In a suit to carry into effect an agreement, by giving the plaintiffs relief in respect of a breach of the agreement by the defendants, and at the same time, on the ground of such breach, to remove them from an office of trust and confidence which they held by virtue of the agreement, and to appoint other persons to such office, the Court, considering the plaintiffs entitled on an interlocutory application to the relief sought, restrained the defendants by interlocutory order in a supplemental suit from prosecuting actions at law against the plaintiffs under the agreement, to recover damages for removing the defendants from such office. *Brenan v. Preston*, 10 Hare, 331.

In a question on the effect of a contract in the circumstances of the case where the Court had concurrent jurisdiction with a court of law, and had assumed such jurisdiction by interfering to protect the rights of the parties, the Court restrained the parties to the contract from bringing actions at law founded on the facts with regard to which the Court had interfered, and in which actions the same question of the legal effect of the agreement in the circumstances would necessarily arise. *Ibid.*

A case in which the Court, on an interlocutory application, appointed a ship's husband at the suit of some of the part-owners of a ship, as against the others who were under a contract ship's husbands as well as part owners. *Ibid.*

(b) To stay Judgment or Execution.

The plaintiff had obtained the common injunction to stay execution in an action on the same day that the action was tried, but before the verdict was given against him:—Held, upon motion by the defendant before answer, that the plaintiff must pay the amount, for which judgment had been signed, into court within a specified time, or the injunction must be dissolved. *Anderson v. Noble*, 21 Law J. Rep. (N.S.) Chanc. 586; 1 Drew. 143.

A lease for years was executed for certain building purposes, but it contained, besides a covenant to pay rent, a covenant by the lessee to cultivate the part not required for the buildings in a good and husband-like manner. There having been a breach of the covenants to cultivate and to pay rent, an action of ejectment was brought, and judgment was recovered against the lessee. On a bill filed by him to restrain execution,—Held, reversing the decision of the Court below, that the Court would not restrain execution, and that, therefore, the injunction which had been granted must be dissolved. *Hills v. Rouland*, 22 Law J. Rep. (N.S.) Chanc. 964; 4 De Gex, M. & G. 430.

(C) BREACH OF.

Where an injunction is granted to restrain the use of a trade mark, and the defendant disobeys and the plaintiff moves for a committal, acquiescence, if set up as a defence against the motion to commit, must be shewn to be such as to amount almost to a licence to use the mark, and entitling the defendant himself to a right in the use of the mark. *Rodgers v. Nowill*, 22 Law J. Rep. (N.S.) Chanc. 404; 3 De Gex, M. & G. 614.

(D) PRACTICE.

(a) *Application for Injunction.*

A party applying for an *ex parte* injunction is bound to state in his bill not only the facts that he considers material, but all facts within his knowledge that are material; and, therefore, where a plaintiff had innocently omitted to state circumstances which turned out to have a material bearing upon his rights under an act of parliament, the injunction was dissolved: *Dalglisch v. Jarvie*, 20 Law J. Rep. (N.S.) Chanc. 475.

On an application for an *ex parte* injunction, a plaintiff omitted to state a material fact. A motion being made to dissolve it, the plaintiff swore that he had forgotten the circumstance:—Held, that it was no excuse for the suppression. *Clifton v. Robinson*, 16 Beav. 355.

The practice as to common injunctions is not, in all respects, assimilated to that in cases of special injunctions. *Senior v. Pritchard*, 16 Beav. 473.

A *prima facie* case, supported by affidavit, is now required to entitle a plaintiff to the common injunction; and although that case be met by the affidavit of the defendant, denying the equity of the bill, still the plaintiff is entitled to an injunction to stay proceedings at law until answer, in order to secure him the benefit of a full discovery, in aid of his defence at law. *Ibid.*

The plaintiff before filing interrogatories moved for an injunction to stay proceedings at law. The defendant filed an affidavit displacing the grounds of defence at law. The injunction was refused. *Chilton v. Campbell*, 20 Beav. 531.

Acquiescence in the violation of a covenant to a certain extent, held a sufficient objection to an interlocutory application for an injunction against a greater violation of it. *Child v. Douglas*, 5 De Gex, M. & G. 739; Kay, 560.

Where, on a motion for an injunction to restrain an alleged breach of covenant, the question in dispute appeared doubtful,—Held, that the burden of proof was on the plaintiff to shew that the balance of convenience was in favour of granting the injunction. *Ibid.*

Leave given before bill filed to give notice of motion for injunction. *Parker v. the Great Northern Rail. Co.*, 4 De Gex & Sm. 138.

After the common decree in a creditors' suit, the executor, not denying that he has assets nor disputing the debt, cannot obtain an injunction to restrain an action by a creditor of the estate against him, commenced before the suit, but not proceeded with since notice of the decree, except upon the terms of paying the costs at law, and also of the motion for the injunction. *Cole v. Burgess*, Kay, App. i.

Proceedings on a motion for an injunction to restrain an action at law before the appearance of a defendant to a bill of discovery. *Fitzgerald v. Bult*, 9 Hare, App. lxxv.

An injunction to stay a trial at law will not be granted on the eve of the trial, where there has been delay on the part of the plaintiff in equity in making the application; but the lapse of time before the application is made is not an objection to granting it, if the trial be not near. *Holme v. Browne*, 9 Hare, App. xxix.

Cases (as of waste) in which delay in applying for

an injunction may not be deemed to preclude the parties aggrieved from obtaining that relief upon an interlocutory application. *Attorney General v. Eastlake*, 11 Hare, 205.

(b) *Dissolving the Injunction.*

Upon a bill filed, the common injunction was granted to restrain proceedings at law, which had been commenced by three defendants. Two of the defendants put in their answer to the bill, and obtained the order *nisi* to dissolve the injunction generally, which, after cause shewn by the plaintiff against dissolving the injunction, was made absolute, though the third defendant had not answered. The plaintiff was then arrested upon a writ issued by the two defendants who had answered:—Held, that the defendants were not guilty of contempt of court by arresting the plaintiff, but that the orders *nisi* and absolute ought to have been confined to the defendants who had put in their answer; and the order for dissolving the injunction was discharged. *Money v. Jorden*, 20 Law J. Rep. (N.S.) Chanc. 174; 13 Beav. 229.

Held, also, that the Court could dissolve the common injunction against several defendants, some of whom had not put in their answers, but that the special circumstances must be brought to the attention of the Court by the defendants who had answered, and who sought to dissolve the injunction generally. *Ibid.*

Where a special injunction has been obtained on affidavits, and on the answer coming in the defendant moves to dissolve, such affidavits may be used against the answer. *Custance v. Cunningham*, 13 Beav. 363.

The plaintiff had obtained the common injunction; the answer was filed on the 28th of July, and the last seal was on the 31st. The Court would not *ex parte* grant an order *nisi* to shew cause on the 31st, but gave leave to make a special motion on that day. *Patent Fuel Company v. Walstab*, 14 Beav. 219.

Where the common injunction had been obtained prior to the 15 & 16 Vict. c. 86, and the answer came in:—Held, that the proper practice was to give notice of motion to dissolve. *Langford v. May*, 16 Beav. 32.

On a motion to dissolve an injunction (there being no answer), the Court will not dissolve the injunction upon the sole ground that the plaintiff's equity is denied by the defendant's affidavit, where the affidavit did not traverse all the facts on which the plaintiff's equity rested. *Pyecroft v. Pyecroft*, 2 Sm. & G. 326.

(c) *Amendment of Bill.*

The common injunction having been dissolved on the merits shewn by the answer, the plaintiffs amended their bill, and upon an affidavit verifying in general terms the truth of the amendments, again obtained an order for the common order:—Held, that the defendant could not contradict that affidavit, but that it was open to the defendant to shew that the answer would not afford the plaintiffs a defence at law, and that the amendments did not materially vary the original case. *Zulueta v. Vincent*, 20 Law J. Rep. (N.S.) Chanc. 431; 14 Beav. 209, 216.

(d) *Costs.*

A plaintiff at law was unsuccessful in an action,

and the defendant at law was about to levy execution for the costs. The plaintiff at law filed a bill to restrain execution, but the Court refused the injunction *ex parte*, unless upon the terms of the plaintiff bringing the amount of the taxed costs of the action into court. *Fisher v. Baldwin*, 22 Law J. Rep. (N.S.) Chanc. 966.

Where the defendant to a bill of discovery in aid of proceedings at law raises an unsuccessful opposition to a motion for an injunction to stay proceedings at law, he will be ordered to pay the costs of the motion, though he gets the general costs of the suit. *Lovell v. Galloway*, 19 Beav. 643.

INNKEEPER.

[See title ALE AND BEERHOUSES.]

LIABILITY TO GUESTS.

The plaintiff, a commercial traveller, whilst a guest at an inn, placed his gig-box in the commercial room, as was the practice with travellers frequenting the inn. The box contained money, and was allowed to remain in the commercial room in the night-time during the plaintiff's three days' stay at the inn. The lock of the box was a very insecure one, and could be opened without a key, by pushing back the bolt. On two or three occasions, the plaintiff opened the box in the room, and counted the money it contained in the presence of several persons:—Held, that the jury were properly directed that gross negligence on the part of the plaintiff would relieve the innkeeper from his common law liability; and that on the above evidence the jury were warranted in finding that the plaintiff had been guilty of gross negligence, and the defendant, therefore, entitled to the verdict, on the plea of not guilty. *Armistead v. White, or Wilde*, 20 Law J. Rep. (N.S.) Q.B. 524; 17 Q.B. Rep. 261.

LIEN OF INNKEEPERS.

An innkeeper is not justified in detaining for his unpaid bill a piano borrowed of a manufacturer by a guest whilst residing at the inn, the innkeeper knowing that it had been so borrowed. *Broadwood v. Granara*, 24 Law J. Rep. (N.S.) Exch. 1; 10 Exch. Rep. 417.

INQUISITION.

[Costs of setting aside, see *Foxall v. Barnett*, title FALSE IMPRISONMENT, (A).]

INQUIRY, WRIT OF.

[When necessary, see stat. 15 & 16 Vict. c. 76. ss. 93, 94—Notice of, s. 97. And see Reg. Gen. Hil. term, 1853, rr. 37—46, 22 Law J. Rep. (N.S.) xi; 1 E. & B. App. ix.]

Where a plaintiff in an action of contract, after judgment on demurrer, recovers less than 20% on an inquisition of damages, he is deprived of his costs by the 13 & 14 Vict. c. 61. s. 11; the case not coming under the exception as to judgment by default.

Prew v. Squire, 20 Law J. Rep. (N.S.) C.P. 175; 10 Com. B. Rep. 912; 2 L. M. & P. P.C. 346.

Quere—whether the word "verdict" in the 12th section of the 13 & 14 Vict. c. 61. means a verdict at the trial of the cause only, or includes a verdict on a writ of inquiry—see *Reed v. Shrubsole*, 18 Law J. Rep. (N.S.) C.P. 225. *Ibid*.

Where the jury have found a verdict for the defendant, with leave given to the plaintiff to enter a verdict for a sum at which his damages have been contingently assessed at the trial, the Court will not afterwards grant a new trial in order that there may be a fresh assessment of damages, unless the plaintiff's counsel has objected to such contingent assessment at the trial. *Booth v. Clive*, 20 Law J. Rep. (N.S.) C.P. 151; 10 Com. B. Rep. 827.

INSOLVENT.

[See LANDLORD AND TENANT.]

(A) PROTECTION FROM PROCESS.

(a) *Petition.*

(b) *Final Order, Effect of.*

(1) *In general.*

(2) *Where Debts are omitted or erroneously stated in the Schedule.*

(c) *Fraudulent Conveyances.*

(d) *Bills of Sale.*

(B) DISCHARGE.

(a) *Construction and Operation of Statutes.*

(b) *When entitled to.*

(c) *Effect of upon the vesting Order.*

(d) *Operation of.*

(1) *In general.*

(2) *As regards Debts in Schedule.*

(3) *Bills of Exchange.*

(4) *On other Property.*

(5) *Agreement to withdraw Opposition to Discharge.*

(e) *Pleadings and Evidence.*

(f) *Warrant of Attorney to Official Assignee.*

(C) ASSIGNEES.

(a) *Liability of.*

(b) *Powers and Rights of, over Debtor's Property.*

(c) *Actions by and against.*

(D) RIGHT OF INSOLVENT TO SUE.

(E) RIGHTS OF SCHEDULED CREDITORS.

(A) PROTECTION FROM PROCESS.

[See stats. 15 & 16 Vict. c. 54. and 17 & 18 Vict. c. 16.]

(a) *Petition.*

A petitioner the county court for protection from process under 5 & 6 Vict. c. 116. as a trader owing debts amounting in the whole to less than 300*l*. It appeared that he had previously presented a similar petition and obtained a final order for protection, and that the debts specified in the schedule to the former petition were still unpaid. The whole amount of the debts stated in both schedules exceeded 300*l*. The Judge decided that he was entitled to protection as a trader owing debts amounting in the whole to less than 300*l*. *In re Bowen*, 21 Law J. Rep. (N.S.) Q.B. 10.

(b) *Final Order, Effect of.*

(1) *In general.*

A surety for the grantor of an annuity who has become insolvent, and has obtained a final order for protection under the 5 & 6 Vict. c. 116. s. 10, is not protected from being sued on the default of the grantor for instalments accruing due subsequently to the filing of the petition, by 7 & 8 Vict. c. 96. s. 25, his liability to pay not being a debt within the meaning of that section. *Thompson v. Whitley*, 20 Law J. Rep. (N.S.) Q.B. 86; 16 Q.B. Rep. 189.

A final order, under the 5 & 6 Vict. c. 116. s. 4. and the 7 & 8 Vict. c. 96. s. 22, does not protect the petitioner from being taken in execution for damages, for which a verdict has been given in an action of tort, but for which, at the date of the petition, judgment has not been signed. *Bevan v. Walker*, 21 Law J. Rep. (N.S.) C.P. 161; 12 Com. B. Rep. 480.

(2) *Where Debts are omitted or erroneously stated in the Schedule.*

If an insolvent, petitioning under the 5 & 6 Vict. c. 116. and 7 & 8 Vict. c. 96. omits a debt from his schedule, with the consent of the creditor, the debt is barred by the final order. *Wilkin v. Manning*, 23 Law J. Rep. (N.S.) Exch. 174; 9 Exch. Rep. 575.

The defendant obtained his final order for protection from process under the 7 & 8 Vict. c. 96, and inserted in his schedule a debt of 20l. as the balance due to the plaintiff upon a judgment founded upon a warrant of attorney. The balance due was, in fact, 70l., but there was nothing to shew that the error was caused by culpable negligence, fraud or evil intention. The plaintiff sued out a *f. fa.* upon this judgment. The Court, under section 21. of the 7 & 8 Vict. c. 96. set aside the writ. *Brook v. Chaplin*, 24 Law J. Rep. (N.S.) Q.B. 188; 4 E. & B. 835.

Action by the plaintiffs as the drawers against the defendant as the acceptor of a bill of exchange, dated the 19th of October 1853, at three months, indorsed to the plaintiffs. Plea, that a petition for protection from process was duly presented by the defendant to the Insolvent Court; that before action a final order for protection and distribution was made by an Insolvent Commissioner, and that the debt in the declaration was contracted before the filing of the petition. Replications, first, that the debt was due at the time of filing the petition, and that the plaintiffs were not named in the defendant's schedule as creditors, or as claiming to be creditors, for the debt, nor was the bill of exchange set forth in the schedule; secondly, that the debt was due and the plaintiffs were then and thenceforth, &c. indorsees and holders of the bill, and were known to him as such indorsees and holders, and were not named in the schedule as creditors, or as claiming to be creditors. The defendant had, before his insolvency, given a renewal bill for 26l. 7s. 6d. to Messrs. W, varnish-merchants, who, without the knowledge of the defendant, indorsed it to the plaintiffs. One of the Messrs. W afterwards died. In his schedule the defendant described the debt and bill in the declaration in these terms:—"The representatives of Messrs. W & Co., varnish-merchants, late of 184, High Holborn, are Messrs. Wallis, varnish-manufacturers, Long Acre. 30l. admitted for varnish. These creditors hold a bill of exchange for 30l.

and upwards, drawn by self and partner, and afterwards renewed by self":—Held, first, that the plea was bad, and that the two replications constituted but one answer to the plea; secondly, that the description in the schedule was defective, and that the debt was not barred. *Kemp v. Hurry*, 24 Law J. Rep. (N.S.) Exch. 220; 11 Exch. Rep. 47.

(c) *Fraudulent Conveyances.*

A tenant being indebted to his landlord for rent, and being in insolvent circumstances, proposed and executed to the defendant, in April 1850, a bill of sale of his farming stock and furniture; and in June 1851 petitioned the Insolvent Court for protection from process. The 7 & 8 Vict. c. 96. s. 19, after making void certain voluntary conveyances by parties in insolvent circumstances, provides, that no such conveyance shall be deemed void if made prior to three months before filing the petition, and not with the view or intention by the party so conveying of petitioning the Court for protection from process. The Judge directed the jury to consider whether the insolvent executed the bill of sale with the view or intention of petitioning the Insolvent Court for protection at any time when he might apprehend proceedings would be or were taken against him:—Held, that this was a misdirection; the question being, not whether the insolvent had a general intention at some future time of petitioning the Insolvent Court, but whether he had the present intention of so doing. *Thoyts v. Hobbs*, 21 Law J. Rep. (N.S.) Exch. 340; 7 Exch. Rep. 810.

(d) *Bills of Sale.*

[See *Simpson v. Wood* and *Congreve v. Evetts*, title *BILLS OF SALE*.]

(B) DISCHARGE.

(a) *Construction and Operation of Statutes.*

The discharge by the Insolvent Court of a person against whom judgment for a debt has been obtained in a county court, does not satisfy the judgment, and the judgment remaining "unsatisfied" within the meaning of the 98th section of the County Courts Act (9 & 10 Vict. c. 95), the party may be proceeded against by summons under that section, and may be committed by the Judge under the provisions of section 99. *Abley v. Dale*, 20 Law J. Rep. (N.S.) C.P. 233; 11 Com. B. Rep. 778.

The Court for the Relief of Insolvent Debtors has no jurisdiction to rehear the case of an insolvent who has been discharged by the Judge of a county court under the 10 & 11 Vict. c. 102. s. 2. *Ex parte Phillips, in re Clabburn*, 21 Law J. Rep. (N.S.) Q.B. 379; 2 E. & B. 192.

Semle—that the Judge of the county court has power to re-hear the case. *Ibid*.

The 10 & 11 Vict. c. 102. s. 10. abolishes the circuits of the Insolvent Commissioners, and transfers their powers to the Judges of the county courts, to whom it gives the same power and authority with respect to any petition transmitted to them, and to do all such matters and things respecting such prisoner as the Court for Insolvent Debtors or any Commissioner might do in the matter of petitions heard before them:—Held (*dubitante Crompton, J.*), that the Judge of a county court, by whom an

insolvent had been discharged, had jurisdiction to order a rehearing, and to issue a warrant under the 1 & 2 Vict. c. 110. s. 96. to bring up the insolvent for the purpose of the re-hearing. *Regina v. Dowling*, 22 Law J. Rep. (n.s.) Q.B. 295; 2 E. & B. 196.

Quere—whether such a warrant can be executed out of the district of the county court. *Ibid*.

A discharge by the Insolvent Court after judgment for a debt recovered against the insolvent in the county court does not satisfy the debt; and the debtor having been after such discharge imprisoned for forty days, under a warrant on a judgment summons, by virtue of the 98th and 99th sections of the 9 & 10 Vict. c. 95. is not entitled to be discharged under the 1 & 2 Vict. c. 110. s. 90. The application for the discharge should be made to the Judge of the county court; and his decision, refusing to allow the discharge, is final, and the superior Courts will not grant a *habeas corpus*;—confirming *Abley v. Dale*, and distinguishing *Ex parte Dakins. Ex parte Somers. in re George v. Somers*, 24 Law J. Rep. (n.s.) C.P. 185; 16 Com. B. Rep. 539: s. p. *Ex parte Christie*, 24 Law J. Rep. (n.s.) Q.B. 144; 4 E. & B. 714; and *George v. Summers*, 24 Law J. Rep. (n.s.) Exch. 247; 11 Exch. 202.

(b) *When entitled to.*

An insolvent, who was adjudged to be discharged forthwith as to all his debts except his debt to A, and as to that debt after he should have remained in custody twenty months, in order to obtain A's consent to his release from custody during the period, gave A a warrant of attorney to secure to A the payment of his debt by instalments:—Held, that the warrant of attorney although given before the time that the insolvent was entitled to his discharge, was invalid and might be set aside before the twenty months had expired, as the statute 1 & 2 Vict. c. 110. s. 91. avoids any new security, given after adjudication, to secure to a creditor payment of his original debt. *Humphries v. Smith*, 22 Law J. Rep. (n.s.) Q.B. 121; 1 Bail C.C. 151.

(c) *Effect of upon the vesting Order.*

Declaration against the defendant as maker of a promissory note, payable to F J, and by him indorsed to the plaintiff. Plea, that after the making of the note, and before the indorsement to the plaintiff, the said F J then being a prisoner for debt in Lancaster Castle Gaol, duly petitioned the Court for the relief of Insolvent Debtors, under the 1 & 2 Vict. c. 110, for his discharge from custody, and that thereupon an order was made by the said Court pursuant to the said statute for the vesting of F J's estate and effects in the provisional assignee, by virtue of which order and the said statute the second promissory note and all right of action in respect thereof became vested in the said provisional assignee, &c. Replication, that before the indorsement, the said F J was discharged from custody by the detaining creditor in the plea mentioned, and with his consent, and without any adjudication by the said Court for the Relief of Insolvent Debtors having been made in that behalf:—Held, upon demurrer, that under the 1 & 2 Vict. c. 110, the discharge out of custody of an insolvent with the consent of his detaining creditor, without any adjudication in that

behalf, had the effect of putting a stop to the operation of the vesting order, and of divesting the insolvent's estate out of the assignee, and revesting it in the insolvent himself, and, therefore, that the replication was good. *Grange v. Trickett*, 21 Law J. Rep. (n.s.) Q.B. 26; 17 Q.B. Rep. 574.

If a vesting order has been made in the case of a prisoner who has petitioned the Insolvent Debtors Court under the statute 1 & 2 Vict. c. 110, his discharge, by default of the detaining creditor without any adjudication being made, does not of itself render void the vesting order. *Kernot v. Pittis* (in error), 23 Law J. Rep. (n.s.) Q.B. 33; 2 E. & B. 421: reversing the judgment below, 21 Law J. Rep. (n.s.) Q.B. 413; 2 E. & B. 406.

Where an insolvent, who has petitioned for his discharge under the 1 & 2 Vict. c. 110, is discharged out of custody by the default or consent of his detaining creditor without any adjudication being made,—Held, by Lord Campbell, C.J. and Coleridge, J. (affirming *Grange v. Trickett*) that upon such discharge the vesting order becomes void, and that the property which had passed to the assignees under it reverts in the insolvent. Held, by Erle, J., that the vesting order continues in force notwithstanding such discharge until made null by the Insolvent Court. *Kernot v. Pittis*, 21 Law J. Rep. (n.s.) Q.B. 413.

Section 44. of the 1 & 2 Vict. c. 110. provides that, in case any prisoner as to whose estates and effects any vesting order shall have been made shall, by the consent or default of his detaining creditor, be discharged out of custody without any adjudication being made, in such case no action shall be commenced against the provisional assignee, nor against any person duly acting under his authority, except to recover any property, &c. of such prisoner detained after an order made by the Insolvent Court for the delivery thereof and demand made thereupon. To an action of detinue, the plea stated proceedings in the Insolvent Court and the making of a vesting order, whereby the goods of the plaintiff in the declaration mentioned became vested in S S, the provisional assignee; and alleged that the defendant, as the servant and by the authority of the said S S, so being such provisional assignee, after the making of the said vesting order, detained the said goods in the declaration mentioned. The replication alleged that, before the defendant detained the said goods the plaintiff was discharged out of custody by the default of his detaining creditor without any adjudication being made by the Court, and that the defendant did not detain the said goods by virtue of any order, authority, or command of the said S S made or given to the defendant before the plaintiff was so discharged as aforesaid. On special demurrer to the replication,—Held, that it admitted that the goods were detained by the defendant under the authority of S S given after the plaintiff's discharge, but before any order of the Insolvent Court for the delivery of the goods; and that even supposing on the discharge without adjudication, the property reverted in the insolvent, the plea was an answer to the action. Held, also, that the allegation in the plea, that the defendant detained by the authority of the provisional assignee, was not premature, and might have been traversed by the replication. *Ibid*.

(d) *Operation of.*

(1) *In general.*

A prisoner was discharged by an order of the Insolvent Court, under 1 & 2 Vict. c. 110, s. 76, except as to four debts, after six months, and as to those four debts, under s. 78, after sixteen months:—Held, whether the order was invalid or not as to the latter part, on the ground of the Commissioner having exercised his power in the former part, that the prisoner was not entitled to his discharge at the end of the six months. *Ex parte Violet*, 20 Law J. Rep. (n.s.) C.P. 171; 10 Com. B. Rep. 891; 2 L. M. & P. C. 279.

A testator, by his will, left all his property to his three daughters, share and share alike, as tenants in common, in fee. By a subsequent codicil, the testator provided that if one of the three daughters should get married, the two then remaining single should, at the end of twelve months after his decease, pay to the married sister the sum of 500*l.* in lieu of any further claim on his property, and that the two surviving daughters, then single, should be sole possessors of all his property in fee:—Held, that this codicil did not operate, unless one of the daughters were married before the death of the testator, or at all events within twelve months after it. *Doe d. Lloyd v. Davies*, 23 Law J. Rep. (n.s.) C.P. 105; 14 Com. B. Rep.

Where an insolvent is adjudged to be discharged as to a particular creditor at a future period, and is arrested by that creditor, a payment of part or all of the debt to obtain his discharge from the arrest is valid although a fresh security given under the same circumstances would be invalid. *Viner v. Hawkins*, 23 Law J. Rep. (n.s.) Exch. 38; 9 Exch. Rep. 266.

Quære—Whether money paid under such invalid security can be recovered back? *Ibid.*

A judgment debt is a good debt on which to found a petition in bankruptcy, although the debtor has been taken in execution under a *ca. sa.*, and subsequently and before the date of the petition discharged from custody under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, and the debt duly inserted in the schedule. *Watson v. Humphrey*, 24 Law J. Rep. (n.s.) Exch. 190; 10 Exch. Rep. 781.

(2) *As regards Debts in Schedule.*

[See *ante*, (A) (b).]

The defendant settled an action brought by the plaintiff by giving a Judge's order for the payment of 100*l.* and costs by certain instalments. He then filed his petition in the Insolvent Debtors Court under 7 & 8 Vict. c. 96, and inserted the plaintiff in his schedule as a creditor for the amount specified in the Judge's order. Default having been made in the payment of the instalments, judgment was signed. The defendant's examination was adjourned *sine die*, and on the same day he was arrested under a *ca. sa.*, at the suit of the plaintiff, upon the judgment so signed. He applied to a Judge at chambers for his discharge, alleging that he was privileged from arrest at the time he was taken because he was on his way to a Judge's chambers. He was discharged on a second order being made for payment of the debt and costs by different instalments. The defendant shortly afterwards obtained an order protecting him from arrest under any pro-

cess in respect of the debts due at the time of his filing his petition to the persons named in the schedule. He was then arrested under a *ca. sa.* issued on a judgment signed under the second Judge's order:—Held, that he was entitled to be discharged, the arrest being in respect of the debt inserted in the schedule. *Hookpayton or Hookpayton v. Russell*, 23 Law J. Rep. (n.s.) Exch. 87; 9 Exch. Rep. 279.

(3) *Bills of Exchange.*

Bills of exchange drawn by the defendant in India, were purchased there for the plaintiff, Moses Symons, who resided in England, and were indorsed and transmitted to him in this country. The defendant afterwards petitioned the Insolvent Court in India, and in his schedule described the plaintiff's debt thus: "Creditor, A. M. Symons for the following bills of exchange (describing them), drawn by us upon Messrs. R, I, & Co. in favour of Moses Symons." A person named A. M. Symons resided in Calcutta, but was not shewn to be connected with the bills in question:—Held, that the description in the schedule was insufficient within the meaning of the 11 Vict. c. 21, s. 5. Sched. C, the Insolvent Act (India), and, therefore, that the defendant was still liable on the bills. *Symons v. May*, 20 Law J. Rep. (n.s.) Exch. 414; 6 Exch. Rep. 707.

(4) *On other Property.*

A party, after being discharged under the Insolvent Act, became possessed of a house and goods and insured them; subsequently to which his discharge was revoked by the Insolvent Court:—Held, that he had an insurable interest. *Marks v. Hamilton*, 21 Law J. Rep. (n.s.) Exch. 109; 7 Exch. Rep. 323.

An insolvent who has petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110, may sue for a debt which accrues due to him after the vesting order, and before his final discharge, unless the provisional assignee interferes. *Jackson v. Burnham*, 22 Law J. Rep. (n.s.) Exch. 13; 8 Exch. Rep. 173.

(5) *Agreement to withdraw Opposition to Discharge.*

Although there is no legal obligation upon a creditor of an insolvent to oppose his discharge, yet where he has given notice of an opposition and led other creditors to believe that he will go on, and that the case will be properly adjudicated on, the subsequent withdrawing of his opposition is not a valid consideration to support an agreement to pay money to him, and such an agreement is illegal and against the policy of the Insolvent Act. *Hall v. Dyson*, 21 Law J. Rep. (n.s.) Q.B. 224; 17 Q.B. Rep. 785.

(e) *Pleadings and Evidence.*

Replication to a plea of discharge under the Insolvent Act, that the cause of action accrued after the order and adjudication in that plea mentioned, —Held bad, as amounting to an argumentative denial of the allegation in the plea, that the order and adjudication were made after the causes of action accrued. *Smith v. Lovell*, 20 Law J. Rep. (n.s.) C.P. 57; 10 Com. B. Rep. 6; 1 L. M. & P. C. 794.

Declaration on a promissory note made by the defendant. Plea, that the defendant being indebted

to the plaintiff, and a prisoner for debt, duly, and according to the provisions of the statute in that behalf, petitioned the Court for the Relief of Insolvent Debtors for his discharge from custody, which petition was duly filed in the said court, and all the estate of the defendants afterwards duly vested in the provisional assignee, and a schedule of his debts and effects was delivered and filed in the said court, containing a description of the debt to the plaintiff. That the said Court did thereupon appoint a day for the defendant's being brought up to be dealt with according to the said act. That the plaintiff threatened to oppose the defendant's discharge, unless the defendant would deliver to the plaintiff promissory notes for the amount of the debt due to the plaintiff, and thereupon, in order to induce the plaintiff to abandon his threat and not to oppose the defendant's discharge, the promissory note in the declaration mentioned was given. That the defendant was afterwards by an order of the said court duly discharged of and from the said debts so due to the plaintiff, and in respect whereof he had made and delivered the said note, which discharge still remained in full force:—Upon demurrer, the Court was of opinion that the plea was open to the objection of duplicity, and the defendant had leave to amend. *Heseltine v. Sibly*, 21 Law J. Rep. (n.s.) Q.B. 305; 18 Q.B. Rep. 443.

A replication to a plea of set-off alleged that the defendant being in custody within the walls of the Queen's Prison at the suit of B, applied, according to the provisions of the 1 & 2 Vict. c. 110. to the Insolvent Court, stating in his petition that he was willing his personal estate should be vested in the official assignee; and that an order was made accordingly:—Held, that the replication was good. That it is sufficient in such a pleading to say, that the proceedings were according to the act, without shewing that the petition stated all the requisites of the 35th section. That the Court will take judicial notice that the Queen's Prison is in England. And that it was not necessary to allege in the replication on what process the defendant was in custody. *Wickens v. Goatley*, 21 Law J. Rep. (n.s.) C.P. 50; 11 Com. B. Rep. 666.

Quære—whether it is necessary that a petition to the Insolvent Court should aver all the particulars mentioned in the 35th section of the act in order to give the Court jurisdiction. *Ibid*.

To an action on a promissory note, it was pleaded that, after the passing of the 1 & 2 Vict. c. 110, one C W H being indebted to various persons, and being in actual custody within the walls of Horsemonger Lane Gaol, did, within fourteen days of such imprisonment, petition the Insolvent Court for his discharge under that act, and that while the petition was pending, and in order to induce Messrs. H, who were creditors of the said C W H, to cease from opposing, and not thereafter to oppose his discharge as they had threatened, the defendant and one H O made the note in question and delivered it to Messrs. H, who indorsed it to the plaintiff, with notice:—Held, that this was an illegal agreement, and the plea good. *Hills v. Mitson*, 22 Law J. Rep. (n.s.) Exch. 273; 8 Exch. Rep. 751.

Held, also, that the production of the copy of the causes of the insolvent's detention filed with the petition and duly sealed, was no evidence of his

having been in actual custody at the time of his petition. *Ibid*.

Where a defence of a discharge under the Insolvent Act is pleaded, and the traverse is taken that the defendant was not by the order of adjudication ordered to be discharged from the debt sued for, evidence is not admissible that the debt was insufficiently described in the schedule, the order of discharge being alone put in issue by such traverse. *Jackson v. Chichester*, 22 Law J. Rep. (n.s.) Exch. 339; 7 Exch. Rep. 877.

(f) *Warrant of Attorney to Official Assignee.*

The jurisdiction to order satisfaction to be entered on a judgment on a warrant of attorney executed by an insolvent debtor, under the 1 & 2 Vict. c. 110. s. 87, is confined to the Insolvent Debtors Court by section 92. of the same act, and cannot be exercised by the superior Court in which the judgment on the warrant of attorney has been entered up. *Sturges v. Joy*, 23 Law J. Rep. (n.s.) Q.B. 25; 2 E. & B. 739.

(C) ASSIGNEES.

(a) *Liability of.*

A creditors' assignee in insolvency under 5 & 6 Vict. c. 116. s. 1. and 7 & 8 Vict. c. 96. s. 4. is not liable for the messenger's fees, except upon an express contract. *Hamber v. Hall*, 20 Law J. Rep. (n.s.) C.P. 157; 10 Com. B. Rep. 780.

(b) *Powers and Rights of, over Debtor's Property.*

Section 40. of the statute 1 & 2 Vict. c. 110. applies only when the bankrupt has obtained a certificate of conformity, and was inserted merely to have the effect of keeping alive the proceedings in the Insolvent Court, for the purpose only of enabling the assignees under the insolvency to reach the property of the bankrupt acquired after the bankruptcy. *Walker v. Edmondson*, 20 Law J. Rep. (n.s.) Q.B. 186.

An annuity awarded to a country Commissioner of Bankrupts, under the 5 & 6 Vict. c. 122, passes to his assignee in insolvency; and is not within the excepted cases mentioned in the 56th section of the 1 & 2 Vict. c. 110. *Spooner v. Payne*, 21 Law J. Rep. (n.s.) Chanc. 791; 1 De Gex, M. & G. 383.

Where the insolvent refused to make the requisite affidavit that he did not hold any public office or employment in the terms of the 58th section of the 5 & 6 Vict. c. 122, the Court allowed other evidence to be given of that fact to enable the assignee to receive the annuity. *Ibid*.

A defendant was committed for contempt for not obeying an order made on him for the payment of certain sums of money into court, and a writ of sequestration issued against his estate. He was afterwards discharged from prison under the Insolvent Debtors Act. A petition by the assignee that the sequestrator might deliver up possession of the estate of the defendant, was dismissed. *Tatham v. Parker*, 22 Law J. Rep. (n.s.) Chanc. 903; 1 Sm. & G. 506.

Real estate was settled on A for life, with remainder to B in tail. C was the eldest son of B. C presented a petition for his discharge, under the 1 & 2 Vict. c. 110, and the usual vesting order was obtained under the 37th section, and C obtained his

final discharge. C gave the warrant of attorney to confess judgment required by the 87th section, but judgment was not entered up upon it. Afterwards A and B died, and C barred the entail and settled the estate on certain trusts:—Held, that the provisional assignee in C's insolvency had not any title, under the 37th or the 87th sections, as against the deed of settlement. *Hawker v. Halliwell*, 23 Law J. Rep. (N.S.) Chanc. 778; 2 Sm. & G. 498.

An insolvent, upon obtaining his discharge, assigned all the property to which he should become entitled, to his assignees, and executed a warrant of attorney to confess judgment, in pursuance of the provisions of the 7 Geo. 4. c. 57. Judgment was never entered up during the life of the insolvent, who before his death became entitled to leasehold property:—Held, that the personal representative, and not the assignees, was entitled to the after-acquired property. *Holsgrove v. Hedges*, 24 Law J. Rep. (N.S.) Chanc. 456; 3 Drew. 74.

The title of an assignee for value of an equitable interest is not affected by a previous insolvency of the assignor, the assignee having no notice of that insolvency. *In re Atkinson*, 2 De Gex, M. & G. 140; 4 De Gex & S. 548.

The effect of the Act 7 Geo. 4. c. 57. is to vest in the assignee in insolvency all the property of the insolvent, but subject to all equities to which it would be liable in the hands of the insolvent. *Ibid*.

(c) *Actions by and against.*

A declaration stated that the plaintiff was a printer, and that the sheriff had seized his goods under a *f. fa.* issued by the defendants, and that, in consideration of the defendants withdrawing the execution, the plaintiff agreed to deliver to them, as a security, a printing-machine, which they were to be at liberty to remove, with a power to the plaintiff to redeem it on payment of 150*l.* within fourteen days; and alleged as a breach that, although within fourteen days the plaintiff offered to pay the defendants 150*l.*, the defendants refused to re-deliver to him the printing-machine, whereby he lost great profits, which he would have made by its use, and also thereby his whole trade and business were ruined and stopped, and he became insolvent. The defendants pleaded that, after the accruing of the causes of action declared upon, the plaintiff became insolvent, and his estate and effects were vested in the provisional assignee:—Held, that this plea was good without averring that the assignee had interfered. *Stanton v. Collier*, 23 Law J. Rep. (N.S.) Q.B. 116; 3 E. & B. 274.

Held, also, that the cause of action stated in the declaration was an entire cause of action which touched the personal estate of the insolvent, and therefore passed to the assignee. *Ibid*.

Section 242. of the Common Law Procedure Act applies only to actions pending at the time when a bankruptcy or insolvency occurs. *Ibid*.

(D) RIGHT OF INSOLVENT TO SUE.

Where a vesting order has been made under the provisions of the 1 & 2 Vict. c. 110, vesting the property of an insolvent in the provisional assignee, the suspension of all further proceedings in the insolvency, and the discharge of the insolvent from custody by consent of the detaining creditors, without

adjudication and without a dismissal of the petition, will not have the effect of re-vesting the property in the insolvent, so as to enable him to sustain a suit in respect thereof. *Tudway v. Jones*, 24 Law J. Rep. (N.S.) Chanc. 507; 1 Kay & J. 691.

(E) RIGHTS OF SCHEDULED CREDITORS.

A B took the benefit of the act (the 1 & 2 Vict. c. 110.), but no judgment was entered up under the 87th section:—Held, on his death, that a scheduled creditor had no remedy against his assets. *In re Moylan*, 16 Beav. 220.

In 1829 R P took the benefit of the Insolvent Act, 7 Geo. 4. c. 57. He executed at the time a warrant of attorney, but no judgment was entered up; and he died in 1849, leaving subsequently-acquired assets:—Held, that a scheduled creditor could not maintain a suit to make the assets liable. *Thomas v. Pinnell*, 15 Beav. 148.

INSPECTION.

[See titles EVIDENCE—PRODUCTION AND INSPECTION OF DOCUMENTS.]

INSURANCE.

[Marine insurance, see title SHIP AND SHIPPING—and see STAMP.]

(A) INSURANCE ON LIVES.

- (a) *Nature of the Contract.*
- (b) *By one Office in Another.*
- (c) *Absence of Interest.*
- (d) *Misrepresentations and untrue Answers.*
- (e) *Variation of Policy from Agreement.*
- (f) *Right to the Policy.*
- (g) *Assignment of the Policy.*
- (h) *Forfeiture of the Policy.*

(B) INSURANCE AGAINST FIRE.

- (a) *The Contract, Construction of.*
- (b) *Insurable Interest.*
- (c) *Alteration of the Risk.*
- (d) *Who entitled to Benefit of the Insurance.*

(C) INSURANCE AGAINST ACCIDENTS.

(D) INSURANCE AGAINST LOSS FROM WANT OF INTEGRITY.

(A) INSURANCE ON LIVES.

[Abatement of income-tax, see 16 & 17 Vict. c. 91, continued by 17 & 18 Vict. c. 40.]

(a) *Nature of the Contract.*

[See *post*, (g) Assignment of the Policy.]

Where a party effects an insurance on the life of another, the statute 14 Geo. 3. c. 48. permits him, after the death, to recover from the insurance office so much of the sum insured, and no more, as his interest in the life extended to at the time of effecting the policy; and it is no ground for refusing payment that the interest had ceased during the life. *Godsall v. Boldero* overruled. *Dalby v. the India and London Life Insurance Co.* (in error), 24 Law J. Rep. (N.S.) C.P. 2; 15 Com. B. Rep. 365.

A policy of insurance on life is not a contract to indemnify against loss like a fire or a marine policy, but is a contract to pay a definite sum in consideration of an annuity paid during the life. *Ibid.*

(b) *By one Office in Another.*

The plaintiffs (the B. Insurance Company) reassured with the defendants (another insurance company) the life of D, which they had themselves previously assured to a larger amount. When the proposition to re-assure was made the defendants sent to the plaintiffs a printed form containing nineteen questions relative to the age, health and habits, &c. of the person whose life was to be re-assured; and a declaration to be made by him that he was then in good health, and not afflicted with any disease tending to shorten life, and also by the plaintiffs agreeing that if any untrue statement were contained in such declaration or the answers to the questions the assurance should be void. When this document was sent by the defendants they had filled up the answers to the first five questions, but the rest were included in a brace, against which was written, "for these particulars see copies of B. papers attached." At the foot of these words the plaintiffs' agent had signed his name. Neither the plaintiffs nor D had signed the printed paper in any other part, and blanks were left for the signatures to the declaration. This document was returned to the defendants with copies attached of the papers delivered to the B. office on the original assurance, which were properly signed by D, the answers to which were admitted to be true when given. The defendants signed the policy, which recited that the plaintiffs had delivered to the defendants a declaration signed by them, setting forth the past and present state of health of the person whose life was assured, and stated that such declaration was to be the basis of the contract, and if anything untrue were averred in it the policy was to be void. The plaintiffs accepted this policy and paid the premiums upon it. At the time when this re-assurance was effected, D was living abroad and was afflicted with a mortal disease, of which he soon afterwards died; but this fact was unknown to the plaintiffs or the defendants. An action being brought on the policy (which was set out in the declaration) the defendants pleaded that the plaintiffs untruly stated, in the declaration mentioned in the policy, that D was at the time of making it in good health, and issue was taken on this plea. At the trial evidence was given of the facts above stated. The defendants applied for a nonsuit on the ground that the plaintiffs, by their agent, must be taken to have signed the declaration on which the policy was founded. The Judge refused to nonsuit, and directed the jury to say whether the meaning of the parties was that the plaintiffs undertook that D was then in good health, or that the defendants were to decide whether they would re-assure upon the statements appearing in the original papers; and he handed to the jury the whole of the documents in evidence, in order that they might form their opinion whether the signature applied to the declaration, or only to the particular questions against which it was placed.—Held, by *Lord Campbell, C.J., Coleridge, J. and Wightman, J.*, that the question whether the plaintiffs had signed the declaration was for the jury, and not for the

Judge, to decide; but, *per Erle, J.*, that the plaintiffs, suing on the policy, could not give parol evidence to contradict the statement contained in it. *Foster v. the Mentor Life Assurance Co.*, 23 Law J. Rep. (n.s.) Q.B. 145; 3 E. & B. 48.

Secondly (by *Wightman, J. and Erle, J.*), that the jury were misdirected in not being told that the plaintiffs having accepted the policy containing the recital that they had signed the declaration without objection, were *prima facie* concluded by that recital. *Per Lord Campbell, C.J. and Coleridge, J.*, that the direction was right, as assuming that the plaintiffs had not signed the declaration, they were not under the circumstances precluded from denying that they had done so. *Ibid.*

Evidence was given that it was usual where insurance offices re-assured lives, on which they had before granted policies, for the office proposing such re-assurance to submit to the office granting it the papers on which the original assurance was effected, and for the latter office to accept or decline such re-assurance on the statements contained in those papers:—Held, by *Lord Campbell, C.J.*, that the evidence of this usage was admissible to shew that no declaration as to the present health of D was signed by the plaintiffs—*dissentientibus Coleridge, J. and Erle, J.* *Ibid.*

(c) *Absence of Interest.*

A being entitled to receive a sum of money when B (in his twenty-ninth year) should attain the age of thirty, insured B's life for two years. B attained the age of thirty, and A received the money. B then died before the expiration of the two years:—Held, that A was entitled to recover on the policy. *Law v. the London Indisputable Life Policy Co.*, 24 Law J. Rep. (n.s.) Chanc. 196; 1 Kay & J. 223.

A life assurance differs from a fire or marine assurance, inasmuch as it is not a contract of indemnity, but a contract to pay a certain definite sum at a future time in consideration of certain annual payments in the mean time. *Ibid.*

A policy of assurance is not void under the 14 Geo. 3. c. 48. s. 3. by reason of the interest in the life assured ceasing before the expiration of the policy. *Ibid.*

Where, by a policy of assurance, it was provided that no members of the company should, in their individual capacity, be held to be liable to any personal responsibility for any sum to become due by virtue of the policy, and that all persons having claims against the company by virtue of the policy should only be entitled to make such claims effectual against the proper funds of the company,—Held, that a claimant under the policy was entitled to relief in a court of equity, there being no adequate remedy at law. *Ibid.*

The amount which a person is entitled to insure by a policy on the life of another, is the full value of his expectant benefit when it shall accrue, and not merely the present value of such benefit at the time of effecting the insurance. *Ibid.*

The statute 14 Geo. 3. c. 48. does not prohibit a policy of life insurance from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument; nor does the effecting of such an insurance in any way contravene the policy of the statute. *Collett v.*

Morrison, 9 Hare, 162; 21 Law J. Rep. (N.S.) Chanc. 878.

Whether the 14 Geo. 3. c. 48, prohibiting insurances by persons having no interest, applies to benefit insurance societies constituted under the Friendly Societies Acts—*quære*. *Brown v. Freeman*, 4 De Gex & Sm. 444.

A director of the A assurance company effected on behalf of that company a cross insurance with the B company on a life, as an indemnity against one effected with the A company. Afterwards the policy with the A company was cancelled, but the director continued to keep up the other until the life dropped:—Held, that a bill filed by the B company to have the policy effected with that company delivered up, and to stay an action upon the policy, was not demurrable. *The India and London Assurance Co. v. Dalby*, 4 De Gex & Sm. 462.

(d) *Misrepresentations and untrue Answers.*

To an action on a policy of insurance, a plea that the insurer was induced to enter into the policy by a false representation of a material fact, made by the assured and their agent, such representation being at the time it was made false to the knowledge of the insurers and their agents, is supported by proof either of concealment or of misrepresentation not fraudulent. *Anderson v. Thornton*, 8 Exch. Rep. 425.

F applied to an insurance office to effect a policy on his life. He received a form of "Proposal" containing questions requiring to be answered. Among these were the following: "Did any of the party's near relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions F answered "No." The answers were false. F signed the proposal, and a declaration accompanying them, by which he agreed "that the particulars mentioned in the above proposal should form the basis of the contract." The policy mentioned several things which were "warranted" by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," the policy should be void, and the monies paid should be forfeited. In an action on the policy,—Held, reversing the judgments of the Courts of Exchequer and Exchequer Chamber in Ireland, that it was a misdirection to leave it to the jury to say whether the answers to the two questions were material as well as false, and if not material, that the plaintiff was entitled to the verdict. The representation being part of the contract, its truth, not its materiality, was in question. *Anderson v. Fitzgerald*, 4 H.L. Cas. 484.

(e) *Variation of Policy from Agreement.*

If the policy varies from the agreement to effect an insurance, a court of equity will interfere and deal with the case of the insured on the footing of the agreement, and not of the policy. *Collett v. Morrison*, 21 Law J. Rep. (N.S.) Chanc. 878; 9 Hare, 162.

Observations on relief in equity against insurance companies in cases of fraud. *Ibid.*

(f) *Right to the Policy.*

A lent B money, and in consideration B granted to A an annuity on the life of B, calculated at 8l. per cent., and a sum equal to a premium on a policy on the life of B. The annuity was secured by B and co-obligors in a bond to A. The annuity was redeemable on notice, and notice being given the same was redeemed. A, the grantee, had effected a policy on the life of B, and paid the premiums out of the money paid by B. B claimed the policy and filed a bill to enforce it:—Held, that the policy, although effected for securing the annuity and the premiums paid by the grantee out of the monies paid by the grantor, belonged to the grantee, the creditor, and not to the grantor, the debtor. *Gottlieb v. Cranch*, 22 Law J. Rep. (N.S.) Chanc. 912; 4 De Gex, M. & G. 440.

Where A effects a policy in his own name upon the life of B, declaring he is interested in B's life, such policy, *prima facie*, belongs to A, and the mere proof that some of the premiums were paid by B does not rebut that presumption. *Tristram v. Hardey*, 14 Beav. 232.

Where the grantee of an annuity insured the lives for which the annuity was granted, without there being any stipulation on the subject between him and the grantor:—Held, that the latter, on redeeming, had no right to have the policy delivered to him. *Ex parte Lancaster*, 4 De Gex & Sm. 524.

(g) *Assignment of the Policy.*

A upon his marriage gave a bond to secure 5,000l. to his intended wife. Several years after the marriage, A being in difficulties and unable to perform his bond, it was arranged that his wife should out of her private income keep up certain policies to be effected on A's life, in which he was to have no further interest than to carry out his bond. In pursuance of this arrangement A insured his life by a policy, one of the conditions of which provided that policies effected by persons on their own lives who should die by their own hands should be void, so far as regards the executors or administrators of the person so dying, but should remain in force only to the extent of any *bond fide* interest acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest being given to the directors to their satisfaction. The policy, together with the bond for 5,000l. was immediately on its being effected handed over to T as a trustee for A's wife, in whose hands they always remained. A's wife paid the premiums upon the policy in pursuance of the arrangement. A died by his own hands, and a claim was made upon the insurance office by his executors for the amount of the policy, which was resisted:—Held, that T had a *bond fide* interest in the policy by virtue of an equitable lien as a security for money, within the meaning of the condition, and that the executors of A were therefore entitled to recover. That, under the condition, it was obligatory upon the office to pay the amount of the policy, upon proof of the interest being given as required, and that it was sufficient if evidence to that effect was given to the directors, with which they ought reasonably to be satisfied. That the condition was

not illegal as offering an encouragement to suicide. *Moore v. Woolsey*, 24 Law J. Rep. (N.S.) Q.B. 40; 4 E. & B. 243.

(h) *Forfeiture of the Policy.*

A debtor insured his life at the instance of his creditor, by two policies, and assigned the same to his creditor. One of the conditions indorsed on the policies was, that the policies should be void and the monies forfeited to the insurance society if the insured should go beyond the limits of Europe without the licence of the directors. The insured did go beyond the limits without licence, and died in Canada. The society refused to pay, and the creditor filed a claim for payment, and proved that, after the breach of the condition, the local agent of the society, at the place where the insurances had been effected, continued, with knowledge of the breach, to receive the premiums, and represented to the agent of the creditor that the breach of the condition would not invalidate the policies, if the premiums were regularly paid.—Held, that the knowledge of the local agent was constructive notice to the society of the breach; and, whether they had express notice or not, they were precluded from insisting on and availing themselves of the forfeiture when the money became payable. *Wing v. Harvey*, 23 Law J. Rep. (N.S.) Chanc. 511; 5 De Gex, M. & G. 265.

(B) INSURANCE AGAINST FIRE.

(a) *The Contract, Construction of.*

[See *Dalby v. the India and London Life Assurance Co.*, ante, (A) (a).]

A policy of insurance against fire contained several conditions, a non-compliance with which it was stated would make the policy void. It then contained a condition, "that whenever a fire shall happen the insured shall give immediate notice thereof to one of the secretaries or agents of the society, and within three months deliver to such secretary or agent under his or her hand accounts exhibiting the full particulars and amount of the loss, &c."—Held, that the delivery of such particulars was a condition precedent to the right to recover on the policy. *Mason v. Harvey*, 22 Law J. Rep. (N.S.) Exch. 336; 8 Exch. Rep. 819.

(b) *Insurable Interest.*

A party, after being discharged under the Insolvent Act, became possessed of a house and goods and insured them; subsequently to which his discharge was revoked by the Insolvent Court.—Held, that he had an insurable interest. *Marks v. Hamilton*, 21 Law J. Rep. (N.S.) Exch. 109; 7 Exch. Rep. 323.

(c) *Alteration of the Risk.*

A declaration on a fire policy, made between the plaintiff and an insurance company, stated the proposals of insurance thus: "Class 4. Special hazardous. Coopers, &c., and any other risks of more than ordinary hazard by reason of any steam-engine, stove, kiln, furnace, oven, or other fire heat, used in the process of any manufactory," &c. The conditions of insurance were stated to be, first, that if in the buildings insured shall be used any steam-engine, stove, &c., or any description of fire heat to be car-

ried on therein, the same must be noticed and allowed in the policy; and in case of any circumstance happening after an insurance has been effected, whereby the risk shall be increased, the insured is to give notice to the company, and the same must, previous to a loss, be allowed by indorsement on the policy, otherwise the policy is void; fourthly, in case of any alteration being made in a building insured, or in case of any steam-engine, stove, &c. being introduced, notice thereof must be given, and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be duly given, and such premium paid, no benefit will arise to the insured in case of loss. The plaintiff, who was a cabinet-maker, built in the insured premises a permanent erection, consisting of a furnace or boiler, connected with a small steam-engine, neither of which was comprised in the original insurance, or allowed by indorsement on the policy. The steam-engine and boiler were used in a heated state for the purpose of turning a lathe, not in the course of the plaintiff's business, but in order to ascertain by experiment whether it would answer his purpose to use it in his business. The plaintiff's stock and premises were subsequently consumed by fire.—Held, that the simple introduction of a steam-engine into the premises, without its having fire heat attached to it, would not affect the policy, but it would be otherwise if fire heat were put to it; that it made no difference whether the steam-engine was used on trial, with the intention of ascertaining whether it would succeed or not, or as an approved means of carrying on the plaintiff's business; nor did it make any difference whether it was used for a longer or a shorter time; and that the assured was not entitled to recover. *Glen v. Lewis*, 22 Law J. Rep. (N.S.) Exch. 228; 8 Exch. Rep. 607.

A policy of insurance against fire was, on the 7th of April 1851, effected with the defendant in London on premises in California, described as "a brick building, used as a dwelling-house and store, described in the paper attached to this policy," from the 1st of February 1851 to the 1st of February 1852. The description in the paper annexed to the policy, and which was sent over to England in October 1850, for the purpose of getting an insurance effected, was as follows (*inter alia*): "The house is composed of two stories, without a basement story." The building in question was erected in September 1850, at a cost of 6,000*l.*, and the description annexed to the policy was correct in all respects at the time when it was sent over to England. In March 1851 alterations in the building were commenced, by carrying up the walls to a greater height, and adding a third story at a cost of 1,000*l.*; which alterations were completed before May 1851. It was found as a fact that the new works had not increased the hazard or probability of fire, except so far, if at all, as the increase of area by the addition of the third story necessarily increased such hazard or probability. On the 3rd of May 1851 the whole building was destroyed by fire.—Held, that the description (which must be read as if inserted in the policy) amounted to a warranty that the premises corresponded with the description on the 7th of April 1851, when the policy was effected, or at least that they had not

been altered in the intermediate time, so as to increase the risk of the insurer; and to a warranty that the assured would not, during the continuance of the risk, voluntarily do anything to make the condition of the building vary from the description, so as thereby to increase the risk or liability of the insurer. That the effect of the alteration in question was necessarily to increase the hazard and probability of fire, and to render the insurer liable for a greater loss, and therefore that the assured could not recover. *Sillem v. Thornton*, 23 Law J. Rep. (N.S.) Q.B. 362; 3 E. & B. 868.

(d) *Who entitled to Benefit of the Insurance.*

In a suit to administer the trusts of a will, the receiver was directed to pay all insurance monies and other outgoings in respect of a particular estate. Certain stables attached to the mansion-house were burned down, and as it was not thought desirable to rebuild them, the money received from the insurance office was paid into court:—Held, that the petitioner, who was afterwards declared by the Court to be tenant in tail of the estate, was entitled to the insurance money, and that it was not to be applied for the benefit of the estate generally. *Seymour v. Vernon*, 21 Law J. Rep. (N.S.) Chanc. 433.

(C) INSURANCE AGAINST ACCIDENTS.

A personal injury occasioned by slipping from the step of a railway carriage, while in the act of stepping to the platform for the purpose of crossing the line to obtain a fresh ticket in order to continue a railway journey, constitutes a "railway accident" within the meaning of a contract of insurance (under the powers conferred on the Railway Passengers Assurance Company by the statutes 12 & 13 Vict. c. xl. and 15 & 16 Vict. c. c.—local and personal), stipulating that the sum assured shall be payable to the legal representatives of the assured in the event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland, or that a proportionate part shall be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. *Theobald v. the Railway Passengers Assurance Co.*, 23 Law J. Rep. (N.S.) Exch. 249; 10 Exch. Rep. 45.

(D) INSURANCE AGAINST LOSS FROM WANT OF INTEGRITY.

A policy of assurance against any loss by the want of integrity, honesty, or fidelity of one R W, in his employment as secretary to the Marylebone Literary and Scientific Institution, was granted by the defendants to the plaintiff. The basis of the contract was recited to be a statement in writing by the treasurer of the institution lodged at the office of the company, containing a declaration of the truth of the answers that had been given to the questions contained in the proposal for the policy; and there was a proviso that any fraudulent misstatement or suppression in that declaration should render the policy void from the beginning. The statement referred to, contained (*inter alia*) the following questions and answers: "In what capacity do you intend to employ the applicant; and with reference to this question will you state, as far as circumstances will permit, the nature of his intended

duties and responsibilities?"—"He is secretary of the — Literary Institution, of which I am treasurer."—"The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?"—"Examined by finance committee every fortnight":—Held, that this statement that the accounts of R W would be examined once a fortnight by the finance committee of the institution did not amount to a warranty; and that the defendants were liable upon the policy for a loss occasioned in consequence of the finance committee neglecting to examine his accounts in the manner specified. *Benham v. the United Guarantee and Life Assurance Co.*, 21 Law J. Rep. (N.S.) Exch. 317; 7 Exch. Rep. 744.

INTEREST.

[See JUDGE.]

- (A) WHEN RECOVERABLE GENERALLY.
- (B) DEMAND OF.
- (C) RATE OF.
- (D) INDORSEMENT OF CLAIM FOR ON WRIT OF SUMMONS.

(A) WHEN RECOVERABLE GENERALLY.

[On error, see Reg. Gen. Trin. term, 1853; r. 26, 22 Law J. Rep. (N.S.) lii; 1 E. & B. App. lxxxiii. And see *Orme v. Galloway*, title ASSUMPSIT, (B) (a).]

A count for interest upon and for the forbearance of sums laid out for the defendant, and at his request, and forborne at the defendant's request, is good, though it does not state that the money was paid to the defendant's use, or forborne to the defendant. *Smith v. Hartley*, 20 Law J. Rep. (N.S.) C.P. 169; 2 L. M. & P. P.C. 304.

The plaintiff having, after notice of action, served a railway company with a written demand of interest under the statute 3 & 4 Will. 4. c. 42. s. 28,—Held, that the arbitrator, under a submission of "all matters in difference," might award the plaintiff interest notwithstanding the notice of action did not contain a demand of interest; and, further, that, assuming a notice of action to have been necessary, the want or insufficiency of such notice could not be taken advantage of, since the 5 & 6 Vict. c. 97. s. 3. unless pleaded specially. *Edwards v. the Great Western Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 72; 11 Com. B. Rep. 588.

(B) DEMAND OF.

A demand for interest, though too large as applying to a time anterior to the demand, may yet be sufficient to entitle the jury to give the plaintiff interest under the statute 3 & 4 Will. 4. c. 42. s. 28. *Londesborough v. Mowatt*, 23 Law J. Rep. (N.S.) Q.B. 38; 4 E. & B. 1.

(C) RATE OF.

[See 17 & 18 Vict. c. 90. s. 3.]

Where the grantor of an annuity had covenanted with his surety to pay the annuity, but had failed to do so, and the surety had, in consequence, been compelled to make the payments of the annuity as

they fell due,—Held, that in an action on the covenant by the surety against the grantor, the jury were at liberty to award as damages for the breach of covenant, not only the amount of the principal sums so paid, but also interest on such principal sums; and that as the grantor had stated an account, allowing interest on some previous payments, at the rate of 5*l.* per cent., the jury were, on this occasion at liberty, if they pleased, to calculate the interest at the same rate. *Petre v. Duncombe*, 20 Law J. Rep. (n.s.) Q.B. 242; 2 L. M. & P.P.C. 107.

In an action against the drawer of a bill of exchange not bearing interest, which has been dishonoured by non-acceptance, if the jury find the plaintiff entitled to interest by way of damages, the measure of damages is the rate of interest at the place where the bill was drawn. *Gibbs v. Fremont*, 22 Law J. Rep. (n.s.) Exch. 302; 9 Exch. Rep. 25.

A mortgage of a vessel having been executed to secure repayment at the end of six months of a sum of money, with interest thereon at the rate of 10*l.* per cent., with a power of sale at the end of that time, and the interest and principal not having been paid at the expiration of the six months,—Held, that the defendant was liable to pay interest at the rate of 10*l.* per cent. in respect of the time that elapsed after the expiration of the six months. *Morgan v. Jones*, 22 Law J. Rep. (n.s.) Exch. 232; 8 Exch. Rep. 620.

Circumstances under which it was held that payments should have been applied by the receiver in reducing principal and not in discharging interest. *Scott v. Sandeman*, 1 Macq. H.L. Cas. 298.

Where a creditor, in the view of speedy payment, agreed to accept 4*l.* per cent. interest,—Held, that mere delay in the payment did not entitle him to charge 5*l.*; the evidence failing to shew that the delay was attributable to misconduct on the part of the debtor. *Ibid.*

(D) INDORSEMENT OF CLAIM FOR, ON WRIT OF SUMMONS.

Where judgment was signed under the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 25, on a writ specially indorsed, claiming, *inter alia*, interest on an I O U, the Court refused to set aside the judgment on the ground that the defendant, by not appearing to the writ, had admitted a contract, express or implied, to pay interest. *Rodway v. Lucas*, 24 Law J. Rep. (n.s.) Exch. 155; 10 Exch. Rep. 667.

Although the Common Law Procedure Act, 1852, s. 25, does not limit the right of specially indorsing a writ with interest to cases where there has been either an express or implied contract to pay interest, yet in all cases, except bills of exchange and promissory notes, if any party not entitled to interest makes a claim for it by special indorsement to gain an improper advantage, the Court will set aside the judgment and compel the attorney making such indorsement to pay the costs. *Ibid.*

INTERPLEADER ISSUE.

[In county courts, see title INFERIOR COURT.]

Procedure, Evidence and Costs.

There is no difference between interpleader issues

and other actions as regards the terms upon which rules for a new trial will be granted, where the verdict is against the evidence. Therefore, where the first verdict was owing to the miscarriage of the jury, a rule was made absolute for a new trial upon payment of costs. *James v. Whitbread*, 20 Law J. Rep. (n.s.) C.P. 217; 11 Com. B. Rep. 406.

Upon an interpleader issue whether certain goods and chattels seized in execution were "at the time of the seizure the goods and chattels of the plaintiff," the plaintiff proved a bill of sale of the goods to himself:—Held, that the defendant, the execution creditor, might set up, by way of answer, a prior bill of sale to a third party. *Gadsden v. Barrow*, 23 Law J. Rep. (n.s.) Exch. 134; 9 Exch. Rep. 514.

Where an auctioneer, who was sued for the deposit-money paid on a sale by auction of real estate, on the ground that the vendor's title was defective, applied for a rule calling upon the vendor and the purchaser to interplead, the Court, on its appearing that the vendor had no other property than that of which the title was disputed, refused to substitute the vendor as defendant, unless the original defendant gave security for costs; and refused to allow the defendant his costs of the application out of the deposit-money. *Deller v. Prickett*, 20 Law J. Rep. (n.s.) Q.B. 151; 15 Q.B. Rep. 1081.

INTERPLEADER SUIT.

After a decree in an interpleader suit, one of the defendants, who was the official assignee in insolvency of another defendant, died, and a supplemental bill was filed by a third defendant alone, making the assignee subsequently appointed the sole defendant:—Held, that the supplemental suit was properly constituted, and an objection for want of parties overruled. *Lyne v. Pennell*, 20 Law J. Rep. (n.s.) Chanc. 108; 1 Sim. N.S. 113.

G P the elder was the owner of one-third of a ship; Messrs. S M & Co., of Calcutta, were the owners of another third, and were mortgagees of the other third, of which G P the younger was the owner. R, I & Co., of London, were the agents of S, M & Co., and they appointed Messrs. T the ship's brokers, who as such received the freight, which amounted to 2,721*l.* 2*s.* 7*d.*, and paid one-third, 907*l.* 0*s.* 10*d.*, to G P the elder. R, I & Co. accepted several bills of exchange drawn against this freight, and before they became due stopped payment. S, M & Co. also stopped payment, and finally became insolvent. Claims were then made upon Messrs. T for the whole freight by R, I & Co., and also by the holders of the bills drawn by them, as well as on behalf of S, M & Co. and G P the younger, and upon a bill filed by Messrs. T, that the defendants might interplead in respect of the 1,814*l.* 1*s.* 9*d.*:—Held, that no decree could be made in the suit to compel the plaintiffs to bring the entire freight into court; that as no defendant asked to have the bill dismissed, the Court must make a decree of interpleader; and that such decree would only protect them to the extent of 1,814*l.* 1*s.* 9*d.* *Toulmin v. Reid*, 21 Law J. Rep. (n.s.) Chanc. 391; 14 Beav. 499.

Where interpleader suits have been ordered to be brought by the several claimants to a fund and the costs reserved, the Court will not, on petition before

the hearing on further directions, order payment to any one of the claimants of the share found due to him on the separate report of the Master. *Bruce v. Elwin*, 22 Law J. Rep. (N.S.) Chanc. 150; 9 Hare, 294.

B undertook to pay A the sum of 365*l.* at a particular time, and afterwards paid him 40*l.* on account. A then assigned the sum of 365*l.* alleged to be due to him from B both to C and D, and C and D claimed to be paid this sum from B. B filed a bill of interpleader against C and D, stating the payment of 40*l.*, and requiring them to interplead as to the 325*l.*:—Held, that, on account of the difference of the two sums of 365*l.* and 325*l.*, interpleader did not lie. *Diplock v. Hammond*, 23 Law J. Rep. (N.S.) Chanc. 550; 5 De Gex, M. & G. 320; 2 Sm. & G. 141.

C and D had a dispute as to a sum of money in the hands of B. On the 9th of April C gave notice to B that a bill would be filed as to this sum, and filed a bill accordingly on the 16th of April. On the same day B filed a bill of interpleader:—Held, that interpleader did not lie. *Ibid.*

The plaintiff in an interpleader suit disallowed the costs of proceedings taken by him in the suit, subsequent to his receiving notice of the withdrawal of the adverse claims. *Symes v. Magnay*, 20 Beav. 47.

A judgment creditor assigned the debt and afterwards became insolvent. The judgment debtor died, and her executor received notices from three claimants; one from the assignee of the debt, another from the assignee of the judgment creditor in insolvency, and a third from the attorney of the judgment creditor, in respect of his lien for costs; the executor thereupon filed his bill of interpleader:—Held, on the authority of *— v. Bolton*, that the bill could be sustained. *Jones v. Thomas*, 2 Sm. & G. 186.

Where a bill of interpleader had annexed to it only an affidavit of the plaintiff's solicitor, that there was no collusion, a demurrer was allowed. *Wood v. Lyne*, 4 De Gex & S. 16.

A life insurance company received notice of an assignment by an insurer of a policy which the company had granted, and the insurer afterwards became insolvent. Soon after the death of the person whose life was insured, the assignee for value applied for payment of the sum due upon the policy, and the company inquired of the provisional assignee of the insolvent, whether he would consent to payment being made to the assignee for value. The provisional assignee said he could not give such consent, but that it must be sought for from the Court of Insolvent Debtors. The insolvent himself gave notice to the company not to pay over the policy monies to his assignee for value, on the ground that the debt for which it was assigned as a security was satisfied. In the mean time an action was brought upon the policy by the assignee for value in the name of the insolvent against the company:—Held, that it was not a case in which the company were entitled to file their bill of interpleader against the plaintiff in the action, the interest of the insolvent and his provisional assignee being subordinate to that of the assignee for value. *Desborough v. Harris*, 5 De Gex, M. & G. 439.

The case of *Fenn v. Edmonds*, 5 Hare, 314, overruled. *Ibid.*

It is no objection to a bill of interpleader that it is filed after verdict at law, where the effect of the action at law was to ascertain the quantum of damages due on the claim of the plaintiff at law (a defendant in equity). *Hamilton v. Marks*, 5 De Gex & Sm. 638.

Upon a motion to dissolve an injunction, it is not the proper time to object to the form of the plaintiff's affidavit denying collusion; but any such objection should be taken on demurrer, when the Court might grant leave to amend the affidavit. *Ibid.*

In a case of interpleader, where the claim of the principal defendant was legal, and the claims of the other defendants were derived from him, and equitable only, and did not extend to the whole amount recovered at law:—Held, that an injunction restraining legal proceedings, obtained on an interpleader bill, could be sustained. *Ibid.*

ISLE OF MAN.

The Isle of Man is not within the United Kingdom. *Davison v. Farmer*, 20 Law J. Rep. (N.S.) Exch. 177; 6 Exch. Rep. 242.

JEWS.

[See title OATH.]

JOINT-STOCK COMPANY.

[See titles BANKERS AND BANKING COMPANY—COMPANY—MINE.]

JUDGE.

DISQUALIFICATION ON GROUND OF INTEREST.

[See title JUSTICE OF THE PEACE, (B) (d).]

A public company, which was incorporated, filed a bill in equity against a landowner, in a matter largely involving the interests of the company. The Lord Chancellor had an interest as a shareholder in the company to the amount of several thousand pounds, a fact which was unknown to the defendant in the suit. The cause was heard before the Vice Chancellor, who granted the relief sought by the company. The Lord Chancellor, on appeal, affirmed the order of the Vice Chancellor:—Held, that the Lord Chancellor was disqualified, on the ground of interest, from sitting as Judge in the cause, and that his decree was therefore voidable, and must consequently be reversed. *Dimes v. the Grand Junction Canal Co.*, 3 H.L. Cas. 759.

Held also, that the Vice Chancellor is, under the 53 Geo. 3. c. 24, a Judge subordinate to, but not dependent on, the Lord Chancellor, and that, consequently, the disqualification of the Lord Chancellor did not affect him; but that his decree might be made the subject of appeal to the House of Lords. *Ibid.*

Before a decree made by the Vice Chancellor can be appealed against, it is required to be enrolled. The enrolment is the act of the Lord Chancellor:—Held, that the act of enrolment, though performed

by a Lord Chancellor disqualified by interest from adjudicating in the cause, was not affected by his disqualification, but was valid for the purpose of bringing up the appeal to the House of Lords. *Ibid.*

Under an appointment by the Bishop, Robert Joseph Phillimore, D.C.L., was constituted Chancellor and Vicar General in Spirituals, and Official Principal of the Episcopal and Consistory Court of Chichester for life, with power of surrogating and substituting fit person or persons in his stead, and of recalling or removing them, with the consent of the bishop; and power is conferred upon him, in the absence of the bishop from the Consistory Court, to proceed by himself or his substitute in all causes, business, suits and complaints, spiritual and ecclesiastical, &c., and decide and finally determine the same (with certain exceptions not now material), nevertheless, first consulting and having the consent of the bishop, if either party prayed the judgment of the bishop. The appointment also reserved to the bishop to examine and determine every cause in his proper person in the Consistory Court:—Held, that although the Official Principal exercised powers delegated to him by the bishop, he was constituted an ordinary Judge of the Consistory Court, and acted judicially quite independently of the bishop. And, therefore, that the bishop being interested in a suit heard and decided by the Official Principal was no ground for a prohibition. *Ex parte Medwin, in re Rawlinson v. Medwin*, 22 Law J. Rep. (n.s.) Q.B. 169; 1 E. & B. 609.

JUDGMENT.

[Actions on, see title ACTION.]

- (A) FOR WANT OF A PLEA.
- (B) FOR NOT PROCEEDING TO TRIAL.
 - (a) *As in Case of Nonsuit.*
 - (1) *Since the Common Law Procedure Act.*
 - (2) *Before Issue joined.*
 - (3) *After Peremptory Undertaking to try.*
 - (4) *In other Cases.*
 - (b) *After Notice to try.*
- (C) AFTER VERDICT.
 - (a) *Siging and entering up.*
 - (b) *Nunc pro Tunc.*
 - (c) *Arrest of.*
 - (d) *Non Obstante Veredicto.*
- (D) REVIVAL OF.
- (E) RELEASE OF.
- (F) CHARGE ON LANDS, UNDER 1 & 2 VICT. c. 110.
 - (a) *Upon what Property charged.*
 - (b) *Entry of Satisfaction.*
 - (c) *Registration of.*
 - (d) *Priority of.*
- (G) PROCEEDINGS UPON, IN EQUITY.
- (H) RIGHTS OF JUDGMENT CREDITORS.

(A) FOR WANT OF A PLEA.

The Lynn and Ely Railway Company having given a bond were afterwards by act of parliament

amalgamated with certain other lines, under the name of the East Anglian Railway Company, to which all the liabilities of the Lynn and Ely Railway Company were transferred. To an action against the East Anglian Railway Company upon the bond, the defendants, after setting out the deed on oyer, pleaded as follows: "which being read and heard, the defendants say that the said writing obligatory is not their deed." The plaintiff having signed judgment as for want of a plea the Court refused a rule to set aside the judgment, there being no affidavit of merits. *Selby v. the East Anglian Rail. Co.*, 21 Law J. Rep. (n.s.) Exch. 27; 7 Exch. Rep. 53.

An order to plead several matters was obtained, after the rule office was closed, upon the day that the time for pleading expired. The pleas were delivered the same evening, with a copy of the order and a notice that the rule would be drawn up and served as soon as it could be obtained from the office. At 10 o'clock the following day the plaintiff signed judgment:—Held, that the judgment was regular. *Glen v. Lewis*, 22 Law J. Rep. (n.s.) Exch. 24; 8 Exch. Rep. 122.

(B) FOR NOT PROCEEDING TO TRIAL.

(a) *As in Case of Nonsuit.*

[The 14 Geo. 2, c. 17. as to judgment in case of nonsuit is repealed by 15 & 16 Vict. c. 76. s. 100.]

(1) *Since the Common Law Procedure Act.*

A rule for judgment as in case of nonsuit cannot be granted in an action of ejectment since the Common Law Procedure Act came into operation. *Doe d. Leigh v. Holt*, 21 Law J. Rep. (n.s.) Exch. 335.

(2) *Before Issue joined.*

The plaintiff delivered a replication concluding to the country, with an "&c." at the end:—Held, that the defendant was not entitled to judgment as in case of nonsuit, as issue had not been joined, and the "&c." could not for this purpose be treated as equivalent to a *similiter*. *Knaggs v. Knaggs*, 2 L. M. & P. C.C. 465.

(3) *After Peremptory Undertaking to try.*

Where the plaintiff, after giving a peremptory undertaking to try, discovers that the defendant has become insolvent, it is no ground for discharging or enlarging the undertaking. *Embsen v. Dewy*, 20 Law J. Rep. (n.s.) Q.B. 397; 16 Q.B. Rep. 804.

Where a rule for judgment as in case of nonsuit has been discharged on a peremptory undertaking to try at the first sittings, the plaintiff cannot throw the trial over the sittings by getting a rule for a special jury, and having the cause marked by the marshal for a special jury. *Levy v. Moylan*, 20 Law J. Rep. (n.s.) C.P. 122; 10 Com. B. Rep. 657; 2 L. M. & P. C.C. 1:2.

(4) *In other Cases.*

The defendant induced the plaintiff to discount his acceptance upon his representation that he was of age, and when it was presented for payment raised no objection on the ground of his infancy, but upon being sued upon it, pleaded infancy. The plaintiff then made inquiries, and having satisfied himself that the plea was untrue, joined issue and gave notice of trial; but he subsequently ascertained

from documents in the defendant's possession that the plea was true, whereupon he countermanded notice of trial, and took no further proceedings:—Held, that the defendant was not entitled to judgment as in case of nonsuit. *Newton v. Farrall*, 20 Law J. Rep. (n.s.) Exch. 201; 2 L. M. & P. P.C. 189.

An affidavit stating that the plaintiff has given notice of trial, and has not proceeded to trial pursuant to the said notice, is sufficient to call upon a plaintiff to shew cause why there should not be judgment as in case of a nonsuit against him, and to satisfy the Court that he has made no default. *Driscoll v. Whalley*, 21 Law J. Rep. (n.s.) Q.B. 232; 17 Q.B. Rep. 948.

The plaintiff having become insolvent after issue joined, a rule for judgment as in case of nonsuit was discharged and a *stet processus* entered, it not appearing whether the assignees were willing to continue the action or not, or that any application had been made to them. *Gavin v. Allan*, 21 Law J. Rep. (n.s.) Exch. 80; 7 Exch. Rep. 306.

Obtaining an injunction to stay the proceedings does not deprive the defendant of his right to move for judgment as in case of nonsuit. *Dobson v. Brocklebank*, 21 Law J. Rep. (n.s.) Exch. 96; 7 Exch. Rep. 316.

Where subsequent to the removal of the injunction, the plaintiff gave notice of trial, but did not try, the defendant was held to be entitled to move for judgment as in case of nonsuit; and, *semble*, that the time for proceeding to trial, according to the practice of the Court, runs from the removal of the injunction. *Ibid*.

Upon a motion for judgment as in case of nonsuit, it is enough if the affidavit shews a default, without going on to negative that the plaintiff has since proceeded to trial: that fact should come from the other side. *Blackman v. Asplin*, 12 Com. B. Rep. 453.

(b) After Notice to try.

[See 15 & 16 Vict. c. 76. s. 101. and Reg. Gen. Hil. term, 1853, r. 58, 22 Law J. Rep. (n.s.) xii; 1 E. & B. App. xiii.]

The Common Law Procedure Act, 15 & 16 Vict. c. 76, which abolishes the old mode of proceeding for judgment as in case of nonsuit applies to cases where issue has been joined, and default made in going to trial, in pursuance of notice before that act came into operation. *Morgan v. Jones*, 8 Exch. Rep. 128.

If a plaintiff has good cause for not proceeding in the action after issue joined, and the defendant notwithstanding gives him a twenty days' notice under section 101. of the Common Law Procedure Act, 1852, to force him to trial, the plaintiff need not wait until the defendant has entered a suggestion that the plaintiff has failed to proceed to trial, although duly required, but may at once apply to the Court to extend the time for proceeding, and the Court will in such case grant an extension for a definite period. *Farthing v. Castles*, 22 Law J. Rep. (n.s.) Q.B. 167; 1 Bail C.C. 142.

Where a defendant, who was in prison, had stated that he intended to go through the Insolvent Court, and that he had made up his mind not to pay anybody, and afterwards, pursuant to the Common Law

Procedure Act, 15 & 16 Vict. c. 76. s. 101, served the plaintiff with a twenty days' notice to bring the cause on for trial, the Court set aside the notice. *Truscott v. Lantour*, 23 Law J. Rep. (n.s.) Exch. 96; 9 Exch. Rep. 420.

A defendant is entitled to enter a suggestion on the record, and sign judgment for his costs under the 101st section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, where a plaintiff neglects to try a cause at the times mentioned in the section, and to proceed to trial at the assizes or sittings occurring immediately after the expiration of the twenty days' notice to try, which by the section the defendant is enabled to give. *Judkins v. Atherton*, 23 Law J. Rep. (n.s.) Q.B. 335; 3 E. & B. 987.

Notice of trial was given for the Summer Assizes, and the plaintiff at the assizes withdrew the record. On the 21st of February following the defendant gave notice, requiring the plaintiff to bring on to trial the issue joined in the action at the next assizes at Liverpool, the commission day of which was the 21st of March. The defendant did not proceed to trial as required by the notice, and the defendant on the 5th of May entered a suggestion on the record in the terms of the 101st section, and signed judgment for his costs:—Held, that the defendant had properly entered the suggestion and signed judgment. *Ibid*.

(C) AFTER VERDICT.

(a) Signing and entering up.

[See 15 & 16 Vict. c. 76. s. 95—Reg. Gen. Hil. term, 1853, r. 55, 22 Law J. Rep. (n.s.) xii; 1 E. & B. App. xii.]

Where, in an action of tort, there was a verdict for the plaintiff, with a farthing damages, on the first count, and for the defendant on the second count, and the defendant took out a summons calling upon the plaintiff to sign judgment upon the verdict so given, or to deliver the postea to the defendant for the purpose of doing so, and an order was made that the postea should be accordingly delivered to the defendant, who thereupon signed judgment for the plaintiff on the first count, and for himself on the second count,—Held, that this judgment was regular. *Taylor v. Nesfield*, 24 Law J. Rep. (n.s.) Q.B. 126; 4 E. & B. 462.

(b) *Nunc pro tunc*.

[See Reg. Gen. Hil. term, 1853, r. 56, 22 Law J. Rep. (n.s.) xii; 1 E. & B. App. xii; also Trinity term, r. 32, *ibid*. lii and lxxxiii.]

The Court cannot depart from a general rule of practice in order to do substantial justice in a particular case. The Court gives a party leave to enter judgment *nunc pro tunc* after the expiration of two terms, only when the delay has been the act of the Court itself. Therefore, where the executrix of a plaintiff was unable to get probate of the will on account of a caveat entered in the ecclesiastical court by the defendant for the purpose of delay, this Court, though reluctantly, refused to give leave to enter judgment *nunc pro tunc* after the expiration of two terms. *Freeman v. Tranch*, 21 Law J. Rep. (n.s.) C.P. 214; 12 Com. B. Rep. 406.

(c) *Arrest of.*

[See 15 & 16 Vict. c. 76. s. 143.—Reg. Gen. Hil. term, 1853, r. 50, 22 Law J. Rep. (N.S.) xii; 1 E. & B. App. xii.]

Some issues of fact had been found for the plaintiff and some for the defendant, in vacation. Issues in law still remained undetermined at the commencement of the next term. It being admitted that no motion in arrest of judgment or for judgment *non obstante veredicto* could be made until the demurrers were determined,—*Semble*, that no such motion could be made under the circumstances after the first four days of term, except by consent. *Harris, or Harrison, v. the Great Northern Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 16; 11 Com. B. Rep. 542.

(d) *Non obstante Veredicto.*

[Curing defective pleadings by suggestion, see 15 & 16 Vict. c. 76. s. 143. As to time for moving for, see Reg. Gen. Hil. term, 1853, r. 50, 22 Law J. Rep. (N.S.) xii; 1 E. & B. App. xii.]

Judgment may be moved for *non obstante veredicto* on a plea of set-off. *Madrall v. Thelluson*, 21 Law J. Rep. (N.S.) Q.B. 410.

[See *ante*, (c).]

(D) REVIVAL OF.

A judgment was more than a year and a day old, but less than six years, when the Common Law Procedure Act came into operation, and had not been revived by *scire facias*.—Held, that execution might issue under the 128th section of 15 & 16 Vict. c. 76. without any revival of the judgment. *Boodle v. Davis*, 22 Law J. Rep. (N.S.) Exch. 69; 8 Exch. Rep. 351.

(E) RELEASE OF.

A judgment debt was equitably assigned by deed, and the same was assigned over, together with the deed, but no notice of the latter transaction was given to the judgment debtor. A release to the debtor was afterwards given by the original assignee, and the debtor accepted the release without requiring the delivery up or the production of the original deed of assignment.—Held, affirming the decree of the Court below, that the release was good as against the assignee, who had neglected to give notice to the debtor of the assignment to him. *Stocks v. Dobson*, 22 Law J. Rep. (N.S.) Chanc. 884; 4 De Gex, M. & G. 11; affirming 5 De Gex & Sm. 760.

(F) CHARGE ON LANDS UNDER 1 & 2 VICT. c. 110.

(a) *Upon what Property charged.*

A judgment is not by the 1 & 2 Vict. c. 110. made a charge on an ecclesiastical benefice held by the debtor. *Bates v. Brothers*, 23 Law J. Rep. (N.S.) Chanc. 782; 2 Sm. & G. 509.

A judgment entered up against a beneficed clergyman does not create a charge, under the 13th section of the statute 1 & 2 Vict. c. 110. upon his living. *Hawkins v. Gathercole*, 24 Law J. Rep. (N.S.) Chanc. 332; 6 De Gex, M. & G. 1; 20 Law J. Rep. (N.S.) Chanc. 59; 21 *Ibid.* 617; 1 Sim. N.S. 63; 1 Drew. 12.

A receiver was appointed by the Court in a suit by a judgment creditor of a beneficed clergyman to enforce his judgment as a charge upon the living, the

Vice Chancellor who appointed the receiver considering that the judgment was a charge. Another judgment creditor then issued a sequestration against the same living, and a motion being made in the cause for his committal for contempt, another Vice Chancellor refused to make any order, but directed him to pay the costs, and he undertook to deal with the sequestration as the Court should direct. At the hearing, the same Vice Chancellor felt bound by the opinion expressed on the occasion of the appointment of the receiver, and decided accordingly. On appeal, the Lords Justices held, that the first judgment was not a charge on the benefice; that a receiver ought not to have been appointed; that sequestration was the only proper mode of enforcing a judgment against the profits of a benefice; and that the judgment creditor who had issued a sequestration had a priority of charge, notwithstanding any contempt he might have committed by interfering when a receiver was appointed. *Ibid.*

Considerations applicable to the interpretation of statutes. *Ibid.*

By a decree, made in a Chancery suit, A was ordered to pay a sum of money to B. This decree was registered in pursuance of the 1 & 2 Vict. c. 110, and operated as a charge on some real estate belonging to A. The order not having been complied with, B issued an attachment against A, and had him taken into custody for contempt.—Held, that B, by such proceeding, had not relinquished his right to his charge on A's property. *Roberts v. Ball*, 24 Law J. Rep. (N.S.) Chanc. 471; 3 Sm. & G. 168.

(b) *Entry of Satisfaction.*

The plaintiff, after making an entry of a judgment obtained against the defendant in the book of the senior Master of the Common Pleas, pursuant to 1 & 2 Vict. c. 110. s. 19, with a view of charging the defendant's real estate, took him in execution under the same judgment. The defendant became insolvent, and his assignee contracted to sell his real estate. The purchaser refused to complete the purchase in consequence of the entry of the judgment which charged the property. The plaintiff having refused to consent to an entry of satisfaction being made in the book, the Court, on the application of the assignee, granted a rule ordering the plaintiff's attorney to attend before the senior Master of Common Pleas and consent to an entry being made that the plaintiff had taken the defendant in execution under the judgment after having made the entry. *Lewis v. Dyson*, 21 Law J. Rep. (N.S.) Q.B. 194; 1 Bail C.C. 33.

(c) *Registration of.*

By the 2 & 3 Vict. c. 11. s. 5, as against purchasers or mortgagees without notice, a judgment registered in the Common Pleas under the 1 & 2 Vict. c. 110. s. 19, is not to "bind or affect any lands, &c. further or otherwise or more extensively in any respect" than a docketed judgment would have done before the 1 & 2 Vict. c. 110. Therefore, leaseholds, which were formerly not bound by a docketed judgment until an *elegit* issued, are not now affected, as against purchasers or mortgagees without notice, until an *elegit* has issued. *Westbrook v. Blythe*, 23 Law J. Rep. (N.S.) Q.B. 386; 3 E. & B. 737.

The 7 Ann. c. 20. s. 18, which provides that no judgment shall affect or bind any lands in Middlesex except from the time when a memorial of such judgment shall be entered at the register office for Middlesex, is not repealed by the 1 & 2 Vict. c. 110. s. 13, and therefore a judgment registered in the Common Pleas has the effect of a charge upon lands in Middlesex only from the time when the judgment has been also registered in Middlesex. *Ibid.*

A was mortgagee of a term of ninety-nine years in Middlesex by a mortgage made on the 19th of June, which was registered in Middlesex on the 28th of June. B had obtained a judgment against the mortgagor, which was registered in the Common Pleas on the 5th of June, but never registered in Middlesex, and upon which an *elegit* issued and was executed on the 5th of September:—Held, that as between A and B, A was entitled to the land. *Ibid.*

An action was brought against Alfred H under the name of Edward H. Alfred H appeared to the action in the name of Edward, and judgment was recovered against him under the name of Edward. This judgment was registered against him under the 1 & 2 Vict. c. 110. in his right name of Alfred H:—Held, that this judgment was valid as against subsequent incumbrancers in respect of the lands of the debtor. *Beavan v. the Earl of Oxford*, 24 Law J. Rep. (N.S.) Chanc. 311; 3 Sm. & G. 11.

(d) Priority of.

In an action of ejectment, by an execution creditor claiming under a writ of *elegit* executed upon a judgment on a warrant of attorney, it cannot be set up as a defence to the action that the warrant of attorney and judgment were given to secure a loan at more than 5l. per cent. interest, and being a charge on land were rendered invalid by the usury laws, and, therefore, that the plaintiff's title by *elegit* could not be supported. *Hughes v. Lumley*, 24 Law J. Rep. (N.S.) Q.B. 57; 4 E. & B. 274.

Supposing the judgment to have been altogether invalidated by the usury laws, or the execution of it, so far as affected land, rendered improper, the right course of proceeding would be either to move to set aside the warrant of attorney and judgment or the writ of *elegit*. *Ibid.*

A judgment has the effect of a charge on lands in Middlesex only from the time when it has been registered in the registry of Middlesex; and as between several judgments registered in the Common Pleas the judgment first registered in the registry of Middlesex is entitled to priority. *Ibid.*

(G) PROCEEDING UPON, IN EQUITY.

On a claim by a registered judgment creditor upon property in the county of York to redeem, an objection was raised that other judgment creditors, whose judgments had not been registered, were necessary parties:—Held, that unregistered judgment creditors were not necessary parties to the suit, and that the plaintiff was entitled to the usual decree. *Johnson v. Holdsworth*, 20 Law J. Rep. (N.S.) Chanc. 63; 1 Sim. N.S. 106.

A judgment creditor obtained a charging order upon a sum of stock standing in the name of the Accountant General, of which the debtor was tenant for life:—Held, that the judgment creditor was entitled to a stop order to prevent the debtor receiv-

ing the dividends accruing due upon the stock, n the interval between the date of the charging order and the expiration of the six months limited by the 14th section of the 1 & 2 Vict. c. 110. *Watts v. Jefferyes*, 20 Law J. Rep. (N.S.) Chanc. 659; 3 Mac. & G. 372.

A was entitled to a sum of stock carried over to his account in a suit. B, a judgment creditor of A, obtained a Judge's order under the 1 & 2 Vict. c. 110, charging the stock, and then filed a claim against A and served him with it. The claim was brought on, and A did not appear:—Held, that B could not obtain the stock without a petition to be presented in the suit, but that it was not necessary to serve A with the petition. *Reece v. Taylor*, 21 Law J. Rep. (N.S.) Chanc. 463; 5 De Gex & Sm. 480.

In suits by judgment creditors, under 1 & 2 Vict. c. 110, the plaintiff's title as to the real estate of the debtor is incomplete until a writ of *elegit* has been sued out. *Smith v. Hunt*, 22 Law J. Rep. (N.S.) Chanc. 289; 10 Hare, 30.

A B had an interest in a fund in court. On the 11th of July 1853 C D having a registered judgment against A B, obtained a charging order *nisi* against A B's interest in the fund, and the order was made absolute on the 29th of the same month. Notice of this charging order was left at the Accountant General's office, and on the 16th of August 1853 C D obtained a stop order. On the 13th of May 1853 A B assigned his interest in the fund to E F, who on the 3rd of August obtained a stop order. C D and E F severally presented petitions claiming A B's share of the fund:—Held, that the Accountant General was not the trustee of the fund, but merely the agent of the Court, and that therefore C D's notice to him was not available against E F's stop order, which was obtained before that of C D's. *Warburton v. Hill*, and *Stent v. Wickens*, 23 Law J. Rep. (N.S.) Chanc. 633; Kay, 470.

The charging order under the 14th section of the 1 & 2 Vict. c. 110. has the same effect as a charge executed by the party against whom it is made; and the 15th section only restrains the dealing with the fund during the interval between the order *nisi* and the order being made absolute. *Ibid.*

A creditor, by judgment registered pursuant to the 1 & 2 Vict. c. 110, but not registered in the Middlesex registry, by suit sought priority over an incumbrancer of a subsequent date, but whose incumbrance was properly registered in the Middlesex registry, and to foreclose him. The Court, having regard to the 2 & 3 Vict. c. 11. s. 5. (in order to determine the priority), directed an issue whether the incumbrancer had, at the date of his incumbrance, actual notice of the judgment. *Robinson v. Woodward*, 4 De Gex & Sm. 562.

A judgment creditor, on ascertaining that a sum of money was about to be paid in a cause to his debtor, applied by petition to the Court that the sheriff might be at liberty to seize in the Accountant General's office a cheque, by means of which the sum of money was to be paid out to the debtor:—Held, that, under the 12th section of the 1 & 2 Vict. c. 110, the cheque was liable to seizure, and that, inasmuch as the cheque was in the hands of the Accountant General, the application to the Court was proper. *Watts v. Jefferyes*, 3 Mac. & G. 422.

(H) RIGHTS OF JUDGMENT CREDITORS.

On a claim by a judgment creditor against his debtor in respect of certain real estate belonging to the debtor, the Court refused to give a decree of foreclosure. *Footner v. Sturgis*, 21 Law J. Rep. (N.S.) Chanc. 741; 5 De Gex & Sm. 736.

In January 1851, A obtained and registered a judgment against B, a beneficed clergyman. By a deed, dated in November 1851, after reciting that A had agreed to allow B to receive the rent-charge in lieu of tithes of the benefice, for his own use, B assigned to A certain property, by way of mortgage, as a security for the judgment debt. In December 1851, C obtained and registered a judgment against B, and obtained a writ of sequestration:—Held (on the ground of contract between A and B, in the deed of November 1851), that C had priority over A. *Bates v. Brothers*, 23 Law J. Rep. (N.S.) Chanc. 150; 2 Sm. & G. 509.

Whether a judgment creditor of a beneficed clergyman has a priority over a subsequent judgment creditor, who had obtained a writ of sequestration—*quære*. *Ibid*.

An execution creditor (where the judgment has not been registered) is entitled, through the medium of a Court of equity, under the 13th section of the 1 & 2 Vict. c. 110, to an equitable term belonging to his debtor. *Gore v. Bousser*, 24 Law J. Rep. (N.S.) Chanc. 316, 440; 3 Sm. & G. 1.

Notice to parties having other securities is not sufficient to secure the priority of a judgment, &c. which is not re-registered till after the expiration of five years from the date of the first registration. *Shaw v. Neale*, 24 Law J. Rep. (N.S.) Chanc. 563; 20 Beav. 157.

A mortgage to secure future advances will not give such advances a priority over a judgment registered without notice of the mortgage. *Ibid*.

A B having obtained judgment against C D in a county court in respect of a debt, a warrant was issued to levy the amount upon C D's goods and chattels. C D had no legal chattels, but he was entitled to an annuity payable by trustees out of the rents of certain leasehold estates:—Held, that this Court would enforce the judgment of the county court against C D's equitable interest. *Bennett v. Powell*, 24 Law J. Rep. (N.S.) Chanc. 736; 3 Drew. 326.

After twelve months a judgment creditor may enforce his equitable charge against the real estate, although twelve months have not elapsed since its registration. *Derbyshire and Staffordshire, &c. Rail. Co. v. Bainbridge*, 15 Beav. 146.

Judgment creditors are not allowed successive periods of three months for redemption. *Bates v. Hillcoat*, 16 Beav. 139.

The relief to which a judgment creditor is entitled under the 1 & 2 Vict. c. 110. is a foreclosure and not a sale. *Jones v. Bailey*, 17 Beav. 582.

A, on the occasion of advancing his client's money to B, had search made for judgments by his clerks. It did not appear whether, in the result of their search, the clerks found any judgment against B, or whether they communicated anything to A. But, in fact, the search was made; and, in fact, there was a prior judgment entered up against B. A afterwards took a mortgage of B's property, and then sold to

C:—Held, that the facts were sufficient evidence of notice of the judgment to A, so as to affect C the purchaser, and let in the judgment. *Procter v. Cooper*, 2 Drew. 1.

Judgment creditors not allowed successive periods of three months each to redeem; but one period of three months is given to them, or any of them. *Radcliffe v. Salmon*, 4 De Gex & S. 526.

A judgment is not such a charge upon land (except it be within the 1 & 2 Vict. c. 110.) as to give it preference over an unregistered mortgage. *Cathrow v. Eade*, 1 Sm. & G. 423.

A, by articles of agreement covenanted to pay B 5,000*l.*, and it was thereby agreed and declared that the 5,000*l.* and interest should be and was thereby charged on land:—Held, that by virtue of the 1 & 2 Vict. c. 110. s. 13. a judgment creditor of B had a charge upon such land, and was a proper party to a suit for foreclosure. *Russell v. M'Culloch*, 1 Kay & J. 313.

JURISDICTION.

(A) OF COURTS.

(B) OF JUDGES.

(A) OF COURTS.

The 3 & 4 Will. 4. c. 53. s. 120. enacts, that all suits, indictments or informations exhibited for any offence against that or any other act relating to the Customs in any of his Majesty's courts of record at Westminster, shall be brought within three years after the date of the commission of the offence:—Held, that this was confined to indictments to be brought under sections 75. and 112. in the name of the Attorney General, in one of the courts of record at Westminster, and did not apply to an indictment preferred at the assizes for a conspiracy to defraud the Queen of certain duties, which was an offence at common law. *Regina v. Thompson*, 20 Law J. Rep. (N.S.) M.C. 183; 16 Q.B. Rep. 332.

The Court has jurisdiction, at the suit of a legal devisee of an estate not affected by the will with any trusts, to establish the will against the heir-at-law. *Boyse v. Rossborough*, 23 Law J. Rep. (N.S.) Chanc. 305; 3 De Gex, M. & G. 817; Kay, 71.

A British subject died intestate at Cape Coast Town, in Africa, leaving personal estate there. A B, holding by warrant of Her Majesty the office of Judicial Assessor to the native princes, took possession of this personal estate, claiming to be the official administrator of it by usage. A B sent part of the assets to this country to be sold, and directed the brokers to carry the proceeds to the account of the deceased's estate; and he afterwards came to this country for a short time, and brought other part of the assets with him. The intestate's father and sole next-of-kin obtained letters of administration in the Prerogative Court of Canterbury, and instituted a suit against A B for the administration of the estate and a receiver. Upon a motion for a receiver, it was held, that the Court had jurisdiction, A B and the assets being in this country; and that as A B claimed the right to take the assets out of the country, and he being about shortly to return to Africa, a sufficient case was made for the appointment of a receiver. Inquiry directed to the Colo-

nial Secretary under the 6 & 7 Vict. c. 94. *Hervey v. Fitzpatrick*, 23 Law J. Rep. (n.s.) Chanc. 564; Kay, 421.

A testator being seised of real estate in England and Ireland, by his will devised all his real estates to A in fee. The heir-at-law instituted a suit in Ireland for the purpose of setting aside the will, and upon an issue *devisavit vel non* directed out of the Court of Chancery in Ireland, a verdict was found against the will. An application for a new trial was refused, and a decree made declaring the invalidity of the will, from which decree A appealed to the House of Lords, and that appeal was still pending. A then filed her bill in the Court of Chancery here, for the purpose of having the will established so far as it related to the real estates in England:—Held, that the decree of the Irish Court of Chancery was no bar to such a suit, that Court having no jurisdiction to declare the validity or invalidity of the will generally, but only so far as it affected estates in Ireland. *Boyse v. Colclough*, 24 Law J. Rep. (n.s.) Chanc. 7; 1 Kay & J. 124.

A suit was instituted by claim in the Court of Chancery of the county palatine of Lancaster, and the plaintiff applied to the Lords Justices under the 5th and 8th sections of the statute 17 & 18 Vict. c. 82, the Court of Chancery Lancaster Act, 1854; and their Lordships ordered that service of the claim in the suit should be effected out of the jurisdiction of the Palatine Court, and directed, under section 5, that the order should be drawn up by a registrar of the High Court of Chancery. *Waltham v. Goodier*, 24 Law J. Rep. (n.s.) Chanc. 587.

The mere allegation that points of legal difficulty arose in this suit instituted in the Chancery Palatine Court did not induce the High Court of Chancery to order the transfer under the 8th section to its own jurisdiction. *Ibid*.

A was domiciled and died in England. The executors and trustees appointed under his will resided here. He had real and personal estate both in England and Scotland. He was a holder of shares in a company for making iron, the works of which were in Scotland, but which had houses of business and agents here. He was one of its agents. Probate was taken out in England, and an administration suit instituted and the usual decree therein made. After that decree, notice of which was given to the directors of the iron company, they instituted a suit in Scotland to obtain payment of a debt which they alleged was due to the company from the testator on account of agency business. The Master of the Rolls granted an injunction to restrain them from proceeding with their suit:—Held, (*Lord St. Leonards dissentiente*) that the injunction could not be maintained. *The Directors of the Carron Co. v. Maclaren*, 24 Law J. Rep. (n.s.) Chanc. 620; 5 H.L. Cas. 416.

(B) OF JUDGES.

A Judge at chambers has jurisdiction to make an order for the issuing of a writ of *procedendo* to send back proceedings removed by *certiorari* from an inferior court, and it is a matter for the discretion of the Judge whether or not a summons to shew cause should not in the first instance be granted. *Regina v. Scaine*, 21 Law J. Rep. (n.s.) M.C. 221.

JURY.

[On writs of inquiry, see Reg. Gen. Hil. term, 1853, r. 46, 22 Law J. Rep. (n.s.) xi; 1 E. & B. App. xi. Also stats. 15 & 16 Vict. c. 76. and 17 & 18 Vict. c. 125.]

(A) COMMON JURIES.

- (a) *Summoning.*
- (b) *Qualification.*

(B) SPECIAL JURIES.

- (a) *Obtaining.*
- (b) *Nominating and reducing.*
- (c) *Obtained for Delay.*
- (d) *Certificate for.*
- (e) *Other Matters.*

(C) CHALLENGE.

(D) DISCHARGE.

(E) IN COUNTY COURTS.

(A) COMMON JURIES.

(a) *Summoning.*

[See 15 & 16 Vict. c. 76. ss. 105, 106, and 107, and 17 & 18 Vict. c. 125. ss. 58, 59.]

Under a precept to summon a jury *de corpore comitatús*, the sheriff may summon the whole jury from a particular hundred. *Taylor v. Loft*, 22 Law J. Rep. (n.s.) Exch. 131; 8 Exch. Rep. 269.

(b) *Qualification.*

The Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. s. 55, provides that in case of a full special jury not appearing, the sheriff shall, upon the application of either party, add to the list of such jury the names of any other disinterested persons qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the Court, or can speedily be procured, so as to complete such jury, all parties having their lawful challenges against such persons:—Held, that the want of qualification in such supplemental jurors is ground of challenge only, and in default of such challenge the proceedings cannot be questioned for want of jurisdiction or irregularity. *Re Chelsea Waterworks Co., ex parte John Phillips*, 24 Law J. Rep. (n.s.) Exch. 79; 10 Exch. Rep. 731.

(B) SPECIAL JURIES.

(a) *Obtaining.*

[See Reg. Gen. Hil. term, 1853, rr. 44—47, 22 Law J. Rep. (n.s.) xi; 1 E. & B. App. x.]

Where a defendant had obtained a rule for a special jury and the special jury had been reduced and struck by the parties, but the defendant took no steps to issue special jury process or to summon the jurors, and the cause was tried by a common jury, the Court, in deference to the opinion expressed in *Haddane v. Beauchlerk*, set aside the trial for irregularity. *Montague v. Smith*, 21 Law J. Rep. (n.s.) Q.B. 73; 17 Q.B. Rep. 688.

Where the defendant has duly obtained a rule for a special jury, and the jury has been struck and reduced, it is not competent to the Court to direct that

the cause be tried by a common jury, on the defendant's failure to summon a special jury. *Newman v. Graham*, 11 Com. B. Rep. 153.

(b) *Nominating and reducing.*

Where, after notice of trial, the defendant had obtained a rule for a special jury for the purpose of delay, and had nominated but not reduced the special jury,—the Court refused a rule *nisi* to discharge the rule for a special jury. *White v. Eastern Union Rail. Co.*, 21 Law J. Rep. (N.S.) C.P. 112; 11 Com. B. Rep. 875.

The Court will not discharge a special jury rule obtained by the defendant, merely because he has neglected to take any step for nominating and striking a special jury for the trial. *Proper v. Tregear*, 2 L. M. & P. C.C. 86.

(c) *Obtained for Delay.*

Where a rule for a special jury (obtained in due time) has been obtained for delay, the proper application to the Court is, for a rule to shew cause why the cause should not be tried by a special jury, in its order, at the sitting for which the notice was given, if the defendant shall then have one in attendance, and, in default thereof, then that the cause be tried by a common jury. *Gray v. Knight*, 16 Com. B. Rep. 143.

Where a cause was set down for trial at the first sittings in term, and a special jury rule was obtained by the defendant for the purpose of delay, the Court granted a rule calling on him to shew cause, on the third day before the sittings, why the special jury rule should not be set aside on that day, unless he had previously nominated the jury. *Devanoge v. Borthwick*, 2 L. M. & P. C.C. 277.

(d) *Certificate for.*

A declaration in trespass contained five counts, to all of which the defendant pleaded not guilty and not possessed. A rule for a special jury was then obtained by the plaintiff; but the defendant, before the trial, amended his pleas, and suffered judgment by default as to the last two counts. At the trial the plaintiff had a verdict upon the plea of not guilty, and the defendant upon the plea of not possessed. The damages were assessed at 40s. as to the last two counts. The Judge certified for a special jury:—Held, that the plaintiff was not entitled to the costs of the special jury. *Walters, or Waters, v. Howells*, 22 Law J. Rep. (N.S.) Exch. 96; 8 Exch. Rep. 244.

A cause came on for trial before *Wilde, C. J.*, on the 13th of December 1848, when a verdict was taken for the plaintiff, subject to a special case. Upon the argument of the special case, on the 11th of June 1850 (which was after *Wilde* had ceased to be a Judge of the Court of Common Pleas), the Court directed a nonsuit. On the 12th of September, the following indorsements were made upon the *Nisi Prius* record:—"I certify that this was a fit and proper cause to be tried by a special jury.—*Thomas Wilde*." "It was assented to at *Nisi Prius*, that, in the event of judgment being for the defendants, I should certify for the special jury; which I have accordingly done *nunc pro tunc*.—*Truro*." The Court refused to set aside the certificate, as being informal or too late. *Serrell v. the Derbyshire, Staffordshire and Worcester Junction Rail. Co.*, 10 Com. B. Rep. 910.

(e) *Other Matters.*

Just before the verdict was delivered in a special jury cause, it was discovered that one of the special jurors impanelled had been summoned in another cause, and had by mistake answered to a wrong name. The defendant then objected to the verdict being received, and thereupon the learned Judge offered to discharge the jury and try the cause over again. This, however, was not assented to, and the plaintiff claiming to have the verdict taken, the jury ultimately returned their verdict in favour of the plaintiff:—Held, a mis-trial; and that as the defect had been discovered and objected to before the verdict was given, the Court was bound to award a *venire de novo*. *Doe d. Ashburnham v. Michael*, 20 Law J. Rep. (N.S.) Q.B. 276; 16 Q.B. Rep. 620.

On the trial of a special jury cause at *Nisi Prius*, it being discovered, after the plaintiff's case had commenced, that there were thirteen jurymen in the box, the Judge discharged them, and directed that twelve of them should be recalled and sworn, which was done. The defendant's counsel protested against this course, and withdrew from the cause, which was then taken as undefended, and a verdict found for the plaintiff. The Court refused to set the verdict aside, and award a *venire de novo*, inasmuch as the Judge who tried the cause was correct in treating the proceedings with thirteen jurymen as a nullity, and in discharging them as soon as the error was discovered. *Per Parke, B.*—if the jurymen last called could have been ascertained, the Judge should have directed him to leave the box, and have continued the trial with the remaining twelve. *Muirhead v. Evans*, 20 Law J. Rep. (N.S.) Exch. 211; 6 Exch. Rep. 447; 2 L. M. & P. C.C. 294.

(C) CHALLENGE.

The right of challenge against a jurymen is a common law right, which cannot be taken away except by the express terms of a statute; and *quære*, whether it is taken away by the 3 & 4 Will. 4. c. 91, except in cases where corporate bodies are parties, and kindred or affinity with a member of the corporate body is the ground of challenge. *Barrett v. Long*, 3 H.L. Cas. 395.

It is not taken away by the effect of the 3 & 4 Will. 4. c. 91. in respect of a disqualification created since that statute. *Ibid*.

Where a challenge in respect of such disqualification was made after reducing a special jury, it was held not to be necessary to allege that the disqualification had arisen since the jury was reduced. *Ibid*.

Where a prisoner was found guilty of larceny on an indictment for larceny which contained a count for a previous conviction, and, after conviction for the larceny, the Court thought fit to swear the jury afresh to try the question of whether the prisoner had been previously convicted.—Held, that the prisoner was not entitled to challenge the jury afresh. *Regina v. Key*, 21 Law J. Rep. (N.S.) M.C. 35; 3 Car. & K. 371.

There is no right of peremptory challenge of special jurors summoned at the assizes under the provisions of the 15 & 16 Vict. c. 76. s. 108. *Creed v. Fisher*, 23 Law J. Rep. (N.S.) Exch. 143; 9 Exch. Rep. 472.

On the trial of a misdemeanour on the crown side

of the assizes, it is a fair mode of practice to allow the defendants to object to the jurors as they are called, without shewing any cause, till the pannel is exhausted, and then to recall the jurors in the same order in which they were called at first, and then not to allow any challenge except for cause, and this is the constant practice on the Welsh circuit, where challenges of jurors very frequently occur. *Regina v. Blakeman*, 3 Car. & K. 97.

(D) DISCHARGE.

The consent of counsel to the discharge of a jury who are unable to agree on a verdict, makes no difference as respects the right of the successful party on a second trial to the costs of the first trial; and the rule is, that the successful party is not entitled to the costs of the first trial. *Bostock v. the North Staffordshire Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 384; 18 Q.B. Rep. 777.

After a trial for murder had commenced, it was ascertained that a witness had not arrived, but was expected by a railway train. The Judge ordered the jury to be locked up until the arrival of the witness, had another jury called, and proceeded with another case. *Regina v. Foster*, 3 Car. & K. 201.

(E) IN COUNTY COURTS.

When a cause is heard before a county court Judge without a jury, and a new trial is afterwards granted generally at the instance of the plaintiff, the latter may demand to have the case tried by a jury on the second occasion. *Regina v. Harwood*, 22 Law J. Rep. (N.S.) Q.B. 127; 1 Bail C.C. 144.

JUSTICE OF THE PEACE.

(A) QUALIFICATION.

(B) JURISDICTION AND DUTY.

(a) Generally.

(b) Informations, Summonses and Warrants.

(c) In Cases of Breach of the Peace.

(d) Where Justices are interested.

(C) RULE REQUIRING JUSTICES TO ACT.

(D) ORDERS.

(E) CONVICTIONS AND COMMITMENTS.

(A) QUALIFICATION.

The 18 Geo. 2. c. 20. s. 1. enacts, that no person shall be qualified to be a Justice of the Peace who shall not (*inter alia*) "be seised or entitled unto in law or equity to and for his own use and benefit, the immediate reversion or remainder of and in lands, tenements or hereditaments which are leased for one, two, or three lives, or for any term of years determinable upon the death of one, two, or three lives, upon reserved rents, and which are of the clear yearly value of 300*l.*":—Held, that no qualification is conferred by an estate in remainder or reversion, unless it be a remainder or reversion in lands, &c. leased for lives upon reserved rents, and of the clear yearly value of 300*l.* *Woodward v. Watts*, 22 Law J. Rep. (N.S.) M.C. 149; 2 E. & B. 452.

Where, therefore, real estate of the clear yearly value of 300*l.*, not leased for lives upon reserved

rents, was devised in trust for A's wife for life for her sole and separate use, and after her death in trust for A for life for his own use and benefit: this was held not to be such a remainder as qualified A to be a Justice of the Peace under the above statute. *Ibid.*

(B) JURISDICTION AND DUTY.

(a) Generally.

[See *Newbould v. Coltman*, title POOR.]

By the 3 & 4 Will. 4. c. 63. s. 3. indentures for binding parish apprentices within any city, &c. are to be allowed by two Justices, one acting for and on behalf of the county, and the other for and on behalf of the city, &c. within the limits of which the child is bound. By the 2 & 3 Vict. c. 71. s. 14. a single Police Magistrate sitting at a police court may do any act directed to be done by more than one Justice. A pauper was bound apprentice by the parish of A, which was situate within the city and liberty of Westminster, into the parish of B, in the county of Middlesex. Justices for the county of Middlesex have concurrent jurisdiction, and usually act in the liberty of Westminster:—Held, that the indenture of apprenticeship was properly allowed by a single Police Magistrate. *Regina v. St. George, Bloomsbury*, 20 Law J. Rep. (N.S.) M.C. 200; 16 Q.B. Rep. 1005.

The plaintiff, a resident inhabitant of the parish of W, in the county of Hertford, which parish is not in the liberty of St. Alban, was summoned to appear in the county of Hertford and out of the liberty of St. Alban before the defendants, Justices of the Peace of the county of Hertford and also of the liberty, to answer a charge of assault committed in the liberty of St. Alban in the county of Hertford. The plaintiff not having appeared was convicted in a penalty and costs, under the 9 Geo. 4. c. 31. s. 27, and not having paid them he was committed by the defendants to the house of correction at St. Albans and imprisoned in the liberty gaol there. The liberty of St. Alban having been created by royal charter, Edward the Fourth by charter granted to the abbot and convent the privilege of appointing their own Justices of the Peace, with an exclusive jurisdiction of trying all felonies, trespasses, &c. committed within the town and liberty, together with a common gaol. By the statute 27 Hen. 8. c. 24. it was enacted, that thenceforth no person except the King should have the power of making Justices of the Peace. By the statute 31 Hen. 8. c. 13. it was enacted, that all abbeyes, &c. thereafter dissolved, together with their courts, liberties, privileges and franchises, should vest in the Crown for ever, and that the order and governance thereof, and the liberties, franchises and temporal jurisdiction should be vested in the Court of Augmentation. James the First, by charter, granted to G W and T W the liberty of St. Alban, with all its rights in as ample a manner as any abbot, &c. had held or enjoyed them. There have always been separate commissions of the peace for the county of Hertford and for the liberty of St. Alban. The county Justices are authorized generally under their commission to keep the peace in the county, and their commission contains the words "as well within the liberties as without"; and the Justices appointed under the liberty commission are authorized generally to keep the peace within

the liberty:—Held, first, that the Justices of the liberty had not exclusive jurisdiction within the liberty; secondly, that the county Justices had jurisdiction over an offence committed within the liberty; and, lastly, that they had power to commit the plaintiff to the liberty house of correction. *Arnold v. Gaussen*, 22 Law J. Rep. (N.S.) Exch. 180; 8 Exch. Rep. 463.

The jurisdiction to convict of the offence, under the 3 & 4 Vict. c. 61, of using a false certificate for the purpose of obtaining a licence to retail beer, is in the Justices acting in and for the place where the offence is committed. *Regina v. Waghorn*, 22 Law J. Rep. (N.S.) M.C. 60; 1 E. & B. 647.

Where such a conviction was made by two Justices of the county of Kent, having jurisdiction within the division in which the house sought to be licensed was situate, but not within the borough of Maidstone, in which the offence was committed,—Held, (*Coleridge, J. dissentiente*) under the 3 & 4 Vict. c. 61. s. 19, the 11 Geo. 4. & 1 Will. 4. c. 64, and the 4 & 5 Will. 4. c. 85, that the jurisdiction given to such Justices by the two latter statutes did not extend to the offence of using a false certificate for the purpose of obtaining a licence to retail beer, subsequently created by the 3 & 4 Vict. c. 61. s. 6, and that the conviction was therefore bad. *Ibid.*

In the liberty of A, which is situated within the county of H, there is a gaol and house of correction, used only for offenders within the liberty. It is entirely supported by a rate in the nature of a county rate levied on the inhabitants of the liberty, who do not contribute to the general county rate. The keeper of the liberty house of correction is appointed by the Justices of the liberty, who act under a separate commission, which does not give them exclusive jurisdiction. There is a Court of Quarter Sessions held for the liberty. The commission under which the Justices of the county of H act gives them jurisdiction as well within liberties as without:—Held, that the county Justices sitting out of the liberty were authorized to commit to the house of correction of the liberty a person guilty of an assault within the liberty, and were not bound to send him to the county house of correction. *Arnold v. Dimsdale*, 22 Law J. Rep. (N.S.) M.C. 161; 2 E. & B. 580.

Quære—whether they could commit to the liberty gaol for offences committed out of the liberty. *Ibid.*

The party charged, though duly summoned, did not appear before the Justices at the time appointed for the hearing. The Justices heard the case, adjudged the party to pay a fine and costs immediately, and on the same day, before any demand or notice, ordered him to be committed for non-payment to the house of correction, under the 9 Geo. 4. c. 31. ss. 27, 33:—Held, that the Justices might order the payment to be made either “immediately,” which means in this statute “on the spot,” or might give time, in their discretion; and that as they had ordered immediate payment, they were authorized (the money not being then paid) at once to order the party’s committal before any demand, and without serving him with any summons to shew cause why he should not be committed. *Ibid.*

F, being at Colchester and intending to travel by the Eastern Union Railway only as far as the Diss station, purposely applied for and obtained from the

company’s clerk at the Colchester station, within the borough of Colchester, a ticket for Norwich, and paid the fare demanded to Norwich. The proper fare to Diss was 7s., and the fare to Norwich, though nineteen miles further from Colchester than Diss, was, owing to competition, 5s. only. On the arrival of the train at Diss, F got out of the train and delivered his ticket to the collector, and refused to pay the difference of fare to Diss, though demanded by the collector. By one of the company’s bye-laws, it was provided that every passenger should pay his fare previously to entering a carriage of the company, upon payment of which he would be furnished with a ticket specifying the class of carriage and distance for which the fare was paid, which ticket such passenger was required to shew when requested by a servant of the company, and to deliver up the same before leaving the carriage; and that any passenger who should enter a carriage without having paid his fare, or who should refuse to shew or deliver up his ticket when required, was thereby subjected to a penalty not exceeding 40s. Under this bye-law F was convicted, by two Justices of the borough of Colchester, in a penalty of 10s., for having, within the said borough, unlawfully and wilfully entered a carriage of the said company, for the purpose of travelling upon the said railway from Colchester to Diss, not having previously paid his fare for so travelling:—Held, that, supposing F to have committed the alleged offence against the bye-law, it was committed within the borough of Colchester; but that no such offence had been committed by him, and that the conviction, therefore, was bad. *Regina v. Frere*, 24 Law J. Rep. (N.S.) M.C. 68; 4 E. & B. 598.

An alderman of London, sitting at the Mansion House and Guildhall, has not (by the 11 & 12 Vict. c. 43. s. 34, and the 3 & 4 Vict. c. 84. s. 6.) the same power as a police magistrate has (by the 3 & 4 Vict. c. 84. s. 13.) to send a constable to view deserted premises, and to deliver up possession, under the 11 Geo. 2. c. 19. s. 16. *Edwards v. Hodges*, 24 Law J. Rep. (N.S.) M.C. 81; 15 Com. B. Rep. 477.

Quære—Whether the summary proceedings of the 11 Geo. 2. c. 19. s. 16, apply, where there is no right of entry reserved to the landlord or lessor without the statute 57 Geo. 3. c. 52. *Ibid.*

Per Williams, J.—Where one section of a statute gives to A the power which B has, and a subsequent section gives B new powers, A does not acquire the new powers given to B. *Ibid.*

The Court allowed the defendant to amend a plea of “not guilty by statute,” by inserting in the margin statutes necessary to justify the trespass complained of, after verdict for the defendant and a rule *nisi* to set it aside. *Ibid.*

Where an act of parliament gives jurisdiction to Justices of a county, and an order is made under it by Justices of the county of a city, which county and city are co-extensive by statute, the order is valid though the Justices describe themselves merely as Justices “in and for the said city.” For the Court will take notice that the city is also a county. So held in the case of an order for past and future maintenance, &c. of a pauper lunatic, under stat. 8 & 9 Vict. c. 126. ss. 53, 62. *Regina v. St. Maurice*, 16 Q.B. Rep. 908.

(h) *Informations, Summonses, and Warrants.*

Section 24. of the stat. 8 Geo. 4. c. 30. gives a Magistrate jurisdiction to convict summarily in cases of malicious damage to property. Section 30, "for the more effectual prosecution of all offences punishable on summary conviction," enacts, that when any person shall be charged on the oath of a credible witness before any Justice with such offence, such Justice may summon the party, and if he do not appear, may determine the case *ex parte*, or issue his warrant to apprehend the party; or without summons may issue his warrant, and the Justice before whom the party charged shall appear or be brought shall hear and determine the case:—Held, that section 30. did not controul the effect of section 24; and that it was not necessary that there should be an information on oath to give the magistrate jurisdiction to hear the case when the party charged with an offence under the act appeared before him. *Regina v. Millard*, 22 Law J. Rep. (N.S.) M.C. 108; 1 Dears. C.C. 116.

A summons was left at eight o'clock in the morning at the house of the defendant, who was a collier, with his wife, requiring him to attend at a petty session, to be held at eleven o'clock the next morning, at a place eight miles off, to answer a charge of assault. The defendant, not returning home from the colliery till eleven o'clock at night, did not receive the summons till that hour. Not being able in time to arrange for some one to supply his place at the colliery or to collect his witnesses to defend himself against the charge, he did not attend the petty sessions, and the Justices convicted him of the assault in his absence:—Held, that the Justices were the judges of whether the summons was served in a reasonable time before the hearing, and that the fact (not known to them) that the defendant did not receive the summons until eleven o'clock at night, did not deprive them of their jurisdiction to hear and adjudicate upon the complaint. *In re Williams*, 21 Law J. Rep. (N.S.) M.C. 46; 2 L. M. & P. C. 580.

The 11 & 12 Vict. c. 44. s. 2, which enacts that no action shall be brought against a Justice of the Peace for anything done under a warrant, upon an information for an alleged indictable offence, if "a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons," does not apply to a summons and warrant issued after conviction, with a view to the levying of penalties and costs. *Bessell v. Wilson*, 22 Law J. Rep. (N.S.) M.C. 94; 1 E. & B. 489.

(c) *In Cases of Breach of the Peace.*

An information made before a magistrate stated, that the informant having been assaulted and beaten by another person prayed that he might be bound over to keep the peace towards him. On the magistrates, before whom the case was heard, proceeding to deal with the merits of the question of the assault, the informant protested against their adjudicating upon it:—Held, that the Justices had no jurisdiction to convict summarily the offending party of the assault against the will of the informant, as under the stat. 9 Geo. 4. c. 31. s. 27. the Justices have no

jurisdiction to convict of an assault, unless the party aggrieved complain of that assault before them, with a view to their adjudicating upon it. *Regina v. Denny*, 20 Law J. Rep. (N.S.) M.C. 189; 2 L. M. & P. C. 230.

A warrant of commitment in substance stated, that whereas the plaintiff had been brought before the defendant (who was a Justice) charged, on the oath of T P, with having written on the pavement in a certain lane the offensive words reflecting on the character of R J W "Donkey Watt, the railway jackass;" and it having been stated to the defendant, on the oath of T P, that the continued writing for some time past of the offensive words was calculated to produce a breach of the peace, and T P praying that the plaintiff might be required to find sureties to keep the peace, he, the defendant, ordered and adjudged that the plaintiff should enter into his own recognizance in 20l., with two sufficient sureties in 15l. each, to keep the peace for three calendar months. The warrant then stated that the plaintiff had refused to enter into such recognizance and find such sureties, and commanded that the plaintiff should be conveyed to prison and there kept for the space of three months, unless the plaintiff, in the mean time, entered into such recognizance with such sureties. This warrant was afterwards quashed on motion, and an action of trespass brought against the defendant, who granted it:—Held, first, that the warrant put in by the plaintiff was evidence of the information recited in it. Secondly, that it must be taken that the defendant intended to require sureties for good behaviour, notwithstanding the words "sureties of the peace" in the warrant. Thirdly, that a Justice of the Peace has jurisdiction to require sureties for good behaviour in some cases of libels against private individuals. That, therefore, the defendant had jurisdiction in the matter out of which the cause of action arose, and within the meaning of the 11 & 12 Vict. c. 44. s. 1, and consequently was not liable to an action of trespass. *Haylock v. Sparke*, 22 Law J. Rep. (N.S.) M.C. 67; 1 E. & B. 471.

(d) *Where Justices are interested.*

Upon the trial of a parish appeal F S, one of the Justices, who was a rated inhabitant of the appellant parish, was on the bench during the hearing, and in the course of the proceedings referred the chairman of the Quarter Sessions to some of the documents put in evidence. Upon an observation being made that he was a party interested, F S stated that he should take no part in the decision, but he remained in court until the final decision, which was in favour of the appellants. It was sworn that he did not vote or give any opinion upon the question at issue, nor did he influence the decision of the other Justices present, and that if he had not believed that the parties were satisfied with his assurance that he would take no part, he would have retired from the court during the trial:—Held, that under the above circumstances, the order of Sessions was invalid by reason of the presence of the interested Justice. *Regina v. the Justices of Suffolk*, 21 Law J. Rep. (N.S.) M.C. 169: and see *s.p. Regina v. the Justices of Surrey*, 21 Law J. Rep. (N.S.) M.C. 195.

Held, also, that notice of an intention to move for

a *certiorari* under 13 Geo. 2. c. 18. s. 5. was properly served on F S, as a Justice "by and before whom the order of Sessions was made." *Ibid*.

The notice stated that application would be made for a *certiorari* "on behalf of the inhabitants" of the respondent parish, and was signed "J M, attorney for the inhabitants of the respondent parish":—*Held*, to be sufficient. *Ibid*.

(C) RULE REQUIRING JUSTICES TO ACT.

[See *Walsh v. Southworth*, title RATE, Poor-rate.]

This Court will inquire into the validity of an order of Justices before compelling them, under 11 & 12 Vict. c. 44. s. 5, to issue a distress warrant to enforce such order, and will refuse a rule for that purpose where the order appears to be invalid. *Regina v. Collins and Regina v. the Justices of Durham*, 21 Law J. Rep. (n.s.) M.C. 73.

A party upon appearing before two Justices upon a summons for non-payment of a church-rate, under the 53 Geo. 3. c. 127. s. 7, stated to the Justices that he disputed the validity of the rate, and specified several objections. Whereupon the Justices adjourned the hearing, to admit of the party in the mean time taking steps to dispute the rate. On the day of adjournment, no such steps having been taken, the Justices made an order for the payment of the amount claimed; but afterwards declined to issue a distress warrant to enforce that order:—*Held*, that the order was made without jurisdiction, and therefore that a rule under the 11 & 12 Vict. c. 44. s. 5, to compel the issuing of a distress warrant to enforce it could not be granted. *Ibid*.

The statute 11 & 12 Vict. c. 44. s. 5, which prescribes that if a Justice shall refuse to do any act relating to his office, he may be directed by rule of court to do it, does not authorize the Court to order Justices to draw up one joint conviction instead of two separate convictions against each of two persons against whom a joint information has been laid, and heard and determined by the Justices. *In re Clee*, 21 Law J. Rep. (n.s.) M.C. 112; 1 Bail C.C. 31.

A rule calling upon Justices to shew cause why they should not issue a distress warrant, was founded upon an affidavit, shewing the refusal only, but not stating the proceedings which took place before the Justices, or the reason why they refused. The parties shewing cause against the rule made no affidavit:—*Held*, that the affidavit must be construed in favour of the party making it; and that the rule should be absolute. *Regina v. Deverell*, 23 Law J. Rep. (n.s.) M.C. 121; 3 E. & B. 372.

On motion against a magistrate under the statute 11 & 12 Vict. c. 44. s. 5. as well as on motion for mandamus, the general rule is that the Court will order the unsuccessful party to pay costs, and will not, on the motion for costs, enter into the merits of the original application. *Regina v. Ingham*, 21 Law J. Rep. (n.s.) M.C. 125; 17 Q.B. Rep. 884.

Where Justices refused to issue a warrant of distress for arrears of a sum ordered to be paid for the maintenance of a bastard child, assigning as their reason that the putative father was discharged from the order by the husband's return and cohabitation, the Court made absolute a rule for ordering them to issue the warrant, holding that this could not be considered as a refusal made in the exercise of the

discretion of the Justices. *Regina v. Pilkington*, 2 E. & B. 546.

Upon an information for keeping open a beer-house until eleven at night, contrary to the 3 & 4 Vict. c. 61. s. 15, it appeared that the house was situated in the township of C, which contained, according to the last parliamentary census, less than 2,500 inhabitants; that it was also situated in a place called H, which comprised parts of three townships (C being one), and was an aggregation of houses and inhabitants under a distinct name, containing more than 2,500 inhabitants, but having no local rights peculiar to itself, and that it was not included in the parliamentary census. The application for the beer licence described the applicant as "dwelling in a house in H, in the township of C." The certificate of character was signed by six "inhabitants of the township of C," and the certificate of the overseer was signed by the description, overseer "of the township of C." The licence was to keep open the house till ten o'clock at night. The Justices having, in order to obtain the opinion of this Court, refused to adjudicate,—*Held*, on a rule under the 11 & 12 Vict. c. 44. s. 5, requiring the Justices to do so, that as the Justices had only refused to adjudicate in order to raise the point in a convenient form for the opinion of this Court, and as the facts were stated on which they so refused, this Court would decide whether they had done right in refusing to convict. *Regina v. Charlesworth*, 20 Law J. Rep. (n.s.) M.C. 165; 2 L. M. & P. P.C. 117.

(D) ORDERS.

[See *ante*, (C).]

An order of maintenance ordered a person as putative father to pay a weekly sum for the maintenance of a bastard child from the birth of the child. As the application for the order was not made until more than two months after the birth, the order was clearly bad as to the period between the date of the birth and the time of applying for the order. Notice of abandonment of all claim under the order for payment anterior to the date of the order had been served on the putative father:—*Held*, that the order was valid, and might be enforced against the putative father in respect of the weekly payments which became due after the date of the application to the magistrates. *Regina v. Green*, 20 Law J. Rep. (n.s.) M.C. 165; 2 L. M. & P. P.C. 130.

By section 1. of 11 & 12 Vict. c. 44, "every action to be brought against any Justice of the Peace for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction, shall be an action on the case." By section 7. of 53 Geo. 3. c. 127, two Justices are empowered "by order under their hands and seals" to direct the payment of money due for church-rates, with costs; and upon refusal of parties "to pay according to such order" by warrant under hand and seal to levy the rate and costs by distress. By section 14. of 11 & 12 Vict. c. 43, it is enacted, "That if Justices convict or make an order against a defendant, a minute thereof shall be then made, and the conviction or order shall be afterwards drawn up in proper form, under their hands and seals." By section 17, "In all cases where by any act authority is given to levy any sum upon any person's goods by distress for not obeying

any order of Justices, the defendant shall be served with a minute of such order before any warrant of distress shall issue in that behalf." The plaintiff having been rated to a church-rate and refused to pay, a complaint was made before Justices, and duly heard, and on the 6th of May a verbal order was made for the payment by the plaintiff of the amount of the rate and costs. This order was not formally drawn up till some days afterwards. On the 7th a minute of the order was served upon the plaintiff, who refused to pay. After such refusal the order was formally drawn up, dated the 6th of May, and a warrant issued by the defendants, dated the same day, which was not executed until October, when a cart of the plaintiff was seized for the distress. It did not appear whether the warrant was drawn up before or after the order dated the 6th of May, nor did it recite the order. The plaintiff having brought trespass for the seizure,—Held, that it was not necessary before issuing the warrant that an order should have been formally drawn up under hand and seal, but that the pronouncing of the order on the 6th and the service of the minute of the order on the 7th were sufficient to justify the issuing of the warrant; and that the non-recital of the order in the warrant, and the fact of the date of the warrant being the same as that of the order, and the neglect to shew in the warrant that it had issued subsequently to the disobedience of the order being only matters of form, the defendants were entitled to the protection of section 1. of 11 & 12 Vict. c. 44. *Ratt v. Parkinson*, 20 Law J. Rep. (n.s.) M.C. 208.

Semble [per *Jervis, C.J.*].—The words "exceeding his jurisdiction" in section 2. of 11 & 12 Vict. c. 44, mean doing something which the Justice could by no possibility have a legal right to do. *Ibid.*

An order for payment of contribution of a proportion of rent-charge under 5 & 6 Vict. c. 54. s. 16, after stating that complaint was made on oath before the two Justices signing the order, of the several matters required to give jurisdiction, proceeded—"and now at this day the said E H and E W, the parties aforesaid, appear before us the undersigned Justices, and we having examined into the merits of the said complaint, do, in pursuance of the statute in that case made and provided, determine," &c.:—Held, that there appeared no sufficient determination of the facts of complaint, and therefore that the order was bad on the face of it. *Regina v. Williams*, 21 Law J. Rep. (n.s.) M.C. 150.

The 11 & 12 Vict. c. 43. (which did not come into operation until six weeks after its passing) by section 11. provides, that where no time is limited for making complaints or laying informations under acts of parliament, such complaint shall be made and such information laid within six calendar months from the time when the matter of such complaint or information arose:—Held, that an order of two Justices, under the 8 Vict. c. 18, awarding compensation for damage done to a landowner by the construction of a railway, was within the above clause of the 11 & 12 Vict. c. 43. *Regina v. the Leeds and Bradford Rail. Co.*, 21 Law J. Rep. (n.s.) M.C. 193: s. c. nom. *In re Edmondson*, 17 Q.B. Rep. 67.

Held, also, that the above section had a retrospective operation and invalidated such an order, where the complaint was not made within six calendar months from the time when the damage complained

of occurred, although the order itself was made more than six months before the passing of the 11 & 12 Vict. c. 43. *Ibid.*

(E) CONVICTIONS AND COMMITMENTS.

[See *Arnold v. Dimsdale, ante*, (B) (a).]

A warrant of commitment issued by a Justice, under the statute 4 Geo. 4. c. 34. s. 3, recited that complaint had been made to the Justice that A had contracted to serve with B and C, in their business, for a term of one year, to commence from the 11th of November last, and that the term of his contract being unexpired, the said A did, on the 2nd of June instant, unlawfully misconduct himself in his said service by neglecting and absenting himself from his said master's service without notice or assigning a sufficient reason. The warrant adjudged the complaint to be true, and convicted A of the offence, and sentenced him to be imprisoned for a month:—Held, that A was entitled to be discharged from custody, as the warrant was bad for not stating either that the contract was in writing, or that A had entered into the service. *In re Askeu*, 20 Law J. Rep. (n.s.) M.C. 241; 2 L. M. & P. P.C. 429.

The forms of convictions given in the schedule to the 11 & 12 Vict. c. 43. apply to all cases; and convictions drawn up in such of the forms as are applicable to the case are sufficient. *Regina v. Hyde*, 21 Law J. Rep. (n.s.) M.C. 94.

A conviction under the Game Acts, 1 & 2 Will. 4. c. 32. and 5 & 6 Will. 4. c. 20. s. 21, adjudged a pecuniary penalty to be paid and applied according to law, following the words of Form I. 2. in the schedule to 11 & 12 Vict. c. 43. The Game Acts provided that one moiety of the penalty should be paid to the informer and the other moiety to go to the overseers of the poor, and to be paid to one of the overseers or to some other parish officer appointed by the Justice:—Held, that the conviction was sufficient. *Ibid.*

By the Game Act the *certiorari* is taken away. *Quere*—whether the objection that there is no proper adjudication of the penalty be one for which the *certiorari* may nevertheless issue; but the conviction having been brought up by *certiorari* under 12 & 13 Vict. c. 45. s. 18. in order to be enforced, the Court entertained the objection. *Ibid.*

The 5 Geo. 4. c. 83. s. 4. (the Vagrant Act) does not render any suspected person or reputed thief who may be found frequenting a street with intent to commit felony liable to be punished as a rogue and vagabond unless the street leads to some river, canal, &c., or is itself a place of public resort, or is adjacent to a place of public resort. Therefore where a commitment stated "that A, being a suspected person, did, on &c., at &c., in the county of M, unlawfully frequent a certain street, to wit, a street called Regent Street, with intent to commit a felony,"—Held, that A was entitled to be discharged on a writ of *habeas corpus*. Held, also, that the statement of the intent to commit a felony was sufficient without the insertion of the word "there." [And see next case.] *Ex parte Jones*, 21 Law J. Rep. (n.s.) M.C. 116; 7 Exch. Rep. 586.

The 5 Geo. 4. c. 83. s. 4. enacts that "every suspected person or reputed thief frequenting any river, canal or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto,

or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway or place adjacent, with intent to commit felony," shall be deemed a rogue and vagabond, and may be convicted accordingly:—Held, (*dissentiente Pattenon, J.*) that the words "place adjacent" must be referred to "street or highway" immediately preceding them, and that it is an offence within the meaning of the clause to be in any street or highway with intent to commit felony. *Per Pattenon, J.* the offence can only be committed by frequenting a street or highway leading to a canal, river, dock, &c. or adjacent to a place of public resort. Held (*per totam Curiam*), that a conviction under this clause need not allege that the person convicted was in the highway, &c. with intent to commit felony *there*. *Ex parte Brown*, 21 Law J. Rep. (N.S.) M.C. 113; 17 Q.B. Rep. 833.

A warrant of commitment, under the 4 Geo. 4. c. 34. s. 3. adjudged that J G having contracted to serve J S as a collier for a certain time, and the term of his contract being unexpired, "did unlawfully misdemean and misconduct himself in his said service by neglecting and absenting himself from his said service without the leave of his master, without having given to his said master any notice thereof, and without assigning any sufficient reason for so doing:—Held, that the warrant was bad, as it did not shew that J G had absented himself without lawful excuse. *In re Geswood*, 23 Law J. Rep. (N.S.) M.C. 35; 2 E. & B. 552.

Semle—that such an instrument, although for some purposes equivalent to a conviction, need not set out the evidence; at all events since the 11 & 12 Vict. c. 43. s. 17. *Ibid*.

A B was committed to prison by a Justice under the Master and Servants Act by a warrant which, after reciting that complaint had been made on oath that A B did contract with Messrs. M in the capacity and employment of a collier for the term of one month, and so on from month to month, determinable on a month's notice, and for the wages of 1s. 10d. per ton for cutting coal; and that the said A B entered into the said service according to the said contract, and afterwards and before the term was completed was, in the execution of his contract, guilty of misconduct and misdemeanour in unlawfully absenting himself without the consent of his masters, and without lawful excuse, proceeded, "and whereas the said A B was, this 10th day of December 1853, duly convicted before me, &c. of the said offence so charged upon him in and by the said information, and I, the Justice, adjudged that the said A B for his said offence should be committed to the said house of correction, &c., these are therefore to command," &c. The warrant then directed the gaoler to detain the prisoner for the time specified therein. Upon a return to a *habeas corpus* consisting of the above warrant,—Held, first, that affidavits might be used for the purpose of shewing that there was no evidence before the Justice from which he could legally infer a contract creating the relation of master and servant between the parties; and so negating jurisdiction. *Ex parte Bailey*; and *Ex parte Collier*, 23 Law J. Rep. (N.S.) M.C. 161; 3 E. & B. 607.

But, it being assumed that the evidence before the Justice was that A B was employed by Messrs. M

under a contract to serve until a month's notice should be given by either party; that the price to be paid should be 1s. 10d. per ton of coal cut, and should rise and fall with the price in other collieries in the district, but that the price was not to affect the month's notice; that A B should serve Messrs. M exclusively, and should not work for any other person during the said service and until the expiration of the month's notice; that if trade was slack or the works stopped by accident, Messrs. M were to be compelled to provide him with work or to pay him reasonable wages; and that the evidence on the part of A B was that he was not bound to any hours of working, nor to cut any quantity of coal; that the employment in the colliery depended on the demand for coal, and that there was not always full employment, and that no allowance was made for loss of time when trade was slack or the works stopped by accident:—Held, that there was no evidence from which the Justice might infer an obligation on the part of Messrs. M to employ and of A B to serve personally, and that he therefore had jurisdiction, and that the Court would not interfere with his decision. *Ibid*.

Held, also, that this being a warrant of commitment purporting to be founded on a preceding conviction, it was good on its face, notwithstanding that it did not state that the evidence was given on oath or in the presence of the prisoner. *Ibid*.

The statute 16 & 17 Vict. c. 30. s. 1. gives jurisdiction to two Justices of the Peace sitting at a place where petty sessions are usually held, to convict persons accused of certain assaults:—Held, that a warrant of commitment in the general form provided by the 11 & 12 Vict. c. 43, Schedule (P), is sufficient, without any allegation that the convicting Justices were sitting at a place where petty sessions are usually held. *Ex parte Allison*, 24 Law J. Rep. (N.S.) M.C. 73; 10 Exch. Rep. 561.

The plaintiff, who had been dismissed from the office of town clerk of L, and had been ordered by the town council to deliver up all books, &c. in his custody, was, by a warrant, dated the 8th of October, ordered to be committed to gaol, under the 5 & 6 Will. 4. c. 76. s. 60, for neglecting to obey that order. This warrant was executed on a Sunday, and the plaintiff conveyed to gaol under it on the 17th of October. This was done in pursuance of an opinion given by S, who had been since appointed town clerk, that such an arrest was legal, and S, after being expressly informed of the arrest, approved of it. On the 24th of October a second warrant, which was obtained by S, as attorney of the town council, for the purpose of detaining the plaintiff, notwithstanding the illegal arrest, and was dated the 8th of October, and made by the same Justices upon the application of the town council, was lodged at the gaol. The plaintiff was, on the 2nd of November, ordered by this Court on *habeas corpus* to be discharged from custody under these two warrants, without being actually brought up before the Court. Prior to the order for the plaintiff's discharge being received by the gaoler, viz., on the 1st of November, a third warrant, made by the same Justices, upon the application of the town council, acting as paving commissioners under a local act, and procured for the purpose of remedying a defect in the second warrant, was lodged with the gaoler, who, conse-

quently, refused to discharge the plaintiff under the order of the Court. This warrant was applied and pressed for by S, notwithstanding the *habeas corpus* had issued. On the 4th of November a warrant, founded on a *ca. sa.* issued, without collusion, at the suit of a creditor of the plaintiff, was lodged with the gaoler. A rule for the plaintiff's discharge from custody being again obtained, was discharged, so far as related to the custody under the *ca. sa.* On the 2nd of March, the plaintiff, having settled with his detaining creditor, was discharged from gaol, and on that day was again arrested after proceeding a few yards from the prison gate, under a fourth warrant, and was detained in gaol under it until the 8th of March, when he was discharged by Judge's order. This fourth warrant recited that the plaintiff had been convicted on the complaint of T B, who was authorized by the town council for that purpose, for that he having been dismissed from the office of town clerk had wilfully neglected to deliver books, &c., pursuant to an order of the town council, and that it had been adjudged that he should be committed to gaol for his said offence. The warrant then directed the plaintiff to be kept in custody accordingly. S, as attorney for the town council, applied for and obtained the fourth warrant, and gave express directions to have the plaintiff arrested under it upon his discharge from the *ca. sa.*:—Held, first, that the imprisonment under the third warrant was not a continuance of the imprisonment under the first two warrants, and therefore that section 133. of the 5 & 6 Will. 4. c. 76. barred an action in respect of the imprisonment from the 16th of October to the 2nd of November, unless brought within six calendar months of the latter day; secondly, that the same section was a like bar to an action in respect of the time between the 3rd of November and the 2nd of March, as the defendants (the town council) must, under the circumstances, be considered as abandoning the third warrant after the plaintiff's discharge, and were, therefore, not responsible for his imprisonment under it; thirdly, that the fourth warrant was bad as it did not shew that the Justices had jurisdiction to grant it under the 5 & 6 Will. 4. c. 76. s. 60, and did not follow the form in the Schedule (P. 1.) to the 11 & 12 Vict. c. 43; fourthly, that the acts of the town council were not such as rendered them liable to an action in respect of the plaintiff's imprisonment under the fourth warrant, but that S, their town clerk, who had taken an active part in procuring all the warrants, and getting them executed so as to keep the plaintiff constantly in prison, was liable. *Eggington v. the Mayor, &c. of Lichfield*, 24 Law J. Rep. (n.s.) Q.B. 360.

Trespass for pulling down a cottage. Plea: not guilty, by statute. The plaintiff was convicted by three Justices, under statute 5 & 6 Will. 4. c. 50, for an encroachment on a highway. The defendant, who was surveyor of the highways, pulled down the plaintiff's cottage, which was what the conviction referred to, but which was not in fact an encroachment within the meaning of the Act. No warrant issued directing the defendant to do the act:—Held, that statute 5 & 6 Will. 4. c. 50. s. 69, requires the surveyor to execute a conviction under that Act, by pulling down the encroachment, though there is no warrant; and that consequently the conviction, though not itself correct, was a defence to this

action, as defendant was shewn to be in the position of a person bound to execute the judgment of a tribunal of competent jurisdiction. *Keame v. Reynolds*, 2 E. & B. 748.

JUVENILE OFFENDERS.

[See stats. 13 & 14 Vict. c. 37. and 17 & 18 Vict. c. 36.]

LABOURER.

[See MASTER AND SERVANT.]

LANCASTER.

[Courts of, see stats. 15 & 16 Vict. c. 76; 17 & 18 Vict. cc. 82, 125; and 18 & 19 Vict. cc. 15, 45, 58.]

LANDLORD AND TENANT.

[Recovery of possession, see *Edwards v. Hodges*, title JUSTICE OF THE PEACE, (B) (a).]

(A) OF THE TENANCY.

- (a) *From Year to Year.*
- (b) *At Will.*
- (c) *Determination.*
 - (1) *Surrender.*
 - (2) *Notice to quit.*
 - (3) *Forfeiture, for insufficient Distress.*

(B) CONTRACTS BETWEEN.

- (a) *For Repairs.*
- (b) *Relating to Husbandry.*
- (c) *For quiet Enjoyment.*
- (d) *To give up Possession.*

(C) OF THE RENT.

- (a) *Contracts.*
- (b) *Payment.*
- (c) *Apportionment.*
- (d) *Arrears.*
- (e) *Action for.*

(D) TENANT'S POWER TO DISPUTE LANDLORD'S TITLE.

(E) ATTORNMENT.

(A) OF THE TENANCY.

- (a) *From Year to Year.*

An agreement, dated the 19th of April 1841, by which part of a dwelling-house was let, stipulated for "the yearly rent of 42l. payable quarterly, the first payment of 7l. 13s. 6d. to be made on the 24th of June next, being the proportion of rent from the 19th of April 1841 to that date." And, further, that the tenant should hold and enjoy the possession "until one of the parties should give to the other six calendar months' notice in writing to quit at the expiration of any such notice":—Held, that a yearly tenancy was not created, and that a six months' notice to quit, expiring on the 5th of December, was a sufficient notice to put an end to the tenancy.

Doe d. King v. Grafton, 21 Law J. Rep. (n.s.) Q.B. 276; 18 Q.B. Rep. 496.

M H and W R, by indenture of February 1805, granted and leased certain premises unto and to the use of J H, his heirs, executors, administrators and assigns for ever, yielding and paying therefor a yearly rent. Proviso for re-entry on non-payment of rent. Covenant by J H for payment of the rent, for repairs, and for insurance:—Held, that, in the absence of proof that the premises were at the date of the instrument in the occupation of tenants, and the expressed intention of the parties precluding the presumption of livery of seisin, the instrument could not operate as a conveyance of the fee subject to a rent-charge, but only to create a tenancy from year to year. *Doe d. Robertson v. Gardener*, 21 Law J. Rep. (n.s.) C.P. 222; 12 Com. B. Rep. 319.

Semble—that if it had been necessary to presume livery of seisin in order to account for the possession under the instrument, the Court would have made that presumption. *Ibid*.

Under an agreement to let for three years, though it is void as a lease for three years by the statute 8 & 9 Vict. c. 106. s. 3, the tenant holds from year to year, subject to the terms of the agreement, and is bound to quit at the expiration of the three years without a previous notice to quit. *Tress v. Savage*, 23 Law J. Rep. (n.s.) Q.B. 339; 4 E. & B. 36.

Where a party became tenant, for a period exceeding three years, under a lease, void at law as not being made by deed under the 8 & 9 Vict. c. 106. s. 3, and the receipts given to him for rent, which he had paid for two years, stated the rent to be payable in advance:—Held, that he became a yearly tenant, on the terms of paying the rent in advance. *Lee v. Smith*, 23 Law J. Rep. (n.s.) Exch. 198; 9 Exch. Rep. 662.

A tenant holding over after the expiration of a lease for years may be taken to hold upon any of the terms of such former lease which are consistent with a yearly tenancy. Whether he does hold on any of such terms or not is a question for the jury on the facts proved. *Hyatt v. Griffiths*, 17 Q.B. Rep. 505.

A covenant in a lease for years ending at *Michaelmas*, that the tenant shall and may retain and sow forty acres of wheat on the arable land demised (consisting of 213 acres) at the seed time next after the end of the term, and have the standing thereof till the harvest then next following, rent free, with the use of premises for the threshing, &c. till a day named, is a term which may be made incident to a tenancy from year to year. *Ibid*.

(b) *At Will*.

Where a party having created a tenancy at will afterwards becomes insolvent, the vesting order and notice thereof to the tenant at will operate as a determination of the tenancy. *Doe d. Davies v. Thomas*, 20 Law J. Rep. (n.s.) Exch. 367; 6 Exch. Rep. 854.

A tenant at will cannot put an end to his tenancy, even by an assignment, without giving notice to his landlord. *Pinkhorn v. Souster, or Sonster*, 22 Law J. Rep. (n.s.) Exch. 266; 8 Exch. Rep. 763.

J W H, being tenant of copyhold premises, granted a lease for twenty-one years, from Christmas 1823, renewable for another term of twenty-one years. In

1838 he died, and H H, L H, and R H were admitted tenants by the lord as devisees. Previous to 1847, L H married A Y B, and in January of that year H H, R H, A Y B, and L, his wife, granted a lease of the premises to J M for twenty-one years, from Christmas, 1844, with covenant for further renewal, J M having previously purchased the interest of the preceding lessee. On the 24th of May 1847 J M leased to Quested; who, on the 29th of July in the same year, executed a mortgage of the premises to the defendant. By this deed Quested granted and demised the residue of his term except one day to the defendant, with a proviso for redemption on payment of principal and interest at certain periods, and covenants for payment of the principal and interest. The deed also provided that Quested should hold the premises as tenant at will of the defendant at a yearly rent, for which rent the defendant might distrain, and that the rent thereby reserved should go in satisfaction of the principal and interest, and the residue (if any) to Quested. Quested subsequently assigned to E F without notice to the defendant, and the rent above reserved being in arrear, the defendant distrained on the premises in pursuance of the above power. The warrant was to distrain the goods of Quested. The plaintiff's goods, being on the premises, were taken:—Held, in an action of trespass for this seizure, that the above deed created a tenancy at will, which was not put an end to by the assignment to E F without notice to the defendant, and that the distress was regular. *Ibid*.

Held, also, that a sufficient *prima facie* title was made without proof of the death of J W H. *Ibid*.

(c) *Determination*.

(1) *Surrender*.

The first count of the declaration averred that the plaintiffs C and S, being tenants to H of certain chambers, at a certain rent, payable quarterly, underlet them to the defendant, who undertook to pay the said rent to H, and agreed that if he did not do so, he would indemnify the plaintiffs in respect thereof, and that the defendant did not pay the rent to H, nor indemnify the plaintiffs:—Held, that whether the contract meant that the defendant was to pay to H the rent due from the plaintiffs to H, or to pay the rent under the demise from the plaintiffs, the promise of the defendant to pay did not extend beyond the term of his own tenancy. Pleas—Sixth, surrender by operation of law; seventh, that the plaintiff C, on behalf of himself and the plaintiff S, agreed with the defendant that he should give up possession of the chambers, and that he did give up possession before the rent became payable; eighth, that C, with the sanction and authority of his co-plaintiff evicted the defendant; eleventh, (to counts for use and occupation, and on an account stated,) discharge of the defendant under the Insolvent Debtors Act:—Held, that these pleas were good. Replication to the sixth plea, a special traverse, alleging that the defendant quitted possession of his own wrong; and that, according to the terms of an agreement, the plaintiffs recovered possession of the chambers, to the intent that they might let them for the benefit of the defendant, and not otherwise, *absque hoc* that they were duly surrendered:—Held bad, on demurrer, because the inducement was inconsistent with the traverse. Replication to the

seventh plea, traversing the agreement by the plaintiff C on behalf of himself and S, and his performance of the agreement; and replication to the eighth plea, traversing the eviction by C, with the sanction and authority of S:—Held bad, on general demurrer, as both being too large, from putting in issue the fact that C had authority from B. Replication to the eleventh plea, as to the third count, that the cause of action accrued after the order and adjudication in that plea mentioned:—Held bad, as amounting to an argumentative denial of the allegation in the plea, that the order and adjudication were made after the causes of action accrued. *Smith, or Coles, v. Lovell*, 20 Law J. Rep. (N.S.) C.P. 37; 10 Com. B. Rep. 6; 1 L. M. & P. P.C. 794.

In an action of debt for rent on a demise for seven years the defendant pleaded, that whilst the demise was in force, and before the accrual of the rent, it was agreed between him and the plaintiff that the plaintiff should make certain alterations, and that in consideration thereof he the defendant should relinquish his interest under the demise, and take a new lease for seven years; and until such new lease should be tendered, that he should remain tenant from year to year; that the plaintiff did make the alterations, and that he the defendant, in pursuance of the agreement, relinquished his interest under the lease, and entered upon the premises under the agreement; and that by means of the said premises, he the defendant was tenant from year to year, and that his title under the lease was surrendered. Issue was taken on this plea, and at the trial no written agreement was proved, but the jury found a verdict for the defendant:—Held, that the agreement was an entire agreement, and the part relative to a lease for seven years being required to be in writing under the Statute of Frauds, no part of it could be proved by parol. *Forquet v. Moore*, 22 Law J. Rep. (N.S.) Exch. 35; 7 Exch. Rep. 870.

A new letting to an old tenant, commencing immediately, operates as a surrender of the original term, because the lessor could have no power to create the new term if the original term had subsisted; and, for a like reason, a new letting to a third party, with the assent of the original tenant, has the same operation. *M'Donnell v. Pope*, 9 Hare, 705.

The above principle forms the ground of the decision in *Thomas v. Cook* (2 B. & Ad. 119), and the authority of that case ought not to be carried further than the reason on which it rests. *Ibid*.

(2) Notice to quit.

An agreement, dated the 19th of April 1841, by which part of a dwelling-house was let, stipulated for "the yearly rent of 42*l.* payable quarterly, the first payment of 7*l.* 13*s.* 6*d.* to be made on the 24th of June next, being the proportion of rent from the 19th of April 1841 to that date." And, further, that the tenant should hold and enjoy the possession "until one of the parties should give to the other six calendar months' notice in writing to quit at the expiration of any such notice":—Held, that a yearly tenancy was not created, and that a six months' notice to quit, expiring on the 5th of December, was a sufficient notice to put an end to the tenancy. *Doe d. King v. Grafton*, 21 Law J. Rep. (N.S.) Q.B. 276.

Though payment and acceptance of rent accruing

after the expiration of a notice to quit amounts to a waiver of the notice, a demand of such rent does not necessarily operate as a waiver; and it is a question for the jury, and not for the Court, whether, under the circumstances of the case, the notice has been waived. *Blyth v. Dennett*, 22 Law J. Rep. (N.S.) C.P. 79; 13 Com. B. Rep. 178.

Under an agreement to let for three years, though it is void as a lease for three years by the statute 8 & 9 Vict. c. 106. s. 3, the tenant holds from year to year, subject to the terms of the agreement, and is bound to quit at the expiration of the three years without a previous notice to quit. *Tress v. Savage*, 23 Law J. Rep. (N.S.) Q.B. 339; 4 E. & B. 36.

The defendant entered as tenant, under a written agreement, on the 7th of May 1850, but paid no rent:—Held, that a six months' notice to quit, expiring on the 7th of May 1851, was a good notice. *Doe d. Cornwall v. Matthews*, 11 Com. B. Rep. 675.

(3) Forfeiture, for insufficient Distress.

[See 15 & 16 Vict. c. 76. s. 210.]

On a motion for judgment under section 210. of the Common Law Procedure Act, it is no objection to an affidavit that it alleges that more than half a year's rent is due, and that no sufficient distress is to be found on the premises countervailing the arrears then due. *Doe d. Powell v. Roe* overruled. *Cross v. Jordan*, 22 Law J. Rep. (N.S.) Exch. 70; 8 Exch. Rep. 149.

(B) CONTRACTS BETWEEN.

(a) For Repairs.

An agreement, under which the defendants became tenants to the plaintiff, stipulated that the defendants would maintain and keep the demised premises in good tenantable repair and condition (the same being first put into good tenantable repair and condition by the plaintiff), and in such repair and condition deliver up the same at the expiration of the tenancy:—Held, in an action for a breach of the agreement by the defendants in not keeping and delivering up the premises in good repair, that the plaintiff's obligation to put in repair was a condition precedent and not divisible; and, therefore, that performance to the extent only of putting a part of the premises in repair, did not entitle the plaintiff to recover for a breach by the defendants as to that part. *Neale v. Ratcliffe*, 20 Law J. Rep. (N.S.) Q.B. 130; 15 Q.B. Rep. 916.

To a declaration on a covenant to repair, alleging that the defendant, during the term, to wit, on &c., and thence hitherto, permitted the premises to be out of repair, the defendant pleaded that, during the said term, the defendant did not permit the said premises to be out of repair:—Held, that the plea was too large a traverse, as it put the whole time in issue. *Aldis v. Mason*, 20 Law J. Rep. (N.S.) C.P. 193; 11 Com. B. Rep. 132.

Covenant by the administratrix of the lessor, R L M, and the assignee of the lessee (W E). The declaration was upon an indenture containing a covenant by W E that he would, at his own costs, repair and put into good repair all the messuages, &c., the said W E having been allowed by the said R L M 400*l.* 17*s.* 8*d.*, being the valuation of the then dilapidations, exclusive of naked rough timber (but not on the stem), which was to be allowed by the said R L M

on some part of the demised premises, and that the said W E, his executors, administrators and assigns, would, at their like costs, from time to time, and at all times during the remainder of the term, repair and keep in good repair the said messuages, &c., being allowed timber as aforesaid, and bricks, tiles and stones on the said premises, or within five miles thereof, the stones to be dug, and, with the timber, &c., to be carried at the expense of the said W E, his executors, administrators and assigns, and would deliver up the premises, so repaired, at the expiration of the said term, and also would, during the said term, in every instance not in the indenture specified, use and cultivate the premises in a good husbandlike manner, and according to the custom of the country. There were also specific covenants as to the mode of cultivation. Covenant by R L M to find and provide timber as aforesaid, to enable the said W E, his executors, administrators and assigns, to repair, and put in repair the said premises, and after they had been put into good repair by and at the expense of the said W E, his executors or administrators, the said R L M would, during the remainder of the term, from time to time, within one month after request made, such request being made at a seasonable time of the year, find and provide sufficient rough timber as aforesaid, and also bricks, &c., for repairing the premises. The declaration then alleged that the defendant became assignee of the term, and so continued until the expiration thereof, and that, although the said R L M was ready and willing at all times to find for the said W E, and since the assignment, &c. the defendant and the said W E, sufficient naked rough timber and rough timber not on the stem, to enable the said W E and the defendant to repair, &c., of which notice, &c., and although the said W E did not, before the said assignment, repair or put into good repair the said premises, and although the said R L M performed all things on his part, yet the defendant did not, at any time after the said assignment, repair or put into good repair the said premises, and did not yield them up well and sufficiently repaired, and that the defendant from the time of the assignment until the expiration of the term, in all instances not in the said indenture particularly specified, used and cultivated the premises in a bad, unhusbandlike manner, and not according to the custom of the country. Third plea, as to so much of the second breach as charged the defendant with not repairing, and for leaving premises out of repair, that the said R L M was after the assignment to the defendant, and more than one month before any breach by the defendant, and at a reasonable time of the year, requested by the defendant to provide sufficient timber, and also bricks, &c. on the premises, or within five miles thereof, for repairing, and that the defendant was ready to fetch, carry, and dig them at his own expense, yet the said R L M would not provide the said timber, bricks, &c. Fourth plea, to so much of the second breach as charged the defendant with permitting the premises to be out of repair, and with leaving them out of repair, that the said R L M did not at any time from the assignment until the expiration of the term provide sufficient rough timber (not on the stem) to enable the defendant to put the premises into repair. The defendant then demurred to so much of the second breach as was not pleaded to by the third and fourth pleas, on the ground that

it was not shewn that naked rough timber (not on the stem) was found by the said R L M, and that the covenant to put into repair was personal to W E and not binding on the defendant, and that it was consistent with the breach that the premises had been put into repair by some one to whom they came by assignment before they came to the defendant. The defendant also demurred to the last breach of covenant, on the ground that it was uncertain in not pointing out what the custom of the country was, and how far it applied to the premises, and in not shewing the particular acts which constituted the breach of good husbandry, and because it was not averred that the said R L M during the said term provided rough timber or bricks, &c., or that the premises were ever put into such a state of repair as was provided by the indenture. The plaintiff demurred to the third and fourth pleas on the ground that readiness and willingness on the part of R L M to find the timber, and notice thereof, formed the only condition precedent on his part to be performed:—Held, first, that the covenants to repair and to yield up the premises in repair ran with the land, and were continuing covenants to the end of the term; secondly, that readiness and willingness to find rough timber was a sufficient performance of the condition precedent relating thereto; thirdly, that the allegation of the breach for non-cultivation, according to the custom of the country, was sufficiently certain, as it followed the words of the covenant, and that the separate covenants for specific acts of cultivation were not irreconcilable with the custom of the country; and, fourthly, that the third plea alleging that materials were not found by the lessor was bad, as the breach to which it was pleaded was in respect of not putting the premises in repair, and the condition for providing the materials mentioned in the plea applied only to the future repairs, after the premises had been put in repair. *Martyn v. Chae*, 22 Law J. Rep. (N.S.) Q.B. 147.

As between the landlord and tenant of premises let from year to year there is no obligation upon the former to do substantial repairs, in the absence of an express stipulation to that effect. Therefore, a declaration, which stated that the plaintiff had become tenant from year to year to the defendant of a house, that during the tenancy a certain chimney, without the default of the plaintiff, became insecure and out of repair, and that the defendant, after notice, refused to repair it, whereby it fell during the tenancy and injured the house, was held not to be maintainable. *Gott v. Gandy*, 23 Law J. Rep. (N.S.) Q.B. 1; 2 E. & B. 845.

A declaration in covenant stated that G, who was lessee of premises for a term of ninety-nine years expiring on the 25th of December 1849, during the term underleased to V and S for twenty-five years and a quarter, from the 25th of December 1823; that, by this underlease, V and S jointly and severally covenanted with G, his heirs, executors, administrators and assigns, that they, their executors, administrators and assigns, would, during the term granted to them, repair the premises, and at the end of the term deliver them up in repair to G, his heirs, &c.; that V and S entered, and that, during the underlease, G granted his reversion to S (one of the underlessees) and the plaintiffs, whereupon the term in the underlease was, as to one undivided sixth part,

merged in the reversion, and S and the plaintiffs became, as joint tenants, possessed of the reversion of three undivided sixth parts of the premises, and the plaintiffs became, as joint tenants, possessed of the reversion of two other undivided sixth parts of the premises; that V afterwards assigned his interest in the underlease to S, and that thereupon the term granted by the underlease, as to one undivided sixth part, merged in the reversion in the three sixth parts whereof S and the plaintiff were possessed, and the plaintiffs became, as joint tenants, possessed of the reversion of two of the last-mentioned three sixth parts; that S died before the determination of the underlease; and alleged, as a breach, that, after S's death, V had neglected to repair, and to leave the premises in repair. The defendant paid money into court as to all the causes of action, except not leaving in repair at the end of the term; and as to such not leaving in repair at the end of the term, pleaded, that the premises were demised by L for the term of ninety-nine years in the declaration mentioned to persons who assigned to G, with covenants to keep and leave in repair; that after G had demised to V and S, and before the assignment by S to V, V and S by deed demised the premises to T for twenty-three years from the 25th of June 1825, with covenants by T to keep and leave in repair. The plea then stated the death of T, and the devolution of his estate to M E T, his widow and executrix; and that L, the person then entitled to the reversion, after the deaths of S and T, and during the continuance of all the terms, brought an action of covenant against the present plaintiffs for breaches in not repairing; that an agreement in writing for settling the action was made, on the 12th of July 1844, between L, the plaintiffs, M E T, and the son of T, but without the privity or consent of V; whereby M E T agreed to pay L 300*l.* and the costs of the action, and all rent up to the 24th of June then last, and the plaintiffs, as trustees of the property of G, agreed to pay L 200*l.*; and M E T agreed to deliver to the plaintiffs possession of the property; and the plaintiffs agreed to deliver up to F (a depositary) the indenture of lease for the benefit of L, but to be produced from time to time for the purpose of supporting any claim by the plaintiffs upon V, or any other person, for the recovery of any rent due or to become due to the plaintiffs, or contribution, &c. in respect of any monies to be paid by the plaintiffs under that agreement, in respect of the liability of the plaintiffs under the lease, or for any damages under any covenants contained in any underlease of the premises; and that when all such claims should have been satisfied, or in any manner put an end to, the said F should deliver the lease to L, and also that M E T should, at the request of L or the person entitled to the reversion of the premises, execute a surrender of the lease; and the plaintiffs thereby agreed to concur in surrendering or assigning their interest in the said lease as L or the person entitled to the reversion might require; and L also agreed to accept the above sums, when paid, in full satisfaction of all claims, &c. whatsoever, under or by virtue of the said lease, for rent, dilapidations, or otherwise. The plea then stated, that the action was put an end to on the terms in the agreement specified; and that afterwards, in pursuance of the agreement, and at the instance and request, and with the privity, consent and procure-

ment of the plaintiffs, but without the privity or consent of V, and before the terms, or either of them, had expired by effluxion of time, the possession of the premises was given up by M E T to L, who thereupon, without the privity or consent of V, entered into and kept possession thereof until, and at and after the expiration of that term by effluxion of time; and that by means of the premises, after the possession had been so given up, V had been prevented from entering into the said premises and repairing the same, and from yielding up the same well repaired, and had been absolutely and necessarily hindered from keeping, and that it became impossible for him to keep, the covenant in that behalf as he might and would otherwise have done.—Held, on demurrer to the plea, that the prevention mentioned in the plea was stated only as a conclusion of law from the facts before alleged. That although V might be unable to perform his covenant during the twenty-three years for which the underlease to T had been granted, yet that he might have entered at the termination of that underlease for the residue of the term granted to him and S; and that there was nothing, therefore, to prevent him from then repairing according to his covenant. That the agreement, coupled with the giving up possession, could not, and was not intended by the parties to operate as a surrender of the interest of the plaintiffs to L. *Badeley v. Vigurs*, 23 Law J. Rep. (N.S.) Q.B. 377; 4 E. & B. 71.

Held, also, that the declaration was good, as the whole of the reversion which remained was vested in the plaintiffs alone, in respect of which they were entitled to sue on the covenant to repair. That under the conveyance by G to S and the plaintiffs, one-third of the reversion was at once destroyed by coalescing with half the interest under the lease which was in S; and that, consequently, S never took as reversioner; and there never was any suspension of the right of action by reason of S being a party to sue and be sued. That even if S took and remained interested in one-sixth of the reversion until that one-sixth was destroyed by the assignment to him by V, still the right of action for not leaving in repair, which arose only at the termination of the lease, never accrued to S, and therefore was never suspended; the doctrine of a right of action being gone by suspension applying only to the case where there has once been a subsisting right of action, and not to a case where the objection is, that if it had accrued earlier, it could not have been enforced from the fact of the same person then being the party both to sue and be sued. That the plaintiffs might recover on the privity of contract, transferred by the 32 Hen. 8. c. 34, although there were an apportionment of the covenant to repair; but that, in the present case, there was no such apportionment, as the plaintiffs had the whole existing reversion, and were injured if the whole of the premises were not kept in repair. That the plaintiffs might recover on the privity of contract, transferred by the statute of Hen. 8, where the entire interest in the covenant had not passed to them. *Ibid.*

Covenant by lessee against an assignee for damages occasioned by the non-repair of premises by the assignee whilst he was such, pursuant to his covenant. It appeared that in 1843 the plaintiff assigned the lease to the defendant; that in October 1851 the

defendant assigned to one T; that in June 1852 T assigned the lease to H, who, in August 1852, surrendered it to the ground landlord. Evidence was given for the plaintiff, that when H held the lease the premises were out of repair, and T stated that he put the premises in no better state than when he received them from the defendant. No further evidence was given, and the defendant was not called as a witness:—Held, that the Judge was right in directing the jury to give substantial damages; and that the jury were warranted in presuming that the dilapidations took place during the time the defendant held the lease. *Smith v. Peat*, 23 Law J. Rep. (N.S.) Exch. 84; 9 Exch. Rep. 161.

The defendant became the lessee of premises, which at the time of taking them were old and in bad repair, under a demise containing a covenant to repair. The premises were destroyed by fire. The cost of reinstating them would amount to 1,635*l.*, but when so reinstated they would be more valuable by 600*l.* than they were at the time of the fire:—Held, that the defendant was liable to pay the sum of 1,035*l.* only, as damages for the non-repair, that being the amount of the plaintiffs' loss. *Yates v. Dunster*, 24 Law J. Rep. (N.S.) Exch. 226; 11 Exch. Rep. 15.

(b) *Relating to Husbandry.*

A declaration stated that the defendant had become and was tenant to the plaintiff of a farm upon the following, among other stipulations:—that the defendant should not sell any hay, straw, &c. grown upon the said farm without the licence of the landlord under a specified penalty; and that the said penalty so made payable should be considered as additional rent, and recoverable by distress or otherwise as rent; and that in consideration thereof the defendant promised the plaintiff that he would pay all such penalties as he might be liable to pay according to the said stipulations for or in respect of any hay, straw, &c. which should be grown on the said farm, and sold by the defendant without the licence of the landlord. Averment, that the defendant without the licence of the plaintiff sold divers quantities of straw grown on the said farm during the last year of the said tenancy, whereby the defendant became liable to pay the said penalty. Breach, that he had not paid. Plea, that the said straw so alleged to have been sold was sold by the defendant after the determination of the said tenancy, and not otherwise. On special demurrer to the plea:—Held (by Lord Campbell, C.J. and Patteson, J., dissentiente Erle, J.) that the plea raised an immaterial issue, and was no answer to the action. *Massey v. Goodall*, 20 Law J. Rep. (N.S.) Q.B. 526; 17 Q.B. Rep. 510.

It is not an unreasonable custom that a tenant who is bound to use and cultivate his farm according to the rules of good husbandry and the custom of the country, should be entitled on quitting the farm to charge his landlord with a certain portion of the expense of the necessary drainage of the farm done without his landlord's consent or knowledge. *Mousley v. Ludlam*, 21 Law J. Rep. (N.S.) Q.B. 64.

A testator, being the owner of B house and land and of two cottages, and the lessee of Little B farm from Miss M, and of certain crown lands, for a term of fourteen years expiring at Michaelmas 1849, and

being desirous of selling B house and land, entered into a negotiation with the plaintiff for the sale thereof, and let to the plaintiff for one year B house and land, from the 29th of September 1846, by an agreement, in which the testator agreed that if he should be able to obtain a further lease from the Crown for fourteen years he would grant the plaintiff the same for thirteen years. By a subsequent agreement, the plaintiff, after stating that he was desirous of securing the occupation of Little B farm and lands, adjoining the B house and lands, and held by the testator of Miss M and of the Crown, agreed to take the said lands belonging to Miss M and the Crown, as under-tenant to the testator, "subject to the same rents, covenants and obligations in all respects as provided for in the leases by which Mr. C (the testator) holds or shall hold the same." By the terms of the Crown lease the custom of the country, which was, that the landlord should pay to the out-going tenant for fallows, half fallows, &c., was excluded. The plaintiff, on entering upon the Crown lands, paid the testator for fallows, half fallows, &c. The Crown lease, at the request of the plaintiff, not having been renewed by the testator, but having expired by effluxion of time at Michaelmas, 1849:—Held, that the plaintiff, as out-going tenant, was entitled to be paid by the executors for fallows, half fallows, &c., the custom of the country to that effect not having been excluded by the agreements between the parties. *Fariell v. Gaskoin*, 21 Law J. Rep. (N.S.) Exch. 85; 7 Exch. Rep. 273.

To a declaration in trespass for assault, the defendants pleaded a justification in defence of the possession of a dwelling-house. The plaintiff new assigned that the trespasses were committed, not in a dwelling-house, but on a certain bridge and in certain yards and fields, parcel of a farm. The plea to the new assignment stated that W was possessed of the dwelling-house, and also of the bridge, yards, and fields, which belonged and were adjacent to the dwelling-house, and then justified the trespasses in defence of the possession of the house, bridge, yards, and fields, and then averred that the defendants removed the plaintiff from the bridge, yards and fields, and took him by the nearest way to a public highway near to the dwelling-house, bridge, yards, and fields. The replication alleged the seisin of W in the farm, the demise of it by him to J as tenant from year to year, the entry of J, an assignment by J to B, to secure a debt, of the present and future growing crops on the farm, with a power to B, in default of payment, to take possession. It then alleged a default by J; that W, at the time of the default, was in possession of the farm, on which there then were growing crops which belonged to J after the date of the assignment; that the plaintiff, as servant of B, took possession, and continued in possession of the growing crops for a reasonable time; and that before a reasonable time had elapsed, the defendants removed him, and dragged him from the dwelling-house, across the bridge, yards, and fields, to the highway:—Held, that the plea was good, as it confessed and justified the trespasses committed on the bridge, yards, and fields, which were all that were alleged in the new assignment; and that the allegation in the plea, admitting that the defendant dragged the plaintiff from the bridge

to the highway might be treated as surplusage, as it was not made a ground of complaint in the new assignment. *Hayling v. Okey*, 22 Law J. Rep. (N.S.) Exch. 139; 8 Exch. Rep. 531.

Held, further, that the replication was bad, as it did not shew any right in B to place a person on the premises to retain possession of the growing crops after J's tenancy had come to an end, and the landlord had regained possession; and that if B's right to do so depended upon the mode of the termination of the tenancy or the nature or condition of the crops, the replication ought to have set forth the circumstances which abridged the *prima facie* rights of the owner of the farm to remove all other persons from it. *Ibid*.

A usage for arbitrators appointed to determine, as between outgoing and incoming tenants of a farm, the value of the away-going crop and the deductions for want of repairs of the farm buildings and fences, to make their award, on inspection of the crops and premises, without notice to the parties and without evidence, may be good; but no usage can justify the arbitrators in hearing one party and his witnesses only, in the absence of and without notice to the other party. *Oswald v. Grey*, 24 Law J. Rep. (N.S.) Q.B. 69.

In an action by an outgoing tenant against his landlord for the value of hay and straw left on the premises, it appeared that the plaintiff held, subject to the terms of a draft lease, by which it was agreed, first, that the tenant was to consume the hay and straw on the premises, and not to sell it except as afterwards mentioned; secondly, that the tenant might sell his hay and wheat-straw (except the last year's) provided for each load he brought back two loads of dung or equivalent manure on the lands; and, thirdly, that all the hay and straw not used for fodder arising from the last year's crop should be left on the determination of the tenancy, the tenant being paid at a fair valuation. It appeared in evidence, that the words "fair valuation" had been substituted in the draft for the words "consuming price." An umpire who had valued the hay and straw, neither at a market price nor at a consuming price, but at a fair valuation between outgoing and incoming tenant, was the only witness as to the value. The amount at a "consuming price" had been paid into court, and a verdict was given for the amount of the "fair valuation." It was contended, for the defendant, that, according to the terms of the agreement, a "fair valuation" must mean a "consuming price." The Court held, without considering the effect of the alteration in the draft, that the plaintiff was entitled to keep his verdict, it being a matter of evidence what is a "fair valuation," and the only evidence on the subject being that of the umpire. *Cumberland v. Glamis*, 24 Law J. Rep. (N.S.) C.P. 46; 15 Com. B. Rep. 348.

Quære—whether this Court could take into consideration the alteration in the terms of the draft lease. *Ibid*.

(c) For Quiet Enjoyment.

Upon a parol demise, the law will imply an agreement for quiet enjoyment, but not for good title. Where, therefore, a tenant under a written demise, containing no agreement for quiet enjoyment or for good title, having been distrained on by the

grantee of an annuity charged upon the land prior to the demise, in an action against his landlord alleged in his declaration breaches for quiet enjoyment, and for good title, and obtained a verdict, the Court granted a new title, on payment of costs by the plaintiff, to enable him to amend by striking out of the declaration the allegation as to covenant for title. *Bandy v. Cartwright*, 22 Law J. Rep. (N.S.) Exch. 285; 8 Exch. Rep. 913.

(d) To give up Possession.

In a lease for forty-two years, which contained numerous covenants by the lessee, there was a proviso that if the lessee should desire to quit at the end of the first eight years, and should give eighteen months' notice beforehand of such desire, then and in such case, all arrears of rent being paid, and all covenants and agreements on the part of the lessee having been observed and performed, the lease should at the expiration of the eighth year cease, determine, and be utterly void, as if the whole term of forty-two years had run out. The proviso concluded thus: "but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to, for breach of any of the covenants or agreements hereinbefore contained"—Held, that a performance of all the covenants by the lessee was a condition precedent to his right to determine the lease by notice. *Friar v. Grey* (in error), 20 Law J. Rep. (N.S.) Exch. 365; 5 Exch. Rep. 584; affirmed 4 H.L. Cas. 565; s.p. and s.o. 15 Q.B. Rep. 891.

(C) OF THE RENT.

[See title DISTRESS.]

(a) Contracts.

[See *ante*, (A) (c) (1).]

A lessee covenanted to pay a certain rent, subject to a proviso for increasing or reducing it every year according to the average price of wheat in every year (such average to be ascertained from the current year's average, under the Tithe Commutation Act, 6 & 7 Will. 4. c. 71. s. 56). These returns give an annual average computed from the averages of the last seven years, and no averages of the one year only.—Held, nevertheless, that the parties must be taken to be bound by the septennial average published annually as the average for the year. *Kendall v. Baker*, 21 Law J. Rep. (N.S.) C.P. 110; 11 Com. B. Rep. 842.

The defendant entered into a written agreement with the plaintiff to take certain premises at a rent of 20s. a week, payable on demand, and subject to four weeks' notice to quit on either side. During the continuance of this tenancy, a verbal agreement was made between the parties that the rent should be 16s. a week, and the defendant for several weeks paid this reduced amount, and on one occasion submitted to a distress.—Held, that there was no fresh demise, and that the original rent continued to be the rent payable for the premises, and therefore that no proceedings could be taken in the county court under the 122nd section, as the jurisdiction of that Court does not attach where either the rent or the value of the premises exceeds 50l. a year. *Crowley*

v. *Vitty*, 21 Law J. Rep. (N.S.) Exch. 135; 7 Exch. Rep. 319.

Replevin. *Avowry*, that the plaintiff was tenant to the defendant at a rent of 400*l.* a year. The plaintiff being the owner of a farm and lessee of the tithe commutation rent-charge, under the Dean and Chapter of W, at a rent of 60*l.* a year, let the land verbally to the defendant at a rent of 400*l.* a year, tithe free:—Held, that as by the 80th section of the Tithe Commutation Act, 6 & 7 Will. 4. c. 71, in the event of the defendant distraining for the tithe rent, she would be compelled to allow the same to the plaintiff in account, the plaintiff was tenant to the defendant at a rent of 400*l.*, and therefore that the *avowry* was proved. *Meggison v. Bowes*, and *Sells v. Bowes*, 21 Law J. Rep. (N.S.) Exch. 284; 7 Exch. Rep. 685.

A, by a contract in writing, demised to B, at a yearly rent of 145*l.* from the 14th of May 1851, certain premises, including a cottage occupied by C at the rental of 5*l.* a year. B took possession of all the premises included in the demise except the cottage, as C refused either to go out or to attorn to B. Before the day fixed for the first half-yearly payment of rent, A and B verbally agreed that A should receive from C some arrears of rent, and that A should pay B 70*l.* on the 14th of November 1851, and 70*l.* on the 14th of May 1852:—Held, that this was a new demise, and that A was entitled to distrain for the 70*l.* due on the 14th of November. *Watson v. Ward*, 22 Law J. Rep. (N.S.) Exch. 161; 8 Exch. Rep. 335.

(b) Payment.

Where a lessee covenants to pay rent at the time and in the manner reserved in the lease, no place of payment being named, it is no defence to an action upon the covenant that the lessee was upon the land demised on the day the rent became due, with the money ready to pay the lessor, but that the lessor was not there ready to receive it. *Haldane v. Johnson*, 22 Law J. Rep. (N.S.) Exch. 264; 8 Exch. Rep. 689.

(c) Apportionment.

A declaration in account stated that A and B, tenants in common in fee, made a lease with a general covenant on the part of the lessee to pay the rent (without saying to whom) on Michaelmas and Lady-day. A died, and on the following Lady-day the tenant paid half a year's rent to B. It appeared at the trial that B, the plaintiff, the heir-at-law of A, received 12*s.* 6*d.* from B; but he claimed 6*l.* 5*s.* which was the amount of half of the half-year's rent:—Held, that the Judge rightly directed the jury that B had received more than his share of the rent, and that he was accountable to the plaintiff for the excess. That the Statute of Apportionment, 4 Will. 4. c. 22, does not apply as between the executor and heir of a tenant in fee—confirming *Browne v. Amyot*—3 Hare, 173: s.c. 13 Law J. Rep. (N.S.) Chanc. 232. That as the demise purported to be a joint demise by tenants in common, with a general *reddendum* not specifying to whom the rent was payable, the rent followed the reversion, and on the death of A, the reversion was split, and the plaintiff became entitled to his share of the rent. *Beer v. Beer*, 21 Law J. Rep. (N.S.) C.P. 124; 12 Com. B. Rep. 60.

Held, also, on motion in arrest of judgment, that the declaration, which was in the usual form, was good, without any allegation that after a request to account a reasonable time had elapsed before the action was brought. *Ibid.*

(d) Arrears.

A landlord levied a distress for rent, and before he sold the tenant was adjudicated bankrupt, and then the sale took place under the distress. The Commissioner decided that the landlord was only entitled to retain one year's rent; but on appeal,—Held, that the landlord was, under the 42nd section of the 3 & 4 Will. 4. c. 27. (the Statute of Limitations) entitled to six years' rent out of the proceeds of the sale. *Ex parte Bayly, in re Lougher*, 22 Law J. Rep. (N.S.) Bankr. 26.

Interest on arrears of rent and an apportionment, as between landlord and tenant, disallowed. *Peers v. Sneyd*, 17 Beav. 151.

(e) Action for.

J W and the plaintiff, being trustees under the will of W W, in 1847 demised a house to the defendant by indenture for four years ending at Michaelmas 1851. J W died in January 1848. An action for use and occupation having been brought by the plaintiff for rent accrued subsequently to January 1848,—Held, that the plaintiff was entitled to maintain the action, and was not bound to sue as surviving trustee. *Wheatley v. Boyd*, 21 Law J. Rep. (N.S.) Exch. 31; 7 Exch. Rep. 20.

A let a house to B as tenant from year to year, and afterwards granted a lease by deed to C of the house and other property for twenty-one years:—Held, that this transferred the reversion of the house to C, and that A could not recover against B for rent due after the lease. *Harner v. Bean*, 3 Car. & K. 307.

(D) TENANT'S POWER TO DISPUTE LANDLORD'S TITLE.

A lease, granted under a power contained in a settlement, recited the title of the lessor, and shewed that he had only an equitable interest. A right of re-entry for a breach of the covenants in the lease was reserved to the lessor and his assigns:—Held, first, that the lessee was not estopped from disputing the title of the lessor so disclosed in the lease; and, secondly, that "assigns" meant assigns of the settlor; and that although the right of re-entry could not be well reserved to the lessor, yet that the owners of the reversion under the settlement for the time being were entitled to take advantage of it as "assigns." *Greenaway v. Hart*, 23 Law J. Rep. (N.S.) C.P. 115; 14 Com. B. Rep. 340.

(E) ATTORNMENT.

A demise by way of grant for a term of years to commence immediately, made by a person entitled to an estate in tail in remainder expectant upon the determination of a life estate, during the lifetime of the tenant for life, operates as a conveyance of an estate for years carved out of the remainder, and vests the estate immediately in the grantee without entry, by virtue of the statute 4 Ann. c. 16. s. 9, which makes such a conveyance effectual without an actual attornment of the tenant of the particular

estate upon which the remainder is expectant. *Doe d. Agar v. Brown*, 22 Law J. Rep. (N.S.) Q.B. 432; 2 E. & B. 331.

LANDS CLAUSES CONSOLIDATION ACT.

- (A) PURCHASE BY AGREEMENT.
- (B) COMPULSORY POWERS OF PURCHASE.
 - (a) *When they may be exercised.*
 - (b) *What is an Exercise of.*
 - (c) *Taking part of a Manufactory.*
- (C) NOTICE TO TAKE LANDS.
- (D) ASSESSMENT OF COMPENSATION.
 - (a) *By Arbitration.*
 - (1) *In what Cases.*
 - (2) *Appointment of Arbitrator.*
 - (3) *Declaration by Arbitrator and Umpire.*
 - (4) *Form and Validity of the Award.*
 - (5) *Costs of Arbitration.*
 - (6) *Taking up the Award.*
 - (b) *By a Jury.*
 - (1) *Warrant to summon Jury.*
 - (2) *Qualification of Jury.*
 - (c) *For what Compensation may be assessed.*
 - (d) *Costs of the Inquiry.*
- (E) ENTRY ON LANDS.
- (F) APPLICATION OF COMPENSATION.
 - (a) *In Discharge of Incumbrances.*
 - (b) *Purchase of other Lands.*
 - (c) *Where Land is in Lease.*
 - (d) *Payment of small Sums to Parties.*
 - (e) *Investment of Compensation.*
 - (f) *Costs of Deposit and Investment of Compensation.*
- (G) CONVEYANCE OF COPYHOLD LANDS.

(A) PURCHASE BY AGREEMENT.

A railway company, who were promoting in parliament a bill for an extension of their line, which, if made, would pass through the lands of the plaintiff, covenanted with the plaintiff, "that in the event of the proposed bill passing in the then session of parliament, the company should, before they should enter upon any part of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion not exceeding forty-three acres, which the company might, under the powers of their act, require and take for the purposes of their undertaking; and that, in addition to such purchase-money as aforesaid, the company should pay to the plaintiff, before they should enter upon any part of his said land, 7,100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands not exceeding forty-three acres to be taken by them."—Held, that the company were not liable to pay either of these sums unless they entered upon some part of the plaintiff's lands. *Gage v. the Newmarket Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 398.

Held, also, that an absolute covenant to pay these sums to the plaintiff by the company would be *ultra vires* and void. *Ibid.*

(B) COMPULSORY POWERS OF PURCHASE.

(a) *When they may be exercised.*

Where a railway company is called upon by a landowner, over whose land their line is authorized to be made, but to whom no notice requiring his land has been given, to proceed to complete their railway and to purchase the land necessary for the purpose, it is no answer to a rule for a mandamus for that purpose, that the period prescribed for the exercise of the powers of compulsory purchase by the company has nearly expired, unless it is also shewn that it is impossible for them to take the initiatory steps towards purchasing the land in question. *Regina v. the York, Newcastle and Berwick Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 503; 16 Q.B. Rep. 886; s. p. *Regina v. the Lancashire and Yorkshire Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 507, n.

Quere—How far there is a legal obligation upon a railway company who have obtained an act of parliament authorizing them to construct a line of railway over certain lands, to make and complete their railway. *Ibid.*

The 1 Geo. 1. c. 24, by section 1, empowered certain persons to make the river Kennet navigable, and to dig and cut through the banks of the said river, and to erect in the said river, and upon the lands adjoining, weirs, pens, dams, &c., and to do all matters and things necessary for making, maintaining, or improving the said navigation, the said undertakers first giving satisfaction to the owners of such lands, weirs, &c. as should be digged, cut, or removed, or otherwise made use of, as the Commissioners named for the purpose should direct, in case the undertakers should not beforehand have agreed with the proprietors of such lands and hereditaments concerning the same. By section 2. Commissioners were appointed to mediate between the undertakers and the owners of lands and hereditaments intended to be made use of, and to settle satisfaction for such portion of the lands as should be cut, digged, or made use of; and a provision was made for filling up vacancies in the body of the Commissioners. By section 18. if any person should sustain damage in his mills by the owners of the navigation taking away or diverting the water, or any similar injury, the Commissioners should, by a jury impannelled as therein directed, assess such damage and award compensation to the party injured. The proprietors of the navigation obstructed the water flowing to the defendant's mill by the erection of a dam, under the powers of the above act. All the Commissioners appointed under the act had died, and there were no Commissioners in existence by whom compensation could be assessed:—Held, under these circumstances, by *Wightman, J.*, *Erle, J.*, and *Crompton, J.*, that the powers of the proprietors to raise weirs for the necessary purposes of the navigation did not cease by reason of the right of the mill-owner to recover compensation for consequential damages through the Commissioners being lost. Held, by *Lord Campbell, C.J.*, that the power to raise the weir and cut off the water flowing to the defendant's mill, could only be exercised during the continuance of the body of Commissioners, and that upon their extinction, the extraordinary powers of the proprietors ceased. *The Kennet and Avon Canal Navigation Co. v. Witherington*, 21 Law J. Rep. (N.S.) Q.B. 419.

Quere—whether any mode of recovering compensation by action or otherwise existed. *Ibid*.

The 11 & 12 Vict. c. 43. (which did not come into operation until six weeks after its passing) by section 11, provides, that where no time is limited for making complaints or laying informations under acts of parliament, such complaint shall be made and such information laid within six calendar months from the time when the matter of such complaint or information arose:—Held, that an order of two Justices, under the 8 Vict. c. 18, awarding compensation for damage done to a landowner by the construction of a railway, was within the above clause of the 11 & 12 Vict. c. 43. *Regina v. the Leeds and Bradford Rail. Co.*, 21 Law J. Rep. (N.S.) M.C. 193; nom. *In re Edmundson*, 17 Q.B. Rep. 67.

Held, also, that the above section had a retrospective operation and invalidated such an order, where the complaint was not made within six calendar months from the time when the damage complained of occurred, although the order itself was made more than six months before the passing of the 11 & 12 Vict. c. 43. *Ibid*.

By a railway act (with which the Lands Clauses Act was incorporated) a company was empowered to take a manufactory belonging to A. In June 1853 the company gave A a notice that they required a part of this property. On the 11th of July A gave a notice to the company that he required them to take the whole of it. On the 27th of July the compulsory powers given by the special act expired. In September 1854 the company sent a letter to A, proposing to purchase the whole of the property. No agreement having been come to, the company on the 2nd of November gave A a notice of their intention to summon a jury to assess the value. On a motion by A for an injunction to restrain the company from proceeding,—Held, that the requisitions of the Lands Clauses Act had been complied with, and that the company was authorized in proceeding with the purchase. *Schwinge v. the London and Blackwall Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 405; 3 Sm. & G. 30.

A notice given by a railway company under the 18th section of the Lands Clauses Act, and a counter-notice given to the company under the 92nd section, but the assent of the company to the counter-notice not given until after the expiration of the compulsory powers given by the special act,—Held, that the notice, counter-notice and assent constituted the relation of vendor and purchaser, and that the company was authorized by the special act to take the property which was comprised in the counter-notice. *Ibid*.

A notice given under the 18th section, and a counter-notice given under the 92nd section, and an assent to take the property given by the company:—Held, first, that a fresh notice was not required to be given by the company under the 18th section; secondly, that the term of twenty-one days mentioned in the 21st section was not applicable to that state of circumstances; but, thirdly, that the company was bound to afford to the landowner an opportunity for treating before proceeding to have the value settled by a jury. *Ibid*.

Compulsory clauses in public acts of parliament will authorize the taking of lands, although the same are inalienably settled upon a family by act of parlia-

ment, and the person having the present interest may sell and convey such lands. But no interest in the Crown can be affected without its being specially named in the particular act. *In re the Cuckfield Burial Board*, 24 Law J. Rep. (N.S.) Chanc. 585; 19 Beav. 153.

Where land was taken for the purposes of a gaol by Justices of a borough whose powers were afterwards taken away by the legislature and together with new powers given to other bodies,—Held, that the corporation of the borough represented the Justices, and that they must pay the costs of obtaining the money out of court. *In re the Justices of Coventry*, 24 Law J. Rep. (N.S.) Chanc. 586; 19 Beav. 153.

The service of a petition upon a material party does not necessarily insure him his costs. *Ibid*.

(b) *What is an Exercise of.*

The ascertaining the amount of compensation after lands have been entered upon and taken under section 85. of the Lands Clauses Consolidation Act is no exercise of a compulsory power on the part of the company. *Doe d. Armistead v. the North Staffordshire Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 249; 16 Q.B. Rep. 526.

Section 68, applies to the case of lands entered upon and used under section 85; and the landowner is in such case bound to initiate proceedings for settling the compensation. *Ibid*.

A was the owner of a field, the whole of which was contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The company served a notice upon A requiring part of the field for the purpose of the railway. A then gave notice to the company that if they took part they must take the whole, to which they agreed. A afterwards receded from his notice. The company then entered upon the whole under section 85. of the Lands Clauses Consolidation Act:—Held, that the question, whether the fifteen perches were necessary for the works, was for the jury, and also that A having required the company to take the whole could not object that their entry on that portion was unlawful. *Ibid*.

The expression "deviation," in 8 Vict. c. 20. s. 15, is used with reference to the *medium filium* of the railway as laid down in the parliamentary plans. *Ibid*.

A notice given by a railway company to a landowner requiring his land for the purpose of the undertaking, is an exercise of the powers for the compulsory purchase of land within the meaning of section 123. of the Lands Clauses Consolidation Act, 1845, and if such notice be given within the prescribed period, the steps necessary to acquire the possession of the land may be taken afterwards. *The Marquis of Salisbury v. the Great Northern Rail. Co.*, 21 Law J. Rep. (N.S.) Q.B. 185; 17 Q.B. Rep. 840.

The entry on land, under section 85, is not the exercise of a power for compulsory purchase, but is the exercise of a power for carrying that purchase into effect. *Ibid*.

(c) *Taking Part of a Manufactory.*

By the special act for a railway company certain

clauses were introduced, requiring the securing to the owner of a certain property particular benefits by arching, making roads, &c., if that property or adjoining property were taken. By another section no building was to be erected on part of the land required by the company; and by another section, the company were required to buy certain specified property. The 92nd section of the Lands Clauses Consolidation Act requires a company, if it takes part, to take the whole of a manufactory, and that act was incorporated with the special act. The company gave notice of an intention to take a small strip of land which was within the boundary line of a manufactory, but which was not, at the time of the passing of the special act, nor at the time of the notice, built upon, but which was soon afterwards covered with buildings:—Held, first, that the land proposed to be taken formed part of a manufactory within the meaning of the 92nd section of the Lands Clauses Consolidation Act; and secondly, that the sections in the special act were not inconsistent with the 92nd section of the general act. *Sparrow v. the Oxford, Worcester, and Wolverhampton Rail. Co.*, 21 Law J. Rep. (n.s.) Chanc. 731; 2 De Gex, M. & G. 94; 9 Hare, 436.

At the hearing, the company produced evidence to shew that what they required could be attained by making a tunnel under the land, and so not touch any part of the surface; but the Court held, that it was not competent for them to set up such a case at the hearing; and *semble*, that such a tunnel would be taking part of a manufactory; and finally,—Held, that where the construction of an act of parliament, which gives authority for the compulsory taking of land, is doubtful, it should be construed most favourably to those who seek to protect the land from innovation. *Ibid*.

(C) NOTICE TO TAKE LANDS.

A notice under the 68th section of the 8 Vict. c. 18. was served upon a clerk of the promoters of the Blackburn Railway Company at their office, being addressed "To the promoters of the Blackburn and Clitheroe Railway Company." There was no railway company of the latter name, but the railway in question ran from Blackburn to Clitheroe. The company had not been misled:—Held, that the notice was good. *Eastham v. the Blackburn Rail. Co.*, 23 Law J. Rep. (n.s.) Exch. 199; 9 Exch. Rep. 758.

A variance in the descriptions of hereditaments in the notice to treat and in the precept to the sheriff, under the 8 & 9 Vict. c. 18, is an irregularity merely, and is waived by appearing before the jury summoned to assess compensation, and, after the objection taken and overruled, proceeding in the trial. *Ex parte Bailey*, 1 Bail C.C. 66.

An annuitant having power of entry and distress, to secure his annuity charged upon certain leasehold houses, was served with notice by a railway company of their intention to buy. The company subsequently purchased the property from a prior mortgagee, who had a power of sale. The annuitant filed a bill, not containing any allegations of fraud, or other improper conduct on the part of the company in their purchase from the first incumbrancer, praying payment of the annuity and all arrears, or of the amount proper for the redemption of the annuity:

—Held, reversing the decision of one of the Vice Chancellors, that the plaintiff was not entitled, on such a bill, to the relief he asked, and it was dismissed. *Hill v. the Great Northern Rail. Co.*, 23 Law J. Rep. (n.s.) Chanc. 524; 5 De Gex, M. & G. 66: reversing 23 Law J. Rep. (n.s.) Chanc. 20.

A railway company, under the powers of an act of parliament authorizing them to widen their line, gave notice in July 1853, three days before the expiration of their compulsory powers, to the owners of certain manufacturing premises which lay on each side of the railway, of their intention to widen the railway, by means of beams resting on piers, not touching the manufactory; and that they were willing to treat for such right of way or easement. Immediately thereupon the proprietors gave a counter-notice, under the 92nd section of the Lands Clauses Act, requiring the company to purchase the whole of their premises. In May 1854 the company gave the owners notice of their intention to summon a jury to assess the value of the easement. On a bill filed by the owners, an injunction was granted, by Wood, V.C., restraining the company from proceeding on their notice unless they would purchase the whole of the manufactory, the plaintiffs undertaking to sell the same. The company then abandoned their first notice, and gave notice of their intention to summon a jury to assess the value of the whole manufactory. A second bill was then filed to restrain the company from proceeding on this notice, and an injunction was granted *ex parte* in the vacation, by the Lord Chancellor, which injunction was subsequently dissolved by Wood, V.C., who was of opinion that the company had a right to take such an easement under the compulsory powers of the act:—Held, upon appeal, affirming the decision below, but upon different grounds, that the plaintiffs by giving the counter-notice had established an equity against themselves, disentitling them to an injunction, and that the first injunction was properly granted upon terms. *Pinchin v. the London and Blackwall Rail. Co.*, 24 Law J. Rep. (n.s.) Chanc. 417; 5 De Gex, M. & G. 851; 1 Kay & J. 34.

Semble, per the Lord Chancellor, an easement is not "land" within the meaning of the Lands Clauses Consolidation Act. *Ibid*.

Specific performance of a contract by a railway company to purchase an interest in land, enforced at the suit of the vendor as falling within the provisions of the Statute of Frauds, in a case where the contract arose out of a notice to treat given by the company, and where the proof of the writing was found in documents which had their origin in an intention to carry out the purchase under the provisions of the company's special act and the Lands Clauses Consolidation Act, 1845. *Inge v. the Birmingham, Wolverhampton and Stour Valley Rail. Co.*, 3 De Gex, M. & G. 658; 1 Sm. & G. 347.

To what extent the Court will interfere to compel the specific performance of contracts for the purchase of land exclusively, under acts of parliament containing special provisions for that purpose.—*quære*. *Ibid*.

A railway company is not entitled to take possession of land under the provisions of the Lands Clauses Consolidation Act, 1845, until it has settled, not only with the persons in possession of the land, but also

with all persons having any interest therein—*semble*. Ibid.

A corporation having under an act of parliament a right to take land for the purpose of certain public works, gave notice to the owner of the inheritance of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons and rails and other implements on the lands, and there left them, but did not commence the works or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent at the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the waggons, &c. to remain on the land, and from taking possession of the land, until they had complied with the provisions of the Lands Clauses Consolidation Act:—Held, that though the corporation were bound by the acts of their contractors the acts done were not a taking possession within the meaning of the act, and the bill was improperly filed. *Standish v. the Mayor of Liverpool*, 1 Drew. 1.

(D) ASSESSMENT OF COMPENSATION.

(a) By Arbitration.

(1) In what Cases.

The 7 & 8 Vict. c. lxxxii. provided that nothing therein contained should exempt the railway thereby authorized from the provisions of any general act relating to railways, to be passed in that or any future session; and by an act of the 10 & 11 Vict. c. clxiii. further provisions are made as to the same railway, and the Lands Clauses Consolidation Act, 1845, (8 & 9 Vict. c. 18.) is expressly extended to the latter act:—Held, that the provisions of the Lands Clauses Consolidation Act as to proceedings by arbitration applied to the construction of the railway. *Evans v. the Lancashire and Yorkshire Rail. Co.*, 22 Law J. Rep. (n.s.) Q.B. 254; 1 E. & B. 754.

Section 23. of the Lands Clauses Consolidation Act, which provides that if, when a matter has been referred to arbitration, the arbitrators fail for three months to make their award, the question of compensation shall be settled by a jury, applies to a case of a reference to arbitration, under section 68, of the amount of compensation in respect of land already taken or injuriously affected. Ibid.

(2) Appointment of Arbitrator.

An injury having been done to the premises of B, a railway company, for which the company refused compensation, B served them with a notice under the 8 & 9 Vict. c. 18, dated the 5th of December, requiring them to appoint an arbitrator on their behalf, and stating that it was *his intention* to appoint S D M his arbitrator, and that if within fourteen days after the notice the company failed to appoint an arbitrator for them, he *would* appoint the said S D M to act for both parties. The company having refused to refer the matter to arbitration, B, on the 1st of January following, served them with a notice, which, after reciting that B had appointed the said S D M his arbitrator, stated that he then appointed

the said S D M to act as arbitrator on behalf of both parties. S D M having awarded a sum of money to be paid by the company to B, a rule was obtained by B for the company to pay the amount, and a cross-rule was obtained by the company to set aside the award on the ground stated in the rule that the arbitrator had awarded respecting matters over which he had no jurisdiction. *Bradley v. the London and North-Western Rail. Co.*, 20 Law J. Rep. (n.s.) Exch. 3; 5 Exch. Rep. 769.

Semble, first, that no valid appointment of an arbitrator to act for B had been made by him, and that this objection to the award had been sufficiently pointed out by the rule, but the Court under the circumstances discharged both rules. Ibid.

(3) Declaration by Arbitrator and Umpire.

On a reference to arbitration, under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, respecting the compensation to be paid to a landowner whose lands have been taken by a railway company for the purposes of the railway, the arbitrators and umpire may make the declaration required by sect. 33. before a Justice of the Peace of any county, and are not limited by the interpretation clause, section 3, to make it before a Justice of the county where the matter in dispute arose. *Davies v. the South Staffordshire Rail. Co.*, 21 Law J. Rep. (n.s.) M.C. 52; 2 L. M. & P. P.C. 599.

(4) Form and Validity of the Award.

Where in pursuance of the arbitration clauses of the 8 & 9 Vict. c. 18. parties agree to refer a question of disputed compensation for land required by a railway company, and the secretary, on behalf of the company, signs the appointment of the arbitrator, an award made under such submission is valid, although all the previous forms imposed by the statute have not been complied with, those forms being necessary only in the case of a compulsory arbitration. *Collins v. the South Staffordshire Rail. Co.*, 21 Law J. Rep. (n.s.) Exch. 247; 7 Exch. Rep. 5.

By the Regent's Canal Act for enabling the Canal Company to purchase lands, and which incorporated the Lands Clauses Act, 1845, the company were authorized to take a field called "Clayfield," held by one W, under a lease from the Warden and Fellows of All Souls, Oxford. Notice to take this field having been given under the act, and the parties being unable to agree as to the terms, an arbitrator was appointed under the act to settle the question of disputed compensation. The company had taken a portion of Clayfield, but had left the rest in the possession of W, without, however, giving him any approach or access to it whatever; but they had delivered to the Warden and Fellows a grant of a right of road to that portion, which it was stipulated was to enure for the benefit of W and his tenants, the way so granted being more commodious than before. The arbitrator awarded to W a pecuniary compensation in respect of the works of the company and the lands taken by them. An application to set aside the award having been made on the grounds that the arbitrator had omitted to adjudicate on the right of way to Clayfield, and that he had not apportioned the rent of the leasehold land, or determined in what proportion the rent should remain chargeable,—Held, that the arbitrator had acted rightly

under the Lands Clauses Act in awarding a money compensation only, and that he would have exceeded his powers if he had adjudicated either on the question of the right of way or of the apportionment of the rent. *Ware v. the Regent's Canal Co.*, 23 Law J. Rep. (n.s.) Exch. 145; 9 Exch. Rep. 395.

(5) Costs of Arbitration.

In an arbitration under sects. 25—37. of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), if the umpire award, in respect of part of the landowner's claim for compensation, a larger sum than the company offer in respect of that part, and at the same time award, as to another distinct part of the claim, in respect of which the company offer nothing, then the landowner has suffered no damage, the landowner is entitled, under sect. 34, to those costs only of the arbitration which are incident to that part of his claim in respect of which compensation has been awarded. *Regina v. Biram*, 17 Q.B. Rep. 969.

A bill by a company against an individual claiming to be injuriously affected under the 68th section of the Lands Clauses Act, was dismissed, with liberty to the defendant to apply for the costs, if he should establish his right to compensation. The parties proceeded by arbitration, but neither took up the award. Upon motion by the defendant that the company might pay the costs, or be compelled to take up the award,—Held, as to the first, that the defendant was premature, no award having been made; and as to the second, that the Court had no jurisdiction. *The Sutton Harbour Co. v. Hitchens*, 16 Beav. 381.

(6) Taking up the Award.

A railway company are bound under the 35th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, to take up an award of compensation for land required by the company, and forthwith to furnish a copy to the owner of the land; and it is no good return to a mandamus for that purpose, that the company were willing to receive the award and to furnish such copy, but were prevented by reason of the arbitrator's refusal to deliver it up to them without the payment of his fees; there being nothing in the act to affect the arbitrator's common law right of lien. *Regina v. the South Devon Rail. Co.*, 20 Law J. Rep. (n.s.) Q.B. 145; 15 Q.B. Rep. 1043.

(b) By a Jury.

(1) Warrant to summon Jury.

Under section 39. of the Lands Clauses Consolidation Act, the promoters of a railway company may properly issue their warrant to summon a compensation jury to the sheriff of the county where the lands are situate, although the under-sheriff be interested as a shareholder in the company. *Worsley v. the South Devon Rail. Co.*, 20 Law J. Rep. (n.s.) Q.B. 254; 16 Q.B. Rep. 539.

In such a case, the sheriff should either take the inquisition in person or appoint some disinterested deputy. *Ibid.*

Where the promoters of a railway company have entered upon and taken land under the provisions of section 85. of the Lands Clauses Consolidation Act within the period prescribed for exercising

their compulsory powers, their continuance in possession after that period, without making compensation to the owner of the land, does not render their original entry unlawful. *Ibid.*

In an action for injury to land, the defendants (a railway company) pleaded that they entered on the plaintiff's land under section 85. of the Lands Clauses Consolidation Act, before the expiration of the prescribed period for exercising their compulsory powers, and having so entered and being lawfully in possession of the land, that they, after the expiration of the prescribed period, continued in possession, and in the due and lawful exercise of the powers of the said act committed the grievances complained of. The plaintiff replied (admitting the statute) *de injuria absque residuo causae*.—Held, that the replication was bad, as the plea claimed an interest in land, and the replication traversed an authority in law by the denial of acting under the statute. *Ibid.*

By an act for the drainage of certain lands in Lincolnshire it was provided that the lords or ladies of three manors for the time being, or in their absence their respective agents appointed in writing, should be Commissioners for executing the act; that no person should act as a Commissioner or agent of a Commissioner until he had made and subscribed a declaration in the form given by the act; that if the Commissioners required certain lands for the purposes of the act, they were to give a notice of their intention to the landowner, stating the particulars of the land required, and if the amount of compensation were disputed, the Commissioners were to issue their warrant to the sheriff to summon a jury to assess compensation, and the sheriff was to give judgment for the sum so assessed. The three lords of the manors never made or subscribed the declaration, and a few days after the statute passed (being all then in England but absent from Lincolnshire) they, by separate instruments in the form of appointment given by the act, appointed the three defendants their respective agents. The defendants made and subscribed the declaration before they did any act as Commissioners.—Held, that the defendants being agents appointed by the lords were themselves Commissioners; that in appointing the defendants the lords did not act as Commissioners, and therefore it was unnecessary for them to make the declaration; that when the Commissioners required lands under the act, and had given the landowner due notice that his lands were required, and had stated it in the particulars of the lands, it was not necessary that either the warrant issued to the sheriff to summon a jury to assess compensation, or the inquisition assessing it, should refer to the notice or state particulars of the land in order to give the sheriff and jury jurisdiction to inquire into the question of compensation. *Ostler v. Cooke* (in error), 22 Law J. Rep. (n.s.) Q.B. 71; 13 Q.B. Rep. 143; affirming the judgment below, 18 Law J. Rep. (n.s.) Q.B. 185.

The defendants, the owners of certain waterworks, solicited a bill in parliament to empower them to extend their works by constructing a reservoir upon the lands of the plaintiff and others. The plaintiff petitioned against the bill, but, upon an agreement that the value of the land and the amount of all compensation should be settled by arbitration, and that the defendants should fix the exact quantity of the plaintiff's land required within six months

after the bill should have passed, he withdrew his opposition, and the bill became an act. The act incorporated a former special act and the Lands Clauses Consolidation Act, 1847, and empowered the defendants to take certain parts of the plaintiff's lands, according to the deposited plans and books of reference. Prior to the expiration of the six months after the act had passed, the defendants gave the plaintiff notice specifying the portions of his land that would be required, according to the boundaries in the plan and book of reference. The arbitration proceeded, and after the expiration of the six months the plaintiff pointed out on the arbitration the inaccuracy in the boundaries, which attributed to the plaintiff's land less in admeasurement than he possessed. The arbitrator made his award, giving compensation for land described according to the plan and book of reference only, but it was in dispute whether he had included in his assessment of value the 2 roods and 5 perches which the plaintiff claimed beyond the admeasurement of the land comprised in the plans and books of reference. The defendants paid the amount awarded to the plaintiff. The defendants had made a statutory conveyance to themselves by deed-poll, describing the land according to the inaccurate plan and book of reference. They took possession of the land. The plaintiff recovered the 2 roods and 5 perches in an action of ejectment against the defendants. The defendants then proceeded, within six months, after a motion for a new trial made by them had been refused, under the 124th section of the Lands Clauses Consolidation Act, 1845, to issue their warrant to the sheriff to summon a jury to ascertain the value of the land and obtain the compulsory purchase of it from the plaintiff. The bill was for an injunction restraining such proceedings, and by motion the plaintiff asked for an injunction according to the prayer of the bill:—Held, that the defendants had failed to purchase the land in proper time through mistake or inadvertence; that they were entitled to proceed under the 124th section of the Lands Clauses Consolidation Act, 1845; that the agreement with the plaintiff previous to the act did not controul the right; and that in proceeding within six months after the refusal by the Court to grant a new trial in ejectment, the defendants were within the six months after the right had been finally established at law, and the Court refused the motion. *Hyde v. the Mayor, &c. of Manchester*, 5 De Gex & Sm. 249.

A corporation empowered by special acts, which incorporated the 8 & 9 Vict. c. 18, to construct waterworks, and to take certain lands, required lands belonging to A and B, the boundary between which was improperly described in their plans and books of reference. In consideration of B's withdrawing his opposition to their bill in committee, the corporation agreed to settle the value of the land required from, and the compensation due to A, by arbitration under the above act, and to fix the exact quantity of land, within six months after the passing of the bill. In the proceedings under the reference, the mistake of the boundary was pointed out; but the award fixed a value in terms only for the land within the boundary so inaccurately delineated, and the corporation took that land accordingly, leaving between it and the true boundary line a narrow slip

of land belonging to B, but which the corporation had agreed to purchase from A as part of his land, and for which they had paid a sum of money to A, and of which they took possession as part of the land purchased from A. B brought an ejectment against the corporation for this slip of land, and recovered a verdict (which the corporation unsuccessfully attempted to set aside), and issued and lodged with the sheriff a writ of *habere facias possessionem*. The corporation having since the judgment in the ejectment perfected their title to the land in question, under the 124th section of the 8 & 9 Vict. c. 18, the Court stayed the proceedings upon the judgment, upon the terms of the corporation paying to the lessor of the plaintiff his "full costs and expenses" of the action, and costs of the application:—Held, that "full costs and expenses," in the 126th section of the 8 & 9 Vict. c. 18, meant costs "as between attorney and client." *Doe d. Hyde v. the Mayor, &c. of Manchester*, 12 Com. B. Rep. 474.

(2) Qualification of Jury.

The Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. s. 55, provides that in case of a full special jury not appearing, the sheriff shall, upon the application of either party, add to the list of such jury the names of any other disinterested persons qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the court, or can speedily be procured, so as to complete such jury, all parties having their lawful challenges against such persons:—Held, that the want of qualification in such supplemental jurors is ground of challenge only, and in default of such challenge the proceedings cannot be questioned for want of jurisdiction or irregularity. *In re Chelsea Waterworks Co., ex parte Phillips*, 24 Law J. Rep. (n.s.) Exch. 79; 10 Exch. Rep. 731.

(c) For what Compensation may be assessed.

Lands Injuriouly affected.

A railway company being about to construct their line over certain land of W C, it was, by agreement, referred to an arbitrator to fix the amount of money to be paid by the company to W C as the price of the land to be purchased as well as for the injury done to his remaining estate by severance or otherwise, and to determine what bridges, arches, culverts, &c. should be made. The arbitrator awarded 7,900*l.* as the amount of compensation, and directed what works should be constructed. The money was paid to W C and the works directed were done:—Held, that this sum covered all damage known or contingent by reason of the construction of the railway on the lands purchased, and all other damage arising from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated when the compensation was awarded; but that it did not include any contingent and possible damage which might arise afterwards by the works of the company at other places which could not have been foreseen by the arbitrator. *Lawrence v. the Great Northern Rail. Co.*, 20 Law J. Rep. (n.s.) Q.B. 293; 16 Q.B. Rep. 643.

A railway was constructed across certain low lands adjoining the river D. over which the flood waters

of that river used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the railway without sufficient openings the flood waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. There was no express clause in their act obliging the railway company to make openings for flood waters in that district, but there was a general provision that they should make openings when the railway crossed any public drains, embankments, or works in any drainage district:—Held, that although they might not be compellable by mandamus to make openings for the flood waters in that district, yet that an action would lie against the company for the injury to the plaintiff's lands. *Ibid.*

A was owner and occupier of a house which was approached by two private roads passing over the property of third parties, and over which he had a right of way as appurtenant to his house. These roads formed the only access to the house. A railway company, in constructing their line, carried it across these two roads on the level in such a direction that a person standing on the roads where they were intersected by the railway could not see a train approaching until within seventeen or twenty-five seconds of its arrival at those points. Gates were erected upon each side of the railway across the roads, and these were kept constantly locked, a key being kept by a servant of the company, who lived 130 yards from the gate, and another key being possessed by A. In consequence of these facts, A's property was depreciated in value:—Held, that the erection of the gates and passage of the trains across the roads were acts by which H's property was injuriously affected and in respect of which he was entitled to be compensated under the Lands Clauses Consolidation Act, 1845. *Glover v. the North Staffordshire Rail. Co.*, 20 Law J. Rep. (n.s.) Q.B. 376; 16 Q.B. Rep. 212.

Where the property of a landowner is depreciated in value by a railway company doing that which would support an action if done by a private individual, the landowner is entitled to be compensated in respect of his property being injuriously affected. *Ibid.*

A railway company being desirous of taking the plaintiff's land for their railway, served him with a notice, pursuant to the 8 Vict. c. 13, stating that they required to purchase and take his land for the railway. The plaintiff afterwards, pursuant to the provisions of the 8 Vict. c. 13. s. 68, served the company with a notice requiring them to issue their warrant to the sheriff to summon a jury to inquire into the value of the land, claiming to be paid by way of compensation for the purchase by them of the fee simple of the land:—Held, that as the land had not been *actually* taken or *actually* injuriously affected by the company, within the meaning of the 68th section, the plaintiff was not entitled to compensation. *Burkinshaw v. the Birmingham and Oxford Junction Rail. Co.*, 20 Law J. Rep. (n.s.) Exch. 246.

An occupier of premises contiguous to the line of a railway in formation, but whose premises were not directly interfered with by the company, gave notice

of claim for compensation, under the 68th section of the Lands Clauses Consolidation Act, 1845, on the ground of his property being "injuriously affected" by the works of the company, by reason of his goods being damaged and his custom diminished thereby; and required the company to issue a precept to the sheriff to summon a jury for settling the compensation. The company filed their bill for an injunction to restrain the defendant from proceeding on his notice, on the ground that his property was not injuriously affected by their works within the meaning of the 68th section:—Held, dissolving the injunction granted by the Court below, that the words 'injuriously affected' in the 68th section, were not confined to the case of persons whose lands were directly interfered with by the company, but extended to a case of consequential damage; and that the sheriff's jury had jurisdiction to decide upon the title to compensation as well as the quantum of damage. *The East and West India Docks and Birmingham Junction Rail. Co. v. Gattke*, 20 Law J. Rep. (n.s.) Chanc. 217; 3 Mac. & G. 155.

The case of *The London and North-Western Rail. Co. v. Smith* (1 Hall & Twells, 364; s.c. 1 Mac. & G. 216; 19 Law J. Rep. (n.s.) Chanc. 193) distinguished from the present case. *Ibid.*

The 68th section of the Lands Clauses Consolidation Act (8 Vict. c. 13), which provides that if any person shall be entitled to any compensation in respect of any lands or any interest therein which shall have been taken for or injuriously affected by the execution of the works and for which the promoters shall not have made satisfaction, such party may have the amount of such compensation settled by arbitration or by a jury, does not give the arbitrators or jury jurisdiction to inquire into the title of the claimant to the land or other hereditament in respect of which he claims compensation, but only to decide upon the question of amount.—*dissentiente Erle, J. Regina v. the London and North-Western Rail. Co.*, 23 Law J. Rep. (n.s.) Q.B. 185; 3 E. & B. 443.

Where a compensation jury returned a verdict upon a claim for compensation in respect of an obstruction of a right of way, negating the evidence of the right of way, and therefore finding that the claimant had sustained no damage, but awarding contingently 150*l.* for compensation in case they were compelled to assume that the claimant was entitled to the right of way.—Held, by *Lord Campbell, C.J.* and *Coleridge, J.*, that the prior part of the finding could not be rejected as surplusage, so as to make it a verdict for 150*l.* *Ibid.*

The defendant claimed a sum of money from a railway company, by way of damages, for having injuriously affected his land, by crossing the road leading to it, and called upon the company either to pay the sum claimed or to summon a jury to assess the amount of compensation. The company alleged that the defendant's land was not injuriously affected, within the meaning of section 68. of the Lands Clauses Consolidation Act, and filed their bill to restrain the defendant from taking proceedings to assess the damage:—Held, in conformity with a decision of Lord Truro, which was opposed to a decision of Lord Cottenham, that an injunction could not be maintained. *The South Staffordshire Rail. Co. v. Hall*, 20 Law J. Rep. (n.s.) Chanc. 397; 1 Sim. N.S. 373.

A harbour improvement company, in the prosecution of their works, under the authority of a special act of parliament, obstructed access to a wharf from the place of business of M H, by which he was put to expense in loading and unloading ships. M H, claiming compensation, gave a notice and proceeded to appoint an arbitrator, under the 68th section of the 8 Vict. c. 18. (the Lands Clauses Consolidation Act, 1845). Upon a bill filed by the company, an injunction was granted to restrain the further proceedings of M H until he established his right at law, but on appeal the same was dissolved. *The Sutton Harbour Improvement Co. v. Hitchins*, 21 Law J. Rep. (N.S.) Chanc. 73; 1 De Gex, M. & G. 161; 20 Law J. Rep. (N.S.) Chanc. 489; 13 Beav. 408.

In 1845 a landowner received under an arbitration compensation for the land and "in respect of damages which might be sustained by reason of making a railway":—Held, that he was not precluded from insisting on a further compensation for future unforeseen damages subsequently sustained. *The Lancashire and Yorkshire Rail. Co. v. Evans*, 15 Beav. 322.

A railway act passed in 1844, under which certain lands were taken. Afterwards, in 1845, the Lands Clauses Act passed, and in 1847 a second railway act was passed extending the first:—Held, that the Lands Clauses Act applied to the whole undertaking, became consolidated both with the acts of 1844 and 1847, and that the owner of lands taken under the first act of 1844 became entitled to the benefit of its provisions. *Ibid.*

There is no equity arising from the provisions of the 68th section of the Lands Clauses Consolidation Act, to restrain a party alleging himself to be "injuriously affected" from recovering compensation by an arbitration or a jury in the manner thereby prescribed, and the balance of authority is against the principle of the decision of Lord Cottenham in the *London and North-Western Rail. Co. v. Smith*. *Ibid.*

In 1848 a landowner gave a railway company notice for a jury to assess damages, which he alleged he had suffered. In 1849 he made a claim for further subsequent damages, and in 1850 gave notice for an arbitrator to assess the whole damages:—Held, that this was not irregular, and that the first notice had not exhausted all the statutory powers. *Ibid.*

Distinction between damages done by a railway for which compensation may be obtained under the statutory powers, and those for which a common action at law is the proper remedy. *Ibid.*

The Vice Chancellor granted an *ex parte* injunction on the application of a railway company, restraining the landowner from taking proceedings under the 68th section for settling the amount of compensation to be paid to him by the company. His Honour subsequently dissolved the injunction at the instance of the defendant; in the meanwhile the time for taking proceedings under the 68th section had expired. The company, who had not raised the question before the Vice Chancellor, appealed from the order dissolving the injunction, on the ground that it ought to have been made on such terms as that their right to take proceedings under the 68th section might not be affected by the lapse of time.

The Lord Chancellor refused the application. *The South Staffordshire Rail. Co. v. Hall*, 3 Mac. & G. 353.

The words "injuriously affected" in the 68th section of the Lands Clauses Consolidation Act, 1845, comprehend cases of damage arising from the user of the railway as well as of the damage sustained in the construction of the railway. *The London and North-Western Rail. Co. v. Bradley*, 3 Mac. & G. 336.

Injunction obtained by a company restraining a landowner from taking proceedings under the act in respect of such damage, dissolved. *Ibid.*

Where there is an original equity affecting the claim of a party to compensation under the 68th section of the Lands Clauses Consolidation Act in respect of lands injuriously affected, the statute does not create such an equity; but where there is an original equity affecting the claim, the statute does not take it away. *Duke of Norfolk v. Tennant*, 9 Hare, 745.

Where, therefore, an agreement for such compensation has been completed and carried out, and the satisfaction perfected, there is no ground for the interference of the Court arising out of the provisions of the statute; but when the defendant has received the consideration for perfecting the satisfaction, and refuses to perfect it, and a case for specific performance arises, there is nothing in the statute to exclude the interposition of the Court. *Ibid.*

The Court does not interfere by injunction to restrain parties who insist that their property has been injuriously affected within the meaning of the 68th section of the Lands Clauses Consolidation Act, from prosecuting their claim under the act, upon the mere ground that the act has not provided the means of determining the preliminary question, whether the property has been injuriously affected or not. But whether the same rule applies to a case in which there are several grounds of claim, some of which have been satisfied—*quære*. *Ibid.*

(d) Costs of the Inquiry.

The defendants, a railway company, by their works, injuriously affected the lands of the plaintiff. They offered him 60*l.* compensation. A jury, summoned pursuant to the provisions of the statute 8 & 9 Vict. c. 18. (the Lands Clauses Consolidation Act), assessed the compensation at 215*l.*:—Held, that the plaintiff was entitled to recover in an action of debt against the company the costs of the inquiry as well as the amount of the compensation; for although the proceeding was under section 68, which makes no provision as to the costs of the inquiry, yet that section, by reference, embodies into itself section 51, which provides for giving the claimant the costs of the inquiry where the jury assess a larger sum for compensation than the sum offered by the promoters of the undertaking. *The South-Eastern Rail. Co. v. Richardson*, 21 Law J. Rep. (N.S.) C.P. 122; 15 Com. B. Rep. 810.

(E) ENTRY ON LANDS.

Before Compensation.

The ascertaining the amount of compensation after lands have been entered upon and taken under section 85. of the Lands Clauses Consolidation Act is no exercise of a compulsory power on the part

of the company. *Doe d. Armistead v. the North Staffordshire Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 249; 16 Q.B. Rep. 528.

Section 68. applies to the case of lands entered upon and used under section 85. and the landowner is in such case bound to initiate proceedings for settling the compensation. *Ibid.*

Where a railway company have complied with the provisions of section 85. and have entered upon and taken land within the prescribed period for exercising their compulsory powers, their continuance in possession after the prescribed period, without having the compensation assessed and the land conveyed to them, is not unlawful, and an ejectment cannot be maintained against them under such circumstances. *Ibid.*

A was the owner of a field, the whole of which was contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The company served a notice upon A requiring part of the field for the purpose of the railway. A then gave notice to the company that if they took part they must take the whole, to which they agreed. A afterwards receded from his notice. The company then entered upon the whole under section 85. of the Lands Clauses Consolidation Act:—Held, that the question, whether the fifteen perches were necessary for the works, was for the jury, and also that A having required the company to take the whole could not object that their entry on that portion was unlawful. *Ibid.*

The expression "deviation," in 8 Vict. c.20. s.15, is used with reference to the *medium flum* of the railway as laid down in the parliamentary plans. *Ibid.*

A railway company by their special act were empowered to purchase land, and enter upon and use the same for the purposes of the railway. But they were not, "except by the consent of the owner or occupier," to enter upon any such lands, until they should have paid, or deposited in the Bank of England, the purchase-money or compensation agreed or awarded to be paid for all interest in the same. The company, with the consent of the owner (the plaintiff), entered in 1847 upon certain lands required for the purposes of the railway; the amount of compensation having been by an agreement between them referred to an arbitrator, who in 1849 awarded a certain sum as compensation. No tender of a conveyance nor payment of the sum awarded had been made, and after the award, a demand of possession was served upon the company:—Held, that an action of ejectment could not be maintained against the company; the plaintiff's only right being to enforce the payment of compensation under the award. *Doe d. Hudson v. the Leeds and Bradford Rail. Co.*, 20 Law J. Rep. (N.S.) Q.B. 486; 16 Q.B. Rep. 796.

(F) APPLICATION OF COMPENSATION.

(a) *In Discharge of Incumbrances.*

Under an inclosure act some lands were allotted to a rector, who had a power of selling to pay the expenses. Under a railway act compensation was made in respect of other lands of the rectory and paid into court. The Court sanctioned the applica-

tion of the money in court to the payment of the expenses of the inclosure. *In re the Oxford, Worcester, &c. Rail. Co., ex parte Lockwood*, 14 Beav. 158.

(b) *Purchase of other Lands.*

A railway company took some settled land and paid the purchase-money into court. A reference to the Master, on the petition of the tenant for life, to inquire as to the propriety of a proposed purchase of land to be settled to the same uses and the title to it, and a direction that, if he should approve of the purchase and title, he should settle the conveyance, and that the money should be paid to the vendors, were comprised in one order. *Ex parte Metherell, in re the South Devon Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 629.

Lands had been settled on A for life, with remainders over. A railway company took part of the lands and the money was paid into court. An eligible property being found for the re-investment of part of the money, the tenant for life petitioned for the payment of so much out of court for that purpose:—Held, that the petition need not be served on the parties entitled in remainder, but the order could be made on the petition of the tenant for life alone. *Ex parte Staples, in re Brown, and In re the Oxford, Bletchley Junction and Buckinghamshire Rail. Co.'s Acts*, 21 Law J. Rep. (N.S.) Chanc. 251; 1 De Gex, M. & G. 294.

Land belonging to a vicarage was taken by a railway company, and the purchase-money paid into court to the account of the vicar. On a petition by the vicar, stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title deeds had been examined and found correct; and praying for a conveyance and payment of the money out of court, without a reference to the Master—the Court made the order. *Ex parte the Vicar of East Dereham*, 21 Law J. Rep. (N.S.) Chanc. 677.

When a petitioner prays for investment in lands, the Court, on being satisfied that the investment is eligible, will order the petition to stand over for the opinion on the title of such of the conveyancing counsel of the Court as the petitioner may select, and on the return of such opinion to the Court an order will be made on the petition. *In re Cad-dick*, 22 Law J. Rep. (N.S.) Chanc. 10; 9 Hare, App. ix.

Upon applying for the re-investment of purchase-money, the Court, in the first instance, will only approve of the purchase, the value, and the intended investment, and postpone any further order until after the opinion of one of the conveyancing counsel of the court has been obtained on the title, and an affidavit made verifying the title; but it will not make the reference to any particular counsel. *In re Martin*, 22 Law J. Rep. (N.S.) Chanc. 248.

Freehold and copyhold hereditaments were taken by a railway company, and the money paid into court:—Held, that the money could not be re-invested in leasehold property. *Ex parte Macaulay, in re the Lancashire and Yorkshire Rail. Co.*, 23 Law J. Rep. (N.S.) Chanc. 815.

Money paid into court by the Liverpool dock trustees, in respect of leaseholds for years, taken by them under the powers of their act of parliament,

ordered to be re-invested in the purchase of copyholds of inheritance. *In re Liverpool Dock Acts*, 1 Sim. N.S. 202.

An order for the settlement of the conveyance and for the payment of the purchase-money out of court, on the re-investment of monies of incapacitated persons, &c. *In re Caddick's Settlement*, 9 Hare, App. lxxxv.

Effect of a contract for the purchase of lands for the re-investment of trust monies being made without reference to the fund proposed to be thereby re-invested. *Ibid.*

(c) *Where Land is in Lease.*

A, by his will, bequeathed a leasehold estate, determinable on his own life and that of another person, to trustees, upon trust for B for life, with remainders over, and directed that his trustees should renew the lease by substituting another life for his own. A railway company took part of the estate, and the purchase-money was paid into court and invested, and the dividends were ordered to be paid to B. The trustees did not renew the lease. The other life dropped:—Held, that B was entitled to the principal of the stock in court. *In re Beaufoy's Trusts*, 22 Law J. Rep. (N.S.) Chanc. 430; 1 Sm. & G. 20.

Where land belonging to a dean and chapter, but subject to a lease, was purchased by a railway company, and the money paid into court, it was held, that the dean and chapter were only entitled, during the continuance of the lease, to so much of the dividends of the purchase-money as would equal the amount of rent, and the rest of the dividends were to be accumulated till the expiration of the lease. *Ex parte the Dean and Chapter of Christchurch*, 23 Law J. Rep. (N.S.) Chanc. 149.

Church lands vested in a precentor by virtue of his office were in lease for terms of years, perpetually renewable every fourteen years upon payment of a fine. The lands were purchased under an act of parliament, and the purchase-money for the interest of the precentor and his successors was paid into court and invested, and a sum equal to the rent of the premises was regularly paid to the precentor out of the dividends by order of the Court, the residue of the dividends being directed to accumulate for the benefit of the Ecclesiastical Commissioners, in whom the estates and property attached to the precentorship would, on the present precentor ceasing to hold his office, become vested by act of parliament. The time having arrived when, if the property had not been sold, some of the leases would have been renewable,—Held, that the precentor was entitled to be paid, out of the fund in court, a sum of money as an equivalent for the fine which he would have received on renewal; and it was referred to chambers to ascertain the amount to be paid. *Ex parte the Precentor of St. Paul's*, 24 Law J. Rep. (N.S.) Chanc. 395; 1 Kay & J. 538.

The Bishop of Winchester, the lessor of lands of the see demised for lives and years, held not to be entitled to any portion of the purchase-money, and compensation for damage and severance, paid into court in respect of lands comprised in the demise, and taken by a railway company, or to the dividends of such money when invested, on the ground of the diminution of the fine which would be payable,

until the lease should become renewable. *Ex parte the Bishop of Winchester*, 10 Hare, 137.

A testator devises real estate subject to a lease for a term of years at 25l. 10s. rent to A for life, remainder to B. A railway company purchases the interest of A and B, subject to the lease, for 1,700l., which is invested. The lease was granted at the said rent (less than a rack rent) in consideration of a covenant to expend money, 600l., on the estate during twenty years:—Held, that the tenant for life was entitled to the whole of the dividends of the purchase-money. *In re Steward's Estate*, 1 Drew. 636.

(d) *Payment of Small Sums to Parties.*

Where money has been paid into court in respect of lands taken by a company from persons under disability, and, with the exception of a small surplus, has been afterwards laid out in the purchase of lands to be settled to the same uses, if such surplus is under 20l., the Court will allow it to be paid to the tenant for life, but not otherwise. *In re Bateman's Estate*, 21 Law J. Rep. (N.S.) Chanc. 691.

(e) *Investment of Compensation.*

A part of some lands which had been vested in trustees under the Municipal Corporations Act, was taken by a railway company, and the purchase-money was paid into court. Order made for the investment in consols, and the payment of the dividends to any two of the trustees for the time being. *In re Collins's Charity and the London and Birmingham Railway Act*, 20 Law J. Rep. (N.S.) Chanc. 168.

Order made on a petition by a rector for the investment of the money arising from the sale to a railway company of a part of the rectory lands. Pending the proceedings in the Master's office the rector died. The new rector consenting that the proceedings should go on, no supplemental order necessary—semble. *Ex parte the Rector of Lea*, 21 Law J. Rep. (N.S.) Chanc. 776.

By agreement in 1847, a railway company took possession of certain lands required for their undertaking, and stipulated to pay the price awarded by arbitration to the owner, or into the Court of Chancery, and interest in the mean time, from the delivery of his abstract until the day on which the purchase should be completed. In 1849 the company paid the purchase-money into the Bank of England, under the provisions of the Lands Clauses Consolidation Act, and received from the solicitors of the vendor an account for interest up to that time. This account was mislaid, and another account was, in 1851, sent to the company at their request, in which the interest was brought down to the latter period. No application had been made by the vendor for the investment of the money paid in by the company:—Held, on special case between the vendor and the company, that the interest ceased to run from the time of payment of the purchase-money into the Bank of England. *Lewis v. the South Wales Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 209; 10 Hare, 113.

The Court, considering there had been great delay on the part of the company in paying the purchase-money, gave them no costs of the application. *Ibid.*

It is not imperative on the Court to require from

a tenant for life an affidavit of conclusive title to the dividends of a fund paid into court under the Lands Clauses Consolidation Act. *In re the Baroness Brayne*, 22 Law J. Rep. (N.S.) Chanc. 285; 9 Hare, App. vii.

Upon a petition by a tenant for life for the investment of money paid into court by a railway company on taking certain land under the Lands Clauses Consolidation Act, it was held, that the old form must be continued—of investing the money, after deducting brokerage, which would be paid by the company, together with the other costs, to the tenant for life; and that an order could not be made for investing the whole amount of the purchase-money in the first instance. *Ex parte Harborough*, 23 Law J. Rep. (N.S.) Chanc. 260.

Money paid into court by a railway company for land taken under the Lands Clauses Consolidation Act from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered, after his death not to be reinvested in or considered as land, but to be paid to his executors. *In re the East Lincolnshire Railway Act*, *ex parte Flamant*, 1 Sm. N.S. 260.

Where compensation money was paid into court by a railway company on an agreement with tenant for life for purchase of the fee simple, but on investigating the title, part of the land was found to be copyhold with a defective title as to one undivided moiety, the Court ordered an apportionment of the money so as to carry over the amount representing the price of that part of the land to which a good title was made, and the dividends to be paid to the tenant for life, but the capital not to be paid out without notice to the company. *In re Perks's Estate*, 1 Sm. & G. 545.

A railway company gave the usual notice to a tenant for life of settled estates, that they required a portion of the estates for their line, and afterwards made an offer for the fee simple. The solicitors of the tenant for life accepted the offer, stipulating that interest at 5l. per cent. should be paid from the time of the company taking possession, and proposing, as the title was well known, that the company should be satisfied without the production of the deeds; to this the company objected, and proposed to pay the money into a banker's in the names of the respective solicitors pending the investigation of the title. The tenant for life's solicitor thereupon suggested that as the money must be paid into court, it had better be paid at once. The company thereupon paid the money into court to the account of the Railway Act only, and communicated to the tenant for life's solicitor, that they had paid the money into court under the 69th section of the Lands Clauses Consolidation Act. The solicitor for the tenant for life thereupon reminded them that interest at 5l. per cent. would continue to be payable till the purchase was completed. To this the company's solicitor returned no answer, and although several other communications passed between the solicitors respecting the purchase, the company's solicitor did not till a year afterwards express any objection to the payment of interest. The money remained uninvested during the whole of that period:—Held, that the company had acquiesced in the vendor's view of the case, and were bound to pay interest up to the investment. *Ex*

parte the Earl of Hardwicke, in re the Royston and Hitchin Rail. Co.'s Act, 1846, 1 De Gex, M. & G. 297.

(f) *Costs of Deposit and Investment of Compensation.*

The L. and B. Railway Company, under their act (1833), purchased land of Eton College, and in May 1846 paid the purchase-money into court. That act authorized the intermediate investment of such money in the funds, but was silent as to the costs of such investment. By the 8 & 9 Vict. c. cciv, the L. and B. Railway Company, and certain other companies, were consolidated and incorporated together under the style of the L. and N. W. Railway Company. By the first section, the existing acts of the several companies were repealed, and the companies dissolved: with a proviso that such repeal should not annul any purchase, &c. made thereunder; and by section 10, where any sum of money had been paid into the Bank on account of the purchase of land by any of the dissolved companies, the same was to be disposed of pursuant to the act under which it had been paid in; and all the provisions of the repealed act, in relation thereto, were, for the purposes of this act, to remain in full force, &c.; and by section 11. the Lands Clauses Consolidation Act, 1845, was incorporated with this act. The 80th section of the Lands Clauses Consolidation Act, 1845, provided, that in the case of monies paid into the Bank under that or the special act (the word "special" being interpreted by section 2. as an act to be afterwards passed), the costs of and incident to an intermediate investment in the funds should be borne by the company. Upon the petition of Eton College in 1849 for an investment of the purchase-money in the funds, it was held, that the L. and N. W. Railway Company were liable to pay to the petitioners the costs of such intermediate investment in the terms of the 80th section of the Lands Clauses Consolidation Act, 1845. *In re the London and Birmingham Railway Company's Act* (1833), and *In re the London and North-Western Railway Company's Act* (1846), *ex parte Eton College*, 20 Law J. Rep. (N.S.) Chanc. 1.

Where the words of a railway company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification to the party whose land is taken by the company, the Court will incline to that construction of the words which will make them consistent with the general intent. *Ibid.*

Part of a lunatic's real estate was taken by a railway company:—Held, that the costs of the attendance of the heir-at-law, upon a reference to the Master, ought to be borne by the company. *In re Walker, a lunatic*, and *In re the Manchester and Leeds Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 474.

By a railway act a company was empowered to take lands belonging to a vicarage, and it was declared that the purchase-money should be paid into court, and that, on a petition by the vicar and patron, and with the consent of the ordinary of the diocese, it might be laid out in the purchase of other lands. A purchase was made accordingly:—Held, that the Bishop was entitled to be paid by the company, not only the costs of his attendance in the Master's office, but also of his appearances on the petitions to

the Court for a reference and confirmation of the Master's reports. *Ex parte the Vicar of Creech St. Michael*, 21 Law J. Rep. (N.S.) Chanc. 677.

One of several persons entitled to a fund, which had been paid into court by a railway company upon the purchase of land, petitioned that his share might be transferred to the credit of a cause instituted for the administration of the estate. The petition was served upon the other persons entitled to equal shares with the petitioner:—Held, that the Court had jurisdiction under the Lands Clauses Consolidation Act to direct the company to pay costs in respect of a transfer from one fund to another; but that, as all the persons entitled to this fund might have been joined in the same petition, the company were not bound to pay any costs besides those of the petitioner and trustees. The costs of the other persons served to be costs in the cause. *Melling v. Bird*, 22 Law J. Rep. (N.S.) Chanc. 599.

Under the Lands Clauses Consolidation Act a railway company, which has taken possession of lands and paid the purchase-money into the bank, is bound to pay all the costs of a re-investment in the purchase of other lands, the subject-matter of a suit, although the fact of such lands being in litigation may occasion the necessity of two petitions. *Carpmael v. Proffitt*, 23 Law J. Rep. (N.S.) Chanc. 165.

A part of some settled lands was taken by a railway company, under the disability clause in the Lands Clauses Consolidation Act; and an order was made for the investment of the purchase-money in the redemption of the land-tax affecting other lands settled to the same uses:—Held, that the Court had authority, under the act, to direct the company to pay the costs of such investment. *Ex parte Beddoes, in re Shrewsbury and Hereford Act*, 1846, 24 Law J. Rep. (N.S.) Chanc. 175; 2 Sm. & G. 466.

The purchase-money for settled lands taken by a railway was paid into court, and after a contract had been entered into for laying it out in land, a petition was presented for its temporary investment in the funds:—Held, that the proceeding was not vexatious, and that the company ought to pay the costs. *In re the Liverpool, &c. Rail. Co.*, 17 Beav. 392.

The application of the purchase-money of land taken by a railway company to the redemption of land tax is a re-investment within the Lands Clauses Consolidation Act, and the costs of it are chargeable on the company under the 80th section. The land being part of a charity estate, the petition must be sanctioned by the Charity Commissioners' certificate, and must be entitled in the matter of the statute of 52 Geo. 3. c. 101, must have the fiat of the Attorney General, and must be signed by two individual petitioners, and not by a corporation and an individual. *In re the London, Brighton and South Coast Rail. Co.*, 18 Beav. 608.

A petition by a tenant for life of a fund paid into court by a railway company, praying for the investment of the fund and payment of the dividends to the petitioners, certain persons entitled to a charge on the real estates in respect of which the fund was paid being served with a petition and appearing, the Court refused to direct the railway company to pay their costs. *In re the Settled Estates of Webster*, 2 Sm. & G. App. vi.

Lands being taken from a corporation by a railway company, the company paid the price into court.

The corporation asked that the amount, with other monies to be supplied by them, might be laid out in a specified purchase:—Held, that the order should direct the payment of costs according to the Lands Clauses Consolidation Act; and that it should provide that the corporation should pay all extra costs, by reason of the extra amount to be invested. *In re the Southampton and Dorchester Rail. Co., ex parte King's College, Cambridge*, 5 De Gex & Sm. 621.

A railway company took land belonging to a devisee for life, with reversion to the testator's heirs, and paid the purchase-money into court:—Held, that they must pay the costs of two petitions by two co-heirs, who claimed the fund on the death of the tenant for life, and also the costs of investigating the title of other persons who claimed to be heirs, in answer to the advertisements issued by order of the Court, except such costs as were occasioned by affidavits of the petitioners in opposition to such claims, which were "occasioned by adverse litigation," within sect. 80, of the Lands Clauses Act. *In re Spooner's Estate*, 1 Kay & J. 220.

Costs incurred before the conveyancing counsel are provided for by ss. 82. and 83, and being liable to taxation, a proper bill of them should be delivered to the company. *Ibid.*

Upon a petition for the reinvestment in land of money paid into court under the Lands Clauses Act, and invested in stock, and for payment to the petitioner, the tenant for life of the lands taken by the company, of the dividends of the fund in court, the company must pay the costs of the incumbrancers on the interest of the petitioner, who have been served at their suggestion, and appear but do not oppose, and who have never made any claim upon the company or the fund in court, such costs not coming within the exception of costs of adverse litigation in the 80th section of the statute. *In re Hungerford's Trusts*, 1 Kay & J. 413.

Semble—such incumbrancers need not have been served at all. *Ibid.*

The Court will order the dividends of such a fund to be paid to the tenant for life before conveyance, where the company are in possession of the land. *Ibid.*

(G) CONVEYANCE OF COPYHOLD LANDS.

The South Wales Railway Company took some land, part of a copyhold estate, which was vested in a trustee, who died leaving an infant heir. The company having required a surrender of the lands to be made to them, the parties beneficially entitled to the estate presented their petition under the 11 Geo. 4. & 1 Will. 4. c. 60, and obtained an order that a party should, in the place of the infant, surrender the whole estate to a new trustee, who surrendered to the company the land taken by them for the purpose of their undertaking. Upon a petition by the railway company, objecting to the payment of the costs of and incident to this petition,—Held, that the Taxing Master was wrong in allowing, as against the company, the costs of procuring a new trustee and tenant. *In re the South Wales Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 534; 14 Beav. 418.

LAND-TAX.

- (A) WHAT PROPERTY MAY BE ASSESSED TO THE LAND-TAX.
 (B) MODE OF ASSESSING PARISHES AND PLACES WITHIN DIVISIONS.
 (C) REDEMPTION OF.

(A) WHAT PROPERTY MAY BE ASSESSED TO THE LAND-TAX.

A water company which has laid pipes in a land-tax division under a statutory power in that behalf, but which is the owner of no land within the division, is not assessable there to the land-tax; the right in question being in the nature of an easement, and not "land" or "hereditament." *The Chelsea Waterworks Co. v. Bowley*, 20 Law J. Rep. (N.S.) Q.B. 520; 17 Q.B. Rep. 358.

The 38 Geo. 3. c. 5. for granting a land-tax for 1798 enacts that all personal estate, except &c. should be charged with 4s. in the pound; and all manors, messuages, lands, tenements, &c., tolls, &c., and all hereditaments of what nature and kind soever they be, situate, lying and being, *happening or arising*, should be charged to the land-tax. By the 38 Geo. 3. c. 60. for making the land-tax perpetual, it was enacted, that the sums charged by the 38 Geo. 3. c. 5. in respect to the manors, lands, *tenements and hereditaments* in the said act mentioned should be raised for ever. The act incorporating the Vauxhall Bridge Company authorized them to take tolls, and enacted that the shares of the proprietors should be personal estate, and not in the nature of real property:—Held, that the company were liable under the 38 Geo. 3. c. 60. to be rated to the land-tax in respect of their tolls. *The Vauxhall Bridge Co. v. Sawyer*, 20 Law J. Rep. (N.S.) Exch. 304; 6 Exch. Rep. 504.

The Charing Cross Bridge Company were incorporated by act of parliament, and were authorized to build a bridge across the Thames and make approaches to it and take tolls from foot passengers passing over the bridge. By the act, half the bridge was to be in the parish of St. Martin-in-the-Fields, in the county of Middlesex, the other half in the parish of Lambeth, in the county of Surrey. Under the provisions of the act, the Hungerford Market Company had, by deed, granted to the bridge company for ninety-nine years, leave and licence to construct on the wharf on the river side of Hungerford Market, in the parish of St. Martin-in-the-Fields, such piers and toll-houses as might be necessary for the support and use of the bridge, and also a right of way over Hungerford Market for foot passengers to and from the bridge. A pier and toll-house at the Middlesex end of the bridge were built by the bridge company under this deed on the market company's land, the land-tax on which had been previously redeemed. Another toll-house was placed on the bridge on a pier erected in the bed of the river, and tolls were received at this latter toll-house in respect of passengers landing on the bridge from steamboats:—Held, in error, affirming the judgment below, that the tolls received by the bridge company from passengers were not merely a profit derived from a beneficial occupation of the land, but that the right to

them was a separate and distinct franchise, and assessable as such to the land-tax under the statute 38 Geo. 3. c. 5. s. 4, and was not affected by the circumstance that the land-tax on the land on which one of the termini was built had been redeemed. *The Charing Cross Bridge Co. v. Mitchell* (in error), 24 Law J. Rep. (N.S.) Q.B. 249; 4 E. & B. 549.

(B) MODE OF ASSESSING PARISHES AND PLACES WITHIN DIVISIONS.

Although the assessments of the land-tax on counties are fixed and perpetual, the Commissioners are bound to assess the amount charged upon each land-tax division of the county by an equal pound rate upon all the parishes, &c. within the division with reference to the existing value of property throughout the division. But a mandamus will not lie to the Land-Tax Commissioners to assess the proportion of land-tax charged on a division of a county equally upon every parish and place within the division. *Ex parte Pym, in re the Land-Tax Commissioners*, 20 Law J. Rep. (N.S.) Q.B. 211; 16 Q.B. Rep. 381.

The duty of the Land-tax Commissioners in causing the several districts within their respective divisions to be assessed to the land-tax is regulated, not by the 38 Geo. 3. c. 5, but by the 38 Geo. 3. c. 60, re-enacted by the 42 Geo. 3. c. 116. *Regina v. the Commissioners of Land-Tax for the Tower Division*, 22 Law J. Rep. (N.S.) Q.B. 386; 2 E. & B. 694.

These latter statutes create a fixed quota to be raised from the land in each district (parish or place) within the division, subject to redemption, such fixed quota being that which was laid upon the land in the district in the assessment for 1798, under the 38 Geo. 3. c. 5. *Ibid.*

(C) REDEMPTION OF.

The representatives of a deceased incumbent of a rectory who has, out of his own estate, redeemed the land-tax prior to 1799, are entitled to recover, from the succeeding incumbent, the interest of the purchase-money, at the rate of 3l. per cent. on such purchase-money:—*Seemle*—that the Court of Chancery would not interfere to enforce the charge on the benefice as to the principal stock. *Kilderbee v. Ambrose*, 24 Law J. Rep. (N.S.) Exch. 49; 10 Exch. Rep. 454.

The guardian of an infant tenant in tail redeemed the land-tax on the estate, but made no declaration in pursuance of the 38 Geo. 3. c. 60. so as to make the land-tax a charge on the inheritance. In a suit by the guardian, who was also administrator of the infant tenant in tail, it was declared that the land-tax was an annuity or rent-charge in favour of the infant's personal estate, and the Court directed proper deeds to be executed by the then tenant for life and tenant in tail, charging the estate with the amount of land-tax as an annuity. This was done by deeds not affecting the estate in remainder after the estate tail. On the death of the survivor of the tenant for life and tenant in tail the personal representative of the infant claimed the benefit of the decree against the inheritance:—Held, that the declaration effectually charged the inheritance, and (the legal charges executed by the tenant for life and tenant in tail having failed) the tenant in remainder, after the determina-

tion of these estates, was directed legally to charge the estate with the annuity. *Ware v. Polhill*, 5 De Gex & Sm. 455.

A prebendary sold to a trustee for himself, in 1808, certain prebendal property for the redemption of the land-tax. The Lords Commissioners and other necessary persons were parties to the sale. The succeeding prebendary did not question the transaction; but his successor, who was appointed in 1833, and had ever since been in the receipt of the annual amount of land-tax, which had been redeemed, filed a bill in 1848 to set aside the sale, on the ground of illegality, irregularity and fraud:—Held, first, that such property was saleable under the provisions of the Land-Tax Redemption Acts; secondly, that the selling prebendary might purchase the property for himself; and thirdly, fraud not being proved, the prebendary not being a direct trustee of the property for his successors, and forty years having elapsed since the transaction, impeachable (if at all) at its inception, that the bill ought to be dismissed with costs. *Beadon v. King*, 22 Law J. Rep. (N.S.) Chanc. 111; 9 Hare, 499.

An equitable tenant in fee contracted to purchase a rent-charge in lieu of land-tax redeemed, which was charged upon the estates of which he was so tenant in fee, and the rent-charge was conveyed to the trustees of the estates. Subsequently he contracted to sell the estates free from any incumbrances:—Held, first, that the land-tax was entirely extinguished, and, secondly, that the rent-charge in lieu thereof was merged in the inheritance, and, consequently, that the purchaser was entitled to hold the estates free from such charge. *Bulkeley v. Hope*, 24 Law J. Rep. (N.S.) Chanc. 356; 1 Kay & J. 482.

LARCENY.

[Jurisdiction of petty sessions, see 18 & 19 Vict. c. 126—and see titles EMBEZZLEMENT—FALSE PRETENCES—RECEIVING STOLEN GOODS.]

(A) WHAT CONSTITUTES THE OFFENCE.

(a) As regards the taking.

- (1) *In general.*
- (2) *Ownership.*
- (3) *Lost Property.*
- (4) *Presumption from Possession.*
- (5) *Husband and Wife.*
- (6) *Determination of Bailment.*

(b) As regards the Thing taken.

- (B) FROM A COUNTING HOUSE.
- (C) BY CLERKS AND SERVANTS.
- (D) BY POST OFFICE SERVANTS.
- (E) FROM THE PERSON.
- (F) INDICTMENT.
- (G) EVIDENCE.

(A) WHAT CONSTITUTES THE OFFENCE.

(a) As regards the taking.

(1) *In general.*

J and W, with intent to defraud S, went into the shop of S, and induced S, by an artful story, to draw a cheque for 42*l.* It was arranged that S and J should get the cheque cashed and return to finish

the transaction. S accordingly handed the cheque over to J, and both went together to get it cashed at S's bankers. S directed the banker to cash the cheque in certain bank notes and gold. The banker handed over the bank notes and gold to J in S's presence, and while S and J were on their way back to S's shop, J managed to make off with the notes and gold, which he and W appropriated to their own use. These were to have been J's according to the arrangement if it had been *bond fide* carried out, but S never intended to part with his property in the cheque or change until they had returned to the shop where they had left W, and finished the transaction:—Held, that J had only the bare custody and not the possession of the notes and gold, and, therefore, that the carrying them off and appropriating them amounted to larceny. Held, also, that there was no larceny of the cheque. *Regina v. Johnson*, 21 Law J. Rep. (N.S.) M.C. 32.

The prisoner, professing to be about to pay the prosecutor some money due to the latter, produced a sixpenny receipt stamp and put it down on the table before the prosecutor, and mentioned the amount for which the latter was to fill it up. After the prosecutor had written and signed a receipt for that sum, the prisoner took it up and went away with it without paying the money, intending to defraud the prosecutor:—Held, that the prisoner could not be found guilty of stealing from the prosecutor the stamped paper on which the receipt was written, as the latter never had any property in the document, or independent possession of it. *Regina v. Smith*, 21 Law J. Rep. (N.S.) M.C. 111.

S was in the habit of supplying J S with bags. When he had made a quantity, he used to place them outside J S's warehouse door, and either come himself or send his wife shortly after for payment. M, who was servant to J S, by previous arrangement with S, took a number of bags of J S out of his warehouse and placed them outside the warehouse door as the new bags used to be placed. Shortly after S came to J S and asked for payment, saying he had just made the bags and brought them there, and that they would be J S's property when he had paid for them:—Held, that M was guilty of larceny of the bags, and S guilty of being an accessory before the fact. *Regina v. Manning*, 22 Law J. Rep. (N.S.) M.C. 21; 1 Dears. C.C. 21.

Where the prisoner, by mistake, drove away with his flock of sheep one of the prosecutor's lambs, and afterwards, on finding out that he had the lamb, immediately sold it as his own,—Held, that as the original taking was not rightful, but was an act of trespass, the subsequent appropriation was a larceny. *Regina v. Riley*, 22 Law J. Rep. (N.S.) M.C. 48; 1 Dears. C.C. 149.

The prisoner was indicted for stealing five thousand cubic feet of gas. The gas company had contracted to supply him with gas to be paid for by meter. The gas was received from the company's main into an entrance pipe belonging to the prisoner, and passed through the meter which the prisoner had hired of the company into another pipe, the property of the prisoner, called the exit pipe, which fed the burners. The prisoner fraudulently, by fixing a pipe connecting the entrance and exit pipes, made a passage through which the gas rose to the burners without passing through the meter, which,

consequently, did not shew all the gas consumed. The jury found that the prisoner had not by contract any interest in or controul over the gas until it passed the meter:—Held, that the prisoner by opening the stop-cock of the connecting pipe, and letting the gas pass out of the entrance pipe into it, sufficiently severed a portion of the gas to constitute an asportation, and that he was guilty of larceny of the gas. *Regina v. White*, 22 Law J. Rep. (N.S.) M.C. 123; 1 Dears. C.C. 203.

W was indicted for larceny for stealing 6 lb. of brass from a foundry. The only suggested evidence offered at the trial was that the prisoner, who was employed upon the premises, had been seen to come into the place where the brass was kept:—Held, that there was not a scintilla of evidence to go to the jury. *Regina v. Walker*, 1 Dears. C.C. 280.

The prisoner assigned his goods by deed to trustees for the benefit of his creditors. No manual possession was taken under the assignment, but the prisoner remained in possession of the goods himself, and while in such possession he removed the goods, intending to deprive the creditors of them. The jury found the prisoner guilty of larceny, and found that the goods were not in the custody of the prisoner as the agent of the trustees:—Held, that the conviction was wrong. *Regina v. Pratt*, 1 Dears. C.C. 360.

The prisoners were charged with stealing four sacks of barley and three sack bags from their master. It was proved in evidence that the prisoners and one B were employed by the prosecutor to winnow barley which he had mixed with canary seed. One of the prisoners fetched several sacks from the prosecutor's house, which he and B filled with barley. The two prisoners then sent B home before the usual time. At twelve o'clock on the night of the same day, the carter went into the stable with a lantern, and shortly afterwards the two prisoners entered the stable. In a few minutes after this the prosecutor saw the carter in the loft above with a lantern, and found the two prisoners concealed under straw in the loft, and then in a dust-bin in a stable beneath he found three sacks full of barley mixed with canary seed, which he swore was of the same kind which he had mixed. It was no part of the duty of the prisoners to place the barley in sacks, or to put the sacks of barley into the dust-bin. The jury found both the prisoners guilty:—Held, that the evidence was sufficient to support the conviction. *Regina v. Samways*, 1 Dears. C.C. 371.

The prisoners were charged with stealing certain monies of Jane Jones. It appeared that the prisoners, by false representations, induced the prosecutrix to purchase a dress for 25s., promising that if she would do so, they would give her another dress worth 12s. They then took a guinea out of her hand (she neither consenting nor resisting, but being taken by surprise), and gave her a dress worth much less than a guinea, but refused to give her the dress which they had promised. The jury, upon these facts, found the prisoners guilty:—Held, that the facts warranted the finding, as the Court was bound to assume that the jury were properly directed, and that they found that it was part of the scheme of the prisoners to obtain the money by means of a pretended sale. *Regina v. Morgan*, 1 Dears. C.C. 395.

A quantity of wheat was in the possession of the

prosecutors as bailees, and was deposited in one of their storehouses, under the care of one of their servants, who had authority to deliver it only on the order of the prosecutors or their managing clerk. The prisoner, who was also a servant of the prosecutors, by a false statement, induced the servant, under whose care the wheat was, to allow him to remove part of the wheat, which he carried away and appropriated to his own use:—Held, that under these circumstances the prisoner was properly convicted of larceny. *Regina v. Robins*, 1 Dears. C.C. 418.

A, bargaining with B about some waistcoats, said, "You must go to the lowest price, as it will be ready money;" B said, "Then you shall have them for 12s.," to which A assented. A then said he should put the waistcoats into his gig, which was then standing at the door. B replied "Very well." A drove off with the waistcoats without paying for them, and absconded for two years. The jury returned the following verdict:—"In our opinion the waistcoats were parted with conditionally that the money was to be paid at the time, and that A took them with a felonious intent:"—Held, a larceny in A. *Regina v. Cohen*, 2 Den. C.C. 249.

(2) *Ownership.*

One of the prisoners was sent by a carman to the London Dock Company to receive two particular casks of sugar. Two other casks, the property of some third party, were, by mistake, delivered to him, and he drove off with them. On the road, both prisoners broke open the casks and subtracted a portion of the sugar. They were indicted, and found guilty of stealing it:—Held, that the sugar was properly described in the indictment as the property of the London Dock Company, for the latter did not lose their special property in it as bailees by parting with the possession by mistake. *Regina v. Vincent*, 21 Law J. Rep. (N.S.) M.C. 109; 3 Car. & K. 246.

(3) *Lost Property.*

A purchaser by mistake left his purse on the prisoner's market stall, without himself or the prisoner knowing it. The prisoner afterwards seeing it there, but not at the time knowing whose it was, appropriated it, and subsequently denied all knowledge of it when inquiry was made by the owner:—Held, that the prisoner was guilty of larceny, as the purse was not strictly speaking lost property, and, therefore, it was not necessary to inquire whether the prisoner had used reasonable means to find the owner. *Regina v. West*, 24 Law J. Rep. (N.S.) M.C. 4; 1 Dears. C.C. 402.

(4) *Presumption from Possession.*

On the first floor of a warehouse a large quantity of pepper was kept in bulk. The prisoner was met coming out of the lower room of the warehouse, where he had no business to be, having on him a quantity of pepper of the same description with that in the room above. On being stopped, he threw down the pepper, and said, "I hope you will not be hard with me." From the large quantity in the warehouse, it could not be proved that any pepper had been taken from the bulk. It was objected that as there was no direct proof that any pepper had been stolen, the Judge was bound to direct an acquittal:—Held, that without such direct proof of a

loss, there was abundant evidence to warrant the conviction of the prisoner. *Regina v. Burton*, 23 Law J. Rep. (N.S.) M.C. 52; 1 Dears. C.C. 282.

When a stolen horse was found in the possession of the prisoner six months after it was lost, and there was no other evidence against the prisoner, the Judge would not call on the prisoner for his defence, as the possession was not sufficiently recent. *Regina v. Cooper*, 3 Car. & K. 318.

(5) *Husband and Wife.*

The wife of A left his house, taking with her some of A's money, and saying to B, who was in a room below, "It is all right; come on." B left in a few minutes, joined A's wife, and slept with her at a public-house the same night. B was afterwards taken into custody, and found with A's money upon him. On the trial of B for stealing A's money, the jury found him guilty, stating that he received the money from the wife knowing that she took it without the authority of her husband:—Held, that the conviction was proper. *Regina v. Featherstone*, 23 Law J. Rep. (N.S.) M.C. 127; 1 Dears. C.C. 369.

(6) *Determination of Bailment.*

The prisoner was employed by the prosecutor to sell clothes on commission. The prosecutor fixed the price of each article, and the prisoner was intrusted with the articles to sell at that fixed price, and he was to bring back the money or the goods if they remained unsold. The prisoner on one occasion took away a parcel of clothes on these terms, but instead of selling them he fraudulently pawned part and fraudulently applied the residue of them to his own use:—Held, that there was but one bailment of all the separate articles forming the parcel; that the original bailment was determined by the unlawful act of pawning part of them; and that consequently the subsequent fraudulent appropriation of the residue amounted to a larceny. *Regina v. Poyser*, 20 Law J. Rep. (N.S.) M.C. 191; 2 Den. C.C. 233.

The prisoner was convicted of larceny under the following circumstances. The prisoner was a common carrier, and was employed by the prosecutor to carry a cargo of coals from a ship to a coal yard, and thence to another yard belonging to the prosecutor. The prisoner carted the coals to the first-mentioned coal yard, and was engaged for several days in carting them from thence to the prosecutor's other yard. He left the first-mentioned coal yard on one of those days with two carts and a waggon all laden with coals; before he arrived at the other yard he delivered the two cart-loads to a third person on his own account; but he duly delivered the waggon-load at the prosecutor's other yard:—Held, that the conviction was wrong, the coals having been delivered to the prisoner as a carrier, and there having been no breaking of bulk or other determination of the bailment. *Regina v. Cornish*, 1 Dears. C.C. 425.

(b) *As regards the Thing taken.*

Pigeons if tame and reclaimed may be subjects of larceny, though not in a state of confinement, but living in an ordinary dove-cote, which affords them free access at their pleasure to the open air. *Regina v. Cheafor*, 21 Law J. Rep. (N.S.) M.C. 43.

An executory contract in writing, which requires a stamp, is not, though unstamped, the subject of lar-

ceny; as it is merely evidence of a chose in action; and a person stealing it cannot be convicted on a count charging him with stealing a piece of paper—*Parke, B. dissentiente. Regina v. Watts*, 23 Law J. Rep. (N.S.) M.C. 56; 1 Dears. C.C. 326.

Mortgage deeds which are subsisting securities for money, and therefore choses in action, are not properly described in an indictment as goods and chattels. *Regina v. Powell*, 21 Law J. Rep. (N.S.) M.C. 78.

(B) FROM A COUNTING HOUSE.

The prisoner was indicted for stealing money from a counting-house. The proof was that he stole money from a building called "the machine-house," on the premises of a person who had large chemical works. All goods sent out were weighed in this building, and in it the men's time was taken and wages paid. The books in which the men's time was entered were brought to the building for the purpose of making the entries, but were kept in another building on the premises called "the office," where the general books and accounts of the concern were kept:—Held, that there was evidence that the building was a counting-house within the act 7 & 8 Geo. 4. c. 29. s. 15. *Regina v. Potter*, 20 Law J. Rep. (N.S.) M.C. 170.

(C) BY CLERKS AND SERVANTS.

[See Stat. 14 & 15 Vict. c. 100. s. 13.]

N sent his servant to a railway station to purchase a quantity of coals for him. The wharfinger at the station, on the servant's application on behalf of his master, weighed the coals out, and entered them against N's name in his book. The coals were then put into N's cart, and the servant drove it off, it being his duty to take the coals to his master's house. On his way home, the servant improperly appropriated some of the coals to his own use, and deposited them at another person's house:—Held, that the servant's original exclusive possession of the coals was determined, and his master's constructive possession of them commenced, when they were deposited in the master's cart; consequently that the servant, by afterwards taking them, committed a trespass, and was guilty of larceny. *Regina v. Reed*, 23 Law J. Rep. (N.S.) M.C. 25; 1 Dears. C.C. 257.

It was the duty of the prisoner, who was a servant of the prosecutors, in the absence of their chief clerk, to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale. On one occasion he falsely stated to the chief clerk that he had paid 2s. 3d. for kitchen stuff which he had bought for his masters, and demanded to be paid for it. The clerk on this paid him 2s. 3d. out of money which his master had furnished him with to pay for the kitchen stuff. The prisoner applied the money to his own use:—Held, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining it by false pretences. *Regina v. Barnes*, 20 Law J. Rep. (N.S.) M.C. 34; 2 Den. C.C. 59.

(D) BY POST OFFICE SERVANTS.

If a person, while engaged in gratuitously assist-

ing a post-master, at his request, in sorting the letters, steal one of them, he is liable to the severer penalties imposed by the statute 7 Will. 4. & 1 Vict. c. 36. s. 26, as a person employed under the Post Office. *Regina v. Reason*, 23 Law J. Rep. (n.s.) M.C. 11; 1 Dears. C.C. 226.

(E) FROM THE PERSON.

The prosecutor carried his watch in his waistcoat pocket fastened to a chain which was passed through the button-hole of the waistcoat, and kept there by a watch-key at the other end of the chain turned so as to prevent the chain slipping out. The prisoner took the watch out of the prosecutor's pocket and forcibly drew the chain and watch-key out of the button hole, but the point of the key caught upon a button, and the prisoner's hand being seized the watch remained there suspended:—Held, that the prisoner was guilty of stealing from the person, as the watch and chain were in his possession and severed from the person of the prosecutor for the interval of time after the key was drawn out of the button-hole, and before it caught on the button. *Regina v. Simpson*, 24 Law J. Rep. (n.s.) M.C. 7; 1 Dears. C.C. 421.

(F) INDICTMENT.

[Including three larcenies in same indictment, see 14 & 15 Vict. c. 100. ss. 16. and 17.]

(G) EVIDENCE.

[Admission of unstamped documents, see 17 & 18 Vict. c. 83. s. 27.]

LEASE.

[See titles FRAUDS, STATUTE OF—STAMP.]

- (A) CONTRACTS FOR LEASES.
- (B) LEASE OR AGREEMENT.
- (C) FOR LIVES.
- (D) OPTION OF TAKING.
- (E) COUNTERPART.
- (F) CONSTRUCTION AND OPERATION.
 - (a) *Premises, Fixtures, &c.*
 - (b) *Covenants.*
 - (c) *By Way of Estoppel.*
 - (d) *Non-Execution by Lessor.*
- (G) ASSIGNMENT.
- (H) SURRENDER.
- (I) FORFEITURE.
- (J) RENEWAL.
- (K) REFORMING.

(A) CONTRACTS FOR LEASES.

[What terms are implied, see *Keates v. Cadogan*, title FRAUD AND MISREPRESENTATION, ante, p. 310.]

The plaintiff applied to the defendant for a lease of certain premises, intending at the time he applied to use them as a brothel. The defendant, relying upon the innocent, though false, misrepresentation of a third party, to whom he was referred by the plaintiff, that the plaintiff was a respectable man, and on the plaintiff's own fraudulent representation that he intended to carry on the trade of a perfumer, granted him a lease. The plaintiff accordingly entered into

possession and used the premises as a brothel, whereupon the defendant forcibly evicted him. The plaintiff having brought ejectment to recover possession,—Held that he was entitled to recover, for that the fraudulent misrepresentations were as to matters collateral to the lease, and did not avoid it. *Feret v. Hill*, 23 Law J. Rep. (n.s.) C.P. 185; 15 Com. B. Rep. 207.

By an agreement, not under seal, made between the defendant, described as a common brewer, of the one part, and the plaintiff of the other part, reciting that the defendant was in possession of a messuage and premises wherein the sale of beer had been for some time past carried on by A B, on the defendant's account, and that the plaintiff was desirous of carrying on such trade and business for the defendant, to which he had agreed, it was witnessed, that the defendant agreed, for the consideration therein stated, that the plaintiff should enter upon the said premises and carry on therein such trade or business for the defendant, in the place and stead and in the same manner and with and on the same privileges and terms as the said A B had theretofore done, until the agreement should be determined by the notice thereafter mentioned; and the plaintiff thereby agreed, during all the time he should carry on the said trade on the said premises for the defendant, that all beer sold by him on the said premises should be had by him from the defendant, and that the plaintiff should not part with the said trade or occupation of the said premises to any person without the licence of the defendant; and that whenever either party should be desirous of putting an end to the agreement, the plaintiff should, on receiving from the defendant such notice, quit the said trade, and deliver up possession of the said premises, and should be at liberty to leave the said trade and quit the occupation of the said premises, on giving one month's notice to the defendant:—Held, that this did not create the relation of landlord and tenant between the parties, but that the occupation of the plaintiff was that of servant to the defendant. *Mayhew v. Suttle* (in error), 24 Law J. Rep. (n.s.) Q.B. 54; 4 E. & B. 347.

It was agreed between M, the lessee of certain premises, and the plaintiff, that M should grant him a lease, which was to contain the usual covenants, and particularly those contained in the lease under which M held the premises, so that the same in no way restricted the trade of a retailer of beer. The original lease did contain a restriction against the use of the premises by a retailer of beer:—Held, that whether the words "so that the same" referred to the original or the proposed lease, the meaning was that M should grant a lease without the covenant in restraint of trade, and was not a warranty that the original lease contained no such covenant. *Hayward v. Parkes*, 24 Law J. Rep. (n.s.) C.P. 217; 16 Com. B. Rep. 295.

The agreement was made and the plaintiff entered in March 1853, and in August his attorney sent a draft lease containing a covenant in restraint of selling beer. M died in September, and the plaintiff's attorney returned the draft in November, objecting to the covenant. A correspondence subsequently took place, and early in March 1854 the defendants as M's executors offered a lease pursuant to the agreement; but it was not accepted:—Held, that a

reasonable time had not elapsed before the testator's death for him to grant the lease, nor, after it, for the executors to do so. *Ibid.*

In carrying an informal contract for a lease into effect, the Master will be directed to regard previous leases containing special covenants. *Bell v. Barchard*, 21 Law J. Rep. (N.S.) Chanc. 411; 16 Beav. 8.

A landlord, by memorandum, agreed to cancel a lease for fourteen years containing special covenants, and to grant a new lease for twenty-eight years at a reduced rent. After the decease of the landlord, the solicitors of the devisee and tenant, to avoid a suit, agreed that the term should be reduced to twenty-one years; but upon the draft being sent, the lessor refused to forego a covenant not to assign the lease without consent. Upon a claim by the tenant:—Held, that he was entitled to a specific performance, and though the letter of proposed arrangement by the tenant said, "the lease to contain all covenants usual and ordinary in farming leases," it was referred to the Master, who, in settling the lease, was to have regard to the lease previously held by the tenant. *Ibid.*

(B) LEASE OR AGREEMENT.

Under an agreement to let for three years, though it is void as a lease for three years by the statute 8 & 9 Vict. c. 106. s. 3, the tenant held from year to year, subject to the terms of the agreement, and is bound to quit at the expiration of the three years without a previous notice to quit. *Tress v. Savage*, 23 Law J. Rep. (N.S.) Q.B. 339; 4 E. & B. 36.

By articles of agreement, since the 8 & 9 Vict. c. 106. s. 3, the plaintiff agreed to let, and the defendant to take certain premises for the term of five years, and the defendant to purchase the same at the end of five years; yielding to the plaintiff, as well for the rent for the five years as for the purchase, 70*l.*, by seventy shares, &c., the receipt whereof the plaintiff thereby admitted; no abstract of title to be required beyond evidence of seisin for twenty-one years, and that the defendant should immediately do all acts necessary to transfer the shares to the plaintiff:—Held, that the intention of the parties, as declared by the words of the instrument, was to create a lease, and that as it was not by deed, it was void. *Stratton v. Pettit*, 24 Law J. Rep. (N.S.) C.P. 182; 16 Com. B. Rep. 420.

Held, also, that the production of evidence of seisin by the plaintiff was not a condition precedent to his right to a transfer of the shares. *Ibid.*

(C) FOR LIVES.

There being no satisfactory proof that the persons were living, for whose lives certain hereditaments were held, the Court, on the application of the remainder-man, made an order under the 6 Ann. c. 18. s. 1, requiring the tenant *pur autre vie* to produce the persons at the time and place specified in the order. *In re Clossey*, 2 Sm. & G. 46.

(D) OPTION OF TAKING.

A tenant under an agreement, with an option of taking a lease, held, not to have waived the option by declining to take a lease when asked so to do, no step being taken to determine the tenancy. *Hersey v. Giblett*, 23 Law J. Rep. (N.S.) Chanc. 818; 18 Beav. 174.

The specific day for the commencement of a lease, which a tenant had an option of taking, being uncertain, held, although the lease was not applied for until nearly eight years after the date of the agreement and after a notice to quit, that the tenant was entitled to the lease, and that it was to commence from the time when the tenancy commenced. *Ibid.*

(E) COUNTERPART.

In debt for rent on an indenture, with a plea of *non est factum*, the plaintiff is entitled to recover, on production of a deed bearing a *counterpart* stamp, and on proof of its execution by the defendant, without going on to prove the execution of a lease by himself. *Hughes v. Clark*, 10 Com. B. Rep. 905.

(F) CONSTRUCTION AND OPERATION.

[See title COMMON, (B).]

(a) *Premises, Fixtures, &c.*

[See *Doe d. Robertson v. Gardiner*, title DEED, (C) (c).]

In 1822, W, a lessee for years of certain premises, (including Greenacre) mortgaged them for the residue of the term to B G. In 1834, the mortgage was paid off by R C, who took an assignment of the legal interest of the mortgagees, and at the same time purchased the equity of redemption of W. In 1838, the premises were sold by the executors of R C to W F. In 1846, the same premises were assigned by the executors of W F to R B, one of the lessors of the plaintiff, and in the same year they were mortgaged by R B to A W, the other lessor of the plaintiff. In 1829, the defendant took a lease of part of the premises contiguous to Greenacre of W for twenty-one years. Soon afterwards he applied for a lease of Greenacre, but W refused, alleging that he had granted a right of way over it to persons to whom he had sold houses in an adjoining square; he at the same time told him that if he took possession of it it must be at his own risk, but that if he did he would not interfere. The defendant then took possession of it, and built a workshop on it. In 1850, the lease of the demised premises having expired, the defendant surrendered them to the plaintiffs, but refused to give up Greenacre. In an action of ejectment to recover Greenacre,—Held, first, that it could not be considered as forming part of the demised premises in respect of which rent was paid, and that as there had been no rent paid or any acknowledgment given, the statute 3 & 4 Will. 4. c. 27. s. 2. would be a bar as against W or those claiming under him other than a mortgagee. Secondly, that although the mortgage of 1822 had been paid off, the lessors were "*parties claiming under a mortgage*," within the meaning of 7 Will. 4. & 1 Vict. c. 28, and therefore entitled to recover. *Doe d. Baddeley v. Massey*, 20 Law J. Rep. (N.S.) Q.B. 434; 17 Q.B. Rep. 373.

The following stipulation in a lease not under seal, "All the hedges, trees, thorn bushes, fences, with the lop and top, are reserved to the landlord," is evidence for the landlord under a plea of leave and licence in an action against him by his tenant for entering the close and drawing the trees, when cut down, over the close. *Hewitt v. Isham*, 21 Law J. Rep. (N.S.) Exch. 35; 7 Exch. Rep. 77.

A lessee, for a long term of years, of an unfinished house covenanted with the lessor to surrender the

premises at the end of the term, "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, and other fixtures and articles in the nature of fixtures which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging." At the time of the lease the house was intended to be used as a tavern, and was subsequently completed and fitted up by the lessee with the things necessary for carrying on the business of a tavern-keeper and licensed victualler, including various articles of the description known as "trade fixtures," and others known as "tenant's fixtures," fixed to the house in the ordinary way, and which, in the absence of any covenant to the contrary, would be removable by a tenant:—Held (*dissentiente Platt, B.*), that the lessee was precluded by the terms of the covenant from selling the "tenant's fixtures." Held, also (*dissentiente Parke, B.*), that the lessee was not restrained by the covenant from selling the "trade fixtures." *Elliot v. Bishop*, 24 Law J. Rep. (N.S.) Exch. 33; 10 Exch. Rep. 522.

Under a lease of "all that messuage or tenement, called, &c., now or late in the occupation of C.," the boundaries given not accurately defining the premises,—Held, that a "gateway" under a portion of the messuage, and leading to a yard behind, in which were some small houses, not included in the demise, the tenants of which had always used the gateway, did not pass, in the absence of evidence to shew that it had been in the exclusive occupation of C. *Dyme v. Nutley*, 14 Com. B. Rep. 122.

(b) Covenants.

A lease contained a covenant by the lessor to do certain work, and at the end of the covenant were these words: "and the whole of which is agreed to be left to the superintendence of the defendant and the plaintiff's son":—Held, that this was neither a condition precedent to, nor concurrent with, the covenant. *Jones v. Cannock*, 3 H.L. Cas. 700.

Where a lessee covenants to pay rent at the time and in the manner reserved in the lease, no place of payment being named, it is no defence to an action upon the covenant that the lessee was upon the land demised on the day the rent became due, with the money ready to pay the lessor, but that the lessor was not there ready to receive it. *Haldane v. Johnson*, 22 Law J. Rep. (N.S.) Exch. 264; 8 Exch. Rep. 689.

A lessor is not entitled to require the executors of a deceased lessee to set apart any portion of his assets to secure them and the lessor from possible breaches of the covenants in the lease on the part of the lessee, his executors, administrators and assigns. *King v. Malcott*, 22 Law J. Rep. (N.S.) Chanc. 157; 9 Hare, 692.

A covenant to dig and excavate a given quantity of coal, and to pay a rent after that rate whether it was excavated or not, is not a covenant from which the lessee can be relieved when, after the expiration of the term, it turned out that the coal in the land proved deficient; and a demurrer to a bill for an account and repayment was allowed. *Mellers v. the Duke of Devonshire*, 22 Law J. Rep. (N.S.) Chanc. 310; 16 Beav. 252.

A covenant to insure in the joint names of the lessor and lessee is well performed by insuring only

in the name of the lessor. *Havens v. Middleton*, 22 Law J. Rep. (N.S.) Chanc. 746; 10 Hare, 641.

(c) By Way of Estoppel.

A mortgagor of leasehold premises granted an under-lease. The original lease, by numerous mesne assignments, and by the assignment of the equity of redemption by the mortgagor, became absolutely vested in the lessors of the plaintiff as the legal personal representatives of the last assignee:—Held, first, that as the mortgagor had only the equity of redemption at the time of the grant, the under-lease operated as a demise by estoppel only between the parties to it; and that, as the mortgagor never afterwards acquired any legal interest in the premises, he could not pass any legal interest in that contract. Secondly, that although some of the mesne assignments were made subject to the under-lease, yet any possible effect of this circumstance was confined to the parties to the deeds, and inasmuch as neither the defendant, nor any person through whom he claimed, or with whom he had any legal privity, was a party to such assignments, the lessors of the plaintiff were in no respect bound or affected by the under-lease. Thirdly, that, though payment of rent had been made in accordance with the terms of the under-lease, yet by such payment and the other circumstances of the case a tenancy from year to year only had been created, which was well determined by a regular notice to quit, served upon the attorney of the administratrix of the person who paid rent to the lessors of the plaintiff, and under whom the defendant claimed. *Doe d. Prior v. Ongley*, 20 Law J. Rep. (N.S.) C.P. 26; 10 Com. B. Rep. 25.

(d) Non-execution by Lessor.

Debt on an indenture bearing date the 27th of December 1849, made between five Commissioners of an inland navigation, under the authority of several acts of parliament, of the one part, and the defendant of the other part, whereby the Commissioners, in consideration of a certain rent, demised the tolls of the said navigation to the defendant for a year from the 1st of January 1850, at the rent of 3,470*l.*, together with certain other payments, and the defendant covenanted with them, and also with the whole body of the Commissioners, as a separate covenant for the payment of the rent. The declaration then alleged an entry by virtue of the demise and the occupying and receiving of the tolls during the entire year. Breach, non-payment of the rent. Plea, that the Commissioners never executed the lease, and that the entry and occupation was at the will of the Commissioners only, and not under the demise. Replication, that the defendants had entered and had received and enjoyed the tolls, &c., by the permission of the Commissioners, under the terms of the indenture:—Held, that as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise and under its terms; and, therefore, that he was not liable to be sued upon his covenant in the lease. *Swatman v. Ambler*, 22 Law J. Rep. (N.S.) Exch. 81; 8 Exch. Rep. 72.

(G) ASSIGNMENT.

A, the plaintiff, demised to B certain premises for

a term of fifty-five years, in consideration of 530*l.*, subject to the payment of a yearly rent of 84*l.*, and covenants for repair, &c., but the consideration money not being paid, B, &c. subsequently assigned to A, by way of mortgage, the whole of the residue of the term then unexpired, subject to the rent and covenants, and with a power of sale. Notice of sale having been given by A pursuant to the power, the plaintiff, in consideration of 500*l.* by a deed "bargained, sold, assigned, transferred and set over" to the defendant the premises described in the lease, to hold for all the rest, residue and remainder of the said term of fifty-five years granted by the plaintiff to B discharged from the mortgage debt, but subject to the payment of the yearly rent of 84*l.*, and to the covenants in the said lease to B; and the defendant covenanted to pay the rent and perform the covenants. The defendant then entered upon the premises:—Held, that although the term of fifty-five years was merged by the mortgage to the lessor, the effect of the conveyance to the defendant was to create a new term of the same duration as the unexpired part of the old term, and that the defendant was liable upon the covenants to pay the rent, and to perform the repairs. *Cottee v. Richardson*, 21 Law J. Rep. (N.S.) Exch. 52; 7 Exch. Rep. 143.

(H) SURRENDER.

The plaintiffs having brought an action against the defendant, who was their tenant of a mill, for breaches of covenant in a lease as to paying rent and repairing, the defendant proposed to plead the following plea as an equitable defence: that it was agreed between the plaintiffs and the defendant that the defendant should surrender by yielding up to the plaintiffs the premises in his occupation, and permitting the plaintiffs to receive the rent, and the tenants of the other portions to attorn, and that the defendant should pay the sum of 2*0*0*l.* and give up a quantity of machinery to the plaintiffs, in consideration of the tenancy being put an end to and in discharge of all claims under the said lease. That the defendant accordingly paid such sum of money and delivered up the lease, and withdrew from possession of the premises occupied by him, and permitted the plaintiffs to receive the rents of the tenants who were willing to attorn, and that the defendant relinquished also the machinery, and had done all conditions precedent, and had been ready and willing to do all other things necessary on his part for putting an end to the tenancy and by way of satisfaction as aforesaid; and that this action was brought in fraud and breach of the said agreement, and it was entirely the fault of the plaintiffs that such surrender was not completed:—Held, that such plea did not constitute an equitable defence, within the 17 & 18 Vict. c. 125. ss. 83, 86, (the Common Law Procedure Act, 1854,) as a Court of equity would not either compel performance of the agreement between the parties or restrain the plaintiffs from executing their judgment without at the same time compelling the defendant to execute a surrender in writing, pursuant to the Statute of Frauds; and this Court had no power to compel the defendant to execute such surrender. *Mines Royal Society v. Magnay*, 24 Law J. Rep. (N.S.) Exch. 7; 10 Exch. Rep. 489.

The power of the Court to act under the above sections is confined to cases where they are empow-

ered to grant an injunction absolute and without terms. *Ibid.*

(I) FORFEITURE.

On a motion for judgment under section 210. of the Common Law Procedure Act, it is no objection to an affidavit that it alleges that more than half a year's rent is due, and that no sufficient distress is to be found on the premises countervailing the arrears then due. *Doe d. Powell v. Roe* overruled. *Cross v. Jordan*, 22 Law J. Rep. (N.S.) Exch. 70; 8 Exch. Rep. 149.

E, the tenant of leasehold premises, under-let a portion of them to B for a term of years, reserving a few months' reversion. B covenanted to complete some cottages on the premises by the 25th of June. By an indenture, made on the 30th of July following, which recited that E had entered into several agreements and under-leases affecting the leasehold premises, the particulars of which were known to J, it was witnessed that E did "bargain, sell, assign, transfer and set over the said leasehold premises, with their appurtenances, and all the estate, right, title and interest of him the said E in, to, or out of the said premises and every part thereof, to J, to have and to hold the said premises and every part thereof for the residue of the term of years granted by the indenture of lease under which E held, and all other the estate and interest of the said E therein or thereout, subject nevertheless to the agreement and under-leases hereinbefore referred to." B did not build the cottages by the 25th of June. It did not appear whether E knew of the fact, or elected to treat the default as a breach of covenant and a forfeiture of the lease:—Held, that assuming that the non-completion of the cottages was a breach of covenant, and gave E a right of re-entry before the assignment to J, and that the statute 8 & 9 Vict. c. 106. s. 5. enabled E to assign the right of entry for condition broken, yet that the language of the indenture was not sufficient to transfer that right to J, so as to enable him to take advantage of the forfeiture. *Hunt v. Remnant* (in error), 23 Law J. Rep. (N.S.) Exch. 135.

(J) RENEWAL.

The under-lessee of a renewable customary leasehold estate covenanted with the mesne lessors (the trustees of a charity) to pay the fines and expenses beyond the amount of one year's rent, on the admittance of new trustees when reduced to a certain number. Pending litigation in respect of the amount of the fines payable to the lord of the manor, the under-lessee died, having specifically bequeathed the leasehold estate. On special case between the parties beneficially interested in the leasehold estate, the amount of the fines payable in the lifetime of the under-lessee, and the costs of the litigation in respect thereof, were ordered to be paid out of her general personal estate, and the amount of the fines payable after her decease, and the costs of the litigation in respect thereof, were ordered to be paid by the specific legatees. *Fitzwilliams v. Kelly*, 22 Law J. Rep. (N.S.) Chanc. 1016; 10 Hare, 266.

A granted a lease, and covenanted that he would always at any time when requested by the lessees, &c., demise the premises for the further term of thirty-one years, in which new lease were to be con-

tained the same rents, covenants, articles, clauses, provisoes and agreements:—Held, that this amounted to a covenant for perpetual renewal. *The Copper Mining Company v. Beach*, 13 Beav. 478.

A testator covenanted for a perpetual renewal of a lease:—Held, that the proper form of lease to be granted by trustees was a demise for the new term, reciting the original covenant by the testator. *Ibid*.

Form of lease to be granted by trustees under a covenant by a testator for perpetual renewal. *Hodges v. Blagrove*, 18 Beav. 404.

Under such a covenant trustees are not bound to enter into a covenant to renew, but the original covenant together with the decision of the Court of the lessee's right to a perpetual renewal should be recited in the lease granted by the trustees, and the trustees should purport to demise in obedience thereto. *Ibid*.

The time from which the lessee will be deemed to have neglected or refused to renew is not to be computed from the latest time at which the mesne landlord might have procured a renewal; but from the time at which he applies to the under-lessee to contribute to the fine and expense of the renewal which he is about to obtain, or has obtained. *Chesterman v. Mann*, 22 Law J. Rep. (N.S.) Chanc. 151; 9 Hare, 206.

Where leases which the testator had directed to be renewed were renewed by adding a *cestui que vie*, by means of a payment out of funds belonging to the testator's estate (not charged with such renewal), and it was referred to the Master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal, the Master found and the Court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid in the name of the trustees on the life of the new *cestui que vie*, the costs and premiums in respect of which ought to be paid out of the rents and profits of the estate to which the tenant for life was entitled. The Court subsequently declared the policy of life assurance to be a security for the benefit which the tenant for life had derived or might derive from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own. *Hudleston v. Whelpdale*, 9 Hare, 775.

But, *semble*, the mode of providing the security adopted by the report is erroneous in principle, for the object of the Court in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive, and the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of, and this sum (which would be payable on the death of the tenant for life) is not perfectly secured by a policy of insurance on the life of another person, inasmuch as it throws upon the remainderman not merely the interest of the capital provided, but the burthen of keeping up a policy of life insurance for the full amount, and it is mere speculation whether this burthen will be compensated by giving him the benefit of a policy

at a less rate of premium owing to an earlier insurance of the life. *Ibid*.

Although it may be that when provision is made of a fund for renewal the remainderman will not suffer, this is not the principle, for the principle is that the remainderman ought to bear so much of the capital paid for renewal as may not be paid for the tenant for life under the security which he has given. *Ibid*.

The Court will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals before the occasion for giving such security has arisen. *Ibid*.

(K) REFORMING.

By an agreement in writing A agreed to take an under-lease from B at a rent of 340*l.*, A paying all taxes, land-tax and insurance. A lease was granted, reserving the rent of 340*l.*, stated to include the land-tax; it had, however, been redeemed by the superior landlord. The lessee having refused to pay the amount of the land-tax redeemed, the lease was ordered to be reformed by making him liable for the land-tax, though redeemed:—Held, also, that parol evidence was admissible to explain the meaning of the parties by "land-tax." *Murray v. Parker*, 19 Beav. 305.

On reforming a lease no costs were given to the plaintiff, the lessor, because the suit had been occasioned by his error in not having the lease properly prepared. *Ibid*.

LEGACY.

[See titles COUNTY COURT—DEVISE—WILL.]

(A) CONSTRUCTION OF.

- (a) *In general.*
- (b) *Gift by Implication.*
- (c) *Meaning of Words.*

(B) WHO TAKE AS LEGATEES.

- (a) *Generally.*
- (b) *Description of Legatee.*
- (c) *Gift to a Class.*
 - (1) *When and how ascertained.*
 - (2) *Distribution per Capita or per Stirpes.*
 - (3) *Next-of-Kin.*
 - (4) *Representatives.*
 - (5) *Family.*
 - (6) *Offspring.*
 - (7) *Issue.*
 - (8) *Children.*
 - (9) *Illegitimate Children.*

(C) WHAT PROPERTY PASSES.

- (a) *In general.*
- (b) *Movables.*
- (c) *Dividends.*

(D) WHAT INTEREST VESTS.

- (a) *Absolute.*
- (b) *For Life.*
- (c) *Joint Tenancy.*
- (d) *Trust or Beneficial.*
- (e) *Separate Use.*

(E) ON WHAT PROPERTY CHARGEABLE.

(F) VESTED OR CONTINGENT.

(a) *In general.*(b) *Period of Vesting.*

(G) SPECIFIC AND DEMONSTRATIVE.

(H) CUMULATIVE OR SUBSTITUTIONAL.

(I) CONDITIONAL.

(J) SURVIVORSHIP.

(K) PAYMENT OF.

(L) INVESTMENT.

(M) ABATEMENT.

(N) ADEMPMENT AND SATISFACTION.

(O) REMISSION OF DEBT.

(P) ASSENT OF EXECUTOR.

(Q) FORFEITURE.

(R) VOID.

(S) REVOKED.

(T) LAPSED.

(U) RESIDUE.

(V) INTEREST ON.

(W) ANNUITY.

(X) RECOVERY OF LEGACY.

(Y) RIGHTS AND LIABILITIES OF THE LEGATEE.

(Z) LEGACY DUTY.

(A) CONSTRUCTION OF.

(a) *In general.*

A testator gave his residuary estate equally among his six children, and directed that sums of money appearing by his private ledger to be due from them, should in the division be brought into account:—Held, that allowance must be made for all sums appearing due, though they were barred by the Statute of Limitations. *Rose v. Gould*, 21 Law J. Rep. (n.s.) Chanc. 360; 15 Beav. 189.

A testator by his will bequeathed the sum of 700*l.* unto and amongst J C and C his wife, and W L, and in the same will bequeathed 200*l.* to W L and 200*l.* to J C, and also 200*l.* to the said C the wife of J C:—Held, that the fund was divisible into two parts only, and not into three parts, and that one moiety belonged to J C and C his wife, and that the other moiety belonged to W L. *In re Wyld's Estate*, 22 Law J. Rep. (n.s.) Chanc. 87; 2 De Gex, M. & G. 724.

A testator devised, previously to the Wills Act, real estates, in the event of his death without leaving issue by his wife, to her for life, remainder to his brother for life, remainder to trustees to sell and pay part of the proceeds to a daughter of the testator's brother, on attaining twenty-one, or marrying, and to be a vested interest then, although payment might not be possible until the deaths of the tenants for life:—Held, that the terms of the devise imported failure of issue at the testator's death, and not a general failure of issue, and, therefore, that the legacy out of the proceeds of sale was not void for remoteness. *In the matter of Rye's Trust*, 22 Law J. Rep. (n.s.) Chanc. 345; 10 Hare, 106.

A testator gave to E 200*l.*, and appointed him to be his executor; and declared that, if his (the testator's) son should not recover from his then mental malady, then he gave E 200*l.* E did not prove the will:—Held, that E was entitled to both legacies. *Wildes v. Davies*, 22 Law J. Rep. (n.s.) Chanc. 495; 1 Sm. & G. 475.

A testator gave a fund to four persons or any of them, in such shares, &c. as A B should appoint, and in default equally. He directed that such four persons should bring into hotchpot the amount of advances he might make to any of them in his life:—Held, that the hotchpot clause operated only on the unappointed fund, if any. *Brocklehurst v. Flint*, 16 Beav. 100.

A testator directed his trustees to invest 1,400*l.* for his widow for life, with remainder to his daughter for life, and 800*l.* for his daughter for life; and after the death of his daughter he gave the two sums to her children, and if she died unmarried (which happened) he gave the said principal sums of 1,400*l.* and 800*l.* in manner following: 800*l.*, "part thereof," to A, "and the remainder of the said sums" to B. The daughter died in the lifetime of the widow, unmarried:—Held, that the 800*l.* thus released, was divisible between A and B in the proportion of 8 to 14. *Hewitt v. George*, 18 Beav. 522.

A wife appointed 5,000*l.* to her daughter, but if she had a fortune of 25,000*l.* (over which the husband had a power of appointment), then she desired the 5,000*l.* to be divided between her son and daughter, desiring that her husband should have a life interest therein:—Held, that the husband took a life interest at all events. *Darby v. Darby*, 18 Beav. 412.

Bequest of residue to "divide" the same between the brothers of A, and the nephews of B, and my housekeeper C:—Held, that this did not entitle C to one-third, but that all the objects took equally. *Amson v. Harris*, 19 Beav. 210.

Under a bequest of leaseholds for the legatee's personal support and maintenance, and to be entirely free from any claim, charge or demand, or lien of his creditors:—Held, that the leaseholds could not be withheld from the legatee until he paid a debt due from him to the testator, even assuming that a specific legacy may be so withheld in the absence of such a testamentary exemption; as to which—*quære*. *Harvey v. Palmer*, 4 De Gex & S. 425.

(b) *Gift by Implication.*

A testatrix devised real estate to A B in fee; she then gave legacies, and devised the residue of her real estate to C D for life, with remainder to his issue, with remainder to the first and other sons of A B in tail male, with remainders over. She then bequeathed the residue of her personal estate to trustees upon trust for A B, but if he should die in her lifetime, "without leaving any child or children him surviving," the residue was to be in trust for C D absolutely. A B died in the lifetime of the testatrix, leaving children:—Held, affirming a decree of the Master of the Rolls, that the will did not create any trust by implication of the residue of the personal estate in favour of the children of A B. *Lee v. Busk*, 22 Law J. Rep. (n.s.) Chanc. 97; 2 De Gex, M. & G. 810; 14 Beav. 459.

A testator gave his residue to his wife for her and her son's support, clothing and education, until he should attain twenty-one. If he died under twenty-one, then he gave all the interest of his Bank stock to his wife for life; after her death he gave all his property to his daughter:—Held, that the son did not take any estate by implication on attaining twenty-one; but there was an intestacy. *Fitzhenry v. Bonner*, 2 Drew. 36.

(c) *Meaning of Words*—"Then Unmarried."

A testator, after giving to his daughter, during the joint lives of his wife and herself, an annuity, gave her a larger annuity if she should survive and be still unmarried; and he gave her a sum of money as an outfit at her mother's decease, if she should be then unmarried. The daughter was a spinster at the date of the will and at the testator's death, but she married during her mother's life:—Held, upon the context and comparisons of expressions, that the words "then unmarried" must be construed as "without having been married." *In re Thistlethwayte's Trust*, 24 Law J. Rep. (n.s.) Chanc. 712.

(B) WHO TAKE AS LEGATEES.

(a) *Generally*.

[*De Beauvoir v. De Beauvoir*, 6 Law J. Dig. 384: affirmed 3 H.L. Cas. 524.]

The bequest of a legacy to a person or the wife of a person who has signed his name as a witness in a will, will not take effect, although it may be alleged (*dehors* the will) that the witness signed only as attesting the marks of two previous witnesses (both marksmen) to the execution of the will. *Wigan v. Rowland*, 23 Law J. Rep. (n.s.) Chanc. 69; 11 Hare, 157.

(b) *Description of Legatee*.

A testatrix gave the interest of certain money in the funds to her daughter Mary for life, and after her decease the capital to be divided between the husbands of her daughters and her son, or such of them as might be living at the decease of her daughter Mary. One of the daughters married a second husband, after the death of the testatrix, who was living at the death of the tenant for life:—Held, that the testatrix meant to designate the particular husbands living at the time she made her will, and that the second husband was not entitled to a share of the trust fund. *Ex parte Bryan's Trust*, 21 Law J. Rep. (n.s.) Chanc. 7; 2 Sim. N.S. 103.

The Court will not hold a testamentary disposition to be void for uncertainty if there is a reasonable degree of certainty as to the testator's intention. Therefore, where a testatrix bequeathed a legacy to the wife of a person by the name of one of their daughters, an infant of tender years,—Held, on claim by the husband and wife, that they and not the daughter were entitled to the legacy, and that the gift was not void for uncertainty. *Adams v. Jones*, 21 Law J. Rep. (n.s.) Chanc. 352; 9 Hare, 485.

A bequest of 500*l.* to the Westminster Asylum for pregnant women,—Held, upon extrinsic evidence, and the context of the will, without any inquiry, a gift to "The General Lying-in Hospital." *The General Lying-in Hospital v. Knight*, 21 Law J. Rep. (n.s.) Chanc. 537.

A testator bequeathed to each of the servants living with him at his decease, and who should then have lived in his service for three years, one year's wages:—Held, to be a bequest only to such servants as are usually hired at yearly wages, and not to extend to a gardener living on the grounds, and hired at weekly wages. *Blackwell v. Pennant*, 22 Law J. Rep. (n.s.) Chanc. 155; 9 Hare, 551.

A testator, after giving legacies to various persons,

some of whom were mentioned by name and others described as a class, bequeathed the residue of his property to his several legatees thereinbefore "specially named," exclusive of the objects taking under the trusts for the distribution of blankets:—Held, that the testator, by excluding certain persons not mentioned by name from his residuary bequest, had sufficiently explained his intention; and that under the words "specially named" those legatees who were not mentioned *nominatim*, but only described as a class, were entitled to share equally with the other legatees. *In re Holmes's Trust*, 22 Law J. Rep. (n.s.) Chanc. 393; 1 Drew. 321.

A testator directed his executors to pay the sum of 500*l.* a piece "to each child that may be born to either of the children of either of my brothers," to be paid to each at twenty-one:—Held, upon appeal, that this was not a bequest to a class, but to each individual who at the testator's death might answer that description. *Storrs v. Benbow*, 22 Law J. Rep. (n.s.) Chanc. 823; 3 De Gex, M. & G. 390.

The plaintiff, a child of a nephew, was born six months after the testator's death:—Held, that being *in esse* at the testator's death, he was within the description, and entitled to a legacy of 500*l.* *Ibid*.

A testator bequeathed a legacy to his cousin Ann, the daughter of his uncle Peter, and bequeathed a moiety of his residuary estate to another cousin by the description of Vincent, the son of his said uncle Peter. The testator's uncle Peter had two sons, named Frederick and Alexander, neither of whom was on terms of intimacy with the testator. Another of the testator's uncles, whose Christian names were Joseph Vincent, had an only son named George Vincent, who was generally known and called by the testator by the name of Vincent only, and was on intimate terms with the testator:—Held, on motion for a decree, the Court rejecting extrinsic evidence of the testator's intention, that George Vincent the son of Joseph Vincent was entitled to the residuary bequest in preference to Frederick, the son of the testator's uncle Peter. *Bernasconi v. Atkinson*, 23 Law J. Rep. (n.s.) Chanc. 184; 10 Hare, 345.

A testator gave to Sarah S, the unmarried sister of T S and W S, an annuity of 20*l.* a year for her life. He also gave to Mr. F, who married the sister, now deceased, of T S and W S, an annuity of 30*l.* for his life; and in case Sarah S should depart this life before F, he gave him an additional annuity of 20*l.* for his life. There was no person of the name of Sarah S; but T S and W S had two sisters only, Lucy, who had been married to J H, and Mary, who was never married, but who for many years had lived with F, by whom she had four children who were brought up by him. The testator had frequently called at the house where the legatees resided and made them gifts of money, and he did so after the death of Mary. The annuities were paid for some time after the decease of the testator, but payment was refused after the decease of Lucy H; and, upon a bill filed,—Held, that F was entitled to the annuity of 30*l.* *Ford v. Bailey*, 23 Law J. Rep. (n.s.) Chanc. 225; 17 Beav. 303.

The will directed the executors to purchase the annuities in their names either from the Commissioners for Reduction of the National Debt, under the 10 Geo. 4. c. 24, or from any public company, &c.; but this was never done. Upon inquiry Lucy H

was found to be the person intended by Sarah S, the unmarried sister of T S and W S; and upon further directions, F was declared entitled to the additional annuity of 20*l.*, and he asked that the annuities might not be purchased, but that the money applicable to the purchase might be paid to him:—Held, that F was entitled to have a government annuity purchased, and that he had a right, in lieu thereof, to elect to have such a sum paid to him as would be applicable to purchase such annuities. *Ibid.*

A legacy to the son and unmarried daughters of A equally:—Held, on appeal overruling the decision of the Court below, that the gift was not a gift to a class, but referred to the state of circumstances at the date of the bequest, and that, therefore, daughters who married after that date, and one of whom was a widow at the time of division, were equally entitled with the son and the one daughter who never married. *Hall v. Robertson*, 23 Law J. Rep. (n.s.) Chanc. 241; 4 De Gex, M. & G. 781: overruling 22 Law J. Rep. (n.s.) Chanc. 1054.

A bequest to "The Carey Street Infirmary,"—Held, upon extrinsic evidence, a gift to the Carey Street Dispensary. *King's College Hospital v. Wheldon*, 23 Law J. Rep. (n.s.) Chanc. 537; 18 Beav. 30.

A testatrix devised all her property, subject to certain bequests, to her nephew, "Robert Mostyn, of Calcott Hall," whom she made her executor. Among these bequests were certain annuities, on the expiration of which the property was to fall "into the hands of my dear nephew John Henry Mostyn, of Holywell, surgeon, but late of Calcott Hall; and should he not marry, to be divided equally between Samuel Mostyn, John Mostyn and Mary Davies, all of them late of Calcott Hall." The residue was to go to the executor. John Henry Mostyn, the only person who was properly named in the will, died unmarried. There was no John Mostyn, but there was a Thomas Mostyn, born between Samuel and Mary:—Held, affirming the judgment of the Court below, that this Thomas took no interest in the will. *Mostyn v. Mostyn*, 23 Law J. Rep. (n.s.) Chanc. 925; 5 H.L. Cas. 155: affirming 22 Law J. Rep. (n.s.) Chanc. 673; 3 De Gex, M. & G. 140; 17 Beav. 323.

Lord Dormer, by his will, made such limitations of his estates as that they should in effect be enjoyed by the person who should for the time being hold the title of Lord Dormer. The testator, by a codicil, gave to B, his next heir after the death of A without issue male, an annuity of 150*l.* for life, but in case B should become possessed of the testator's title and estate, then the annuity was to be paid to his next male heir for life, and so on successively to all the sons of the testator's cousin, so that the next heir to the title and estate should always enjoy this annuity. A died without issue male, whereupon B became entitled to the title and estate; and the annuity was from that time paid to C, the eldest son of the testator's cousin (who was then the next heir presumptive to the title and estate of Lord Dormer). B then had a son born, who became heir apparent to the title and estate, and afterwards C died:—Held, that B's son could not take the annuity, as the gift was to the sons of the testator's cousin; and that the second son of the cousin could not take, as he was not the next heir to the testator's title and estate, and consequently that the annuity ceased upon the death of

C. *Dormer v. Philipps*, 24 Law J. Rep. (n.s.) Chanc. 168; 3 Drew. 39: affirmed 4 De Gex, M. & G. 855.

The testator also, by the same codicil, gave to C an annuity of 50*l.* "for life, to devolve to his next brother, and so on, in case of his becoming possessed of the annuity of 150*l.*:"—Held, that, upon the death of C, this annuity ceased, there being no longer any person entitled to the annuity of 150*l.* *Ibid.*

A direction in a will that trustees should "divide" a reversionary fund equally between a testator's children living at the decease of the tenant for life, "or such others as would have been entitled to it at the death of their parents,"—Held, not to include a grandchild whose father died after the testator, but before the tenant for life. *Miller v. Chapman*, 24 Law J. Rep. (n.s.) Chanc. 409.

A bequest to T T of R. There was a J T of R, a nephew of the testatrix, and his brother, named T T, who was not of R:—Held, that T T might adduce extrinsic evidence to shew that he was in some sense rightly described as of R, and that J T might bring evidence to shew that there was a mistake in the name of the legatee, and a prior will being produced, made three years before, in which the testatrix gave a legacy to T T of R, surgeon, which was the profession of J T, was held to be conclusive evidence in his favour, as it was not shewn that the testatrix had discovered her mistake as to the name before she made her last will. *In re Feltham's Trusts*, 1 Kay & J. 528.

A testator by his will gave to each person as a servant in his domestic establishment at the time of his decease a year's wages, beyond what should be due to him or her for wages:—Held, that a head gardener who lived in one of the testator's cottages, and was not dieted by the testator, was not entitled to a year's wages under the will. *Ogle v. Morgan*, 1 De Gex, M. & G. 359.

A testator bequeathed 100*l.* a piece to the four sons of A H by a former husband. She had four children by such former husband, but one of them was a daughter:—Held, that the daughter took a legacy of 100*l.* *Lane v. Green*, 4 De Gex & Sm. 239.

A testator bequeathed a sum of stock in trust for a daughter for life, and in case there should be no child of the daughter living at her decease, or being such they should all die under twenty-one, then the testator bequeathed the stock unto all and every his children then living, and the child or children of such of his said children as should be then dead, in equal shares, but so that such his grandchildren should only have among them such share as their parents would respectively have been entitled to in case they had been then living:—Held, that the children of a child of the testator known by him to be dead at the date of the will did not take any interest. *In re Thompson's Trusts*, 5 De Gex, M. & G. 280.

A testator by his will gave to trustees 1,000*l.* stock on trust to pay the dividends to his nephew for life, and after his decease, in case his nephew's wife should survive him, to pay the same to her for life; and afterwards on trust to pay the capital among his nephew's children. The nephew died unmarried, but left surviving a woman with whom he had cohabited for many years, who was supposed by the

testator to be his wife, and was frequently referred to as such:—Held, that the gift was void. *In re Davenport's Trust*, 1 Sm. & G. 126.

A testator, who died in 1819, bequeathed a legacy to accumulate in trust for the eldest daughter of A B, to be paid at twenty-one, and if none to the eldest daughter of C D, payable in like manner. A B never had a daughter, and died in 1851. C D had a daughter, G, born in 1821 and who died in 1827, and other daughters:—Held, that the representative of G was entitled to the legacy, and to the accumulations accrued down to 1827, together with simple interest thereon from that day to the day of payment in 1852. *Bryan v. Collins*, 16 Beav. 14.

Erroneous description of a legatee rejected upon extrinsic evidence. *In re Blackman*, 16 Beav. 377.

A, the grandchild of C, and B, the widow of a child of C, held under the circumstances entitled to a bequest made to A and B, widow, described as "children of C." *Ibid*.

Bequest to "the treasurer of the fund for the superannuated preachers and widows of Wesleyan Ministers." There being no such fund,—Held, that "the Itinerant Methodist Preachers' Annuitant Society" might take. *Bunting v. Marriott*, 19 Beav. 163.

Legacy to "my granddaughter E.B." There were two of that name, one of them constantly visiting the testator and much noticed by him, the other not:—Held, that the former was entitled to the legacy. *Jefferies v. Mitchell*, 20 Beav. 15.

(c) *Gift to a Class.*

(1) *When and how ascertained.*

Where a sum of money is bequeathed to be divided among a class when the eldest attains twenty-one, whether the gift be vested or contingent, all the children who are born before the period of division are admitted to take shares. *Mann v. Thompson*, Kay, 638.

Where distinct sums of money are given to every individual of the class, but no time is limited for distribution, the persons who answer the description at the death of the testator are alone entitled to take. *Ibid*.

The construction is the same if the gift be of a certain sum to each of the children of A and B who should attain twenty-one, but in case any of them should die under that age, his share to go to his surviving brothers and sisters, although A had no children at the date of the will or at the death of the testator, but had children born after the testator's death. *Ibid*.

"Surviving" in such a limitation cannot be read "other," so as to entitle a child to the share of a brother who died before he was born. *Ibid*.

Devise and bequest to all the testator's children living at his decease (without naming them). A subsequent codicil confirmed the gift as mentioned in his will "to his surviving children" (naming them all). One died in the testator's lifetime leaving children who survived the testator:—Held, that the survivorship had relation to the testator's death and not to the date of the will, and that the representatives of the deceased child took nothing under the 1 Vict. c. 26. s. 33. *Fullford v. Fullford*, 16 Beav. 565.

Gift to A, a child of the testatrix, for life by weekly payments, remainder to "my surviving children":—Held, that this meant only children surviving the tenant for life. *In re Pritchard's Trusts*, 3 Drew. 163.

Testator gave real estate to his wife for life, and after her decease on trust to sell twelve months after her death, the proceeds to go "equally between all his children; but if any of them should be then deceased leaving lawful issue surviving them, then the respective share or shares of such deceased child or children should be given to such issue, if more than one, in equal proportions." The widow died, leaving the testator; one of the children of the testator survived the widow and died, leaving the testator, leaving a husband and children:—Held, that her share went to the surviving children of the testator, and not to her issue, nor to her personal representatives under the Wills Act. *Olney v. Bates*, 3 Drew. 319.

The 33rd section of the Wills Act applies only to cases of strict lapse, not to the case of gifts to a class. *Ibid*.

(2) *Distribution per Capita or per Stirpes.*

Bequest of 3,000*l.* to trustees for L C for life, with remainder in default of appointment equally to and amongst her sisters or their children living at her decease:—Held, that the children of a sister who had died in the testator's lifetime before the date of the codicil took no interest. *Congreve v. Palmer*, 23 Law J. Rep. (N.S.) Chanc. 54.

Held, also, that the children of the sisters surviving L C took *per stirpes*. *Ibid*.

A testator gave real and personal estate to trustees during the lives of eight nephews and nieces, whom he named, and the survivors and survivor of them, upon trust to pay one-eighth of the rents to each during their respective natural lives; and directed that in case any should die without leaving issue, the share of him, her or them so dying should go among the survivors in the same manner as their original shares; and in case any of the eight legatees should die leaving issue, the share original and accruing of him, her or them so dying should be paid to and equally among such issue; and after the decease of the survivor of the eight legatees the testator devised such real and personal estate unto the issue then living of the eight legatees and their heirs, the share of the issue in the fee simple to be in the same proportion as the rents and profits he or they might then be in receipt of:—Held, that on the death of the survivor of the eight legatees the property became divisible and payable among and to the children living of the legatees who had died and left children, such children to take *per stirpes*, but the members of each stirps to take equally. *Bradshaw v. Melting*, 23 Law J. Rep. (N.S.) Chanc. 603; 19 Beav. 417.

A testator, after the death of his wife, gave certain property to be equally divided between B J and A his wife, and C A and S his wife, for their lives, after which to be equally divided between the children of B J and C A above named:—Held, that the children of B J and C A were entitled *per capita*. *Abrey v. Newman*, 22 Law J. Rep. (N.S.) Chanc. 627; 16 Beav. 431.

A testatrix bequeathed stock to T P and J S for their lives, and from and after their decease to the

"surviving children" of the said T P and J S, share and share alike:—Held, that the children living at the death of the survivor of T P and J S were alone entitled, and that they took *per capita* and not *per stirpes*. *Stevenson v. Gullan*, 18 Beav. 590.

A testator directed his executors to pay and divide the residue "unto and amongst his own next-of-kin under the Statute of Distributions".—Held, that brothers and deceased brothers' children took *per stirpes*. *Lewis v. Morris*, 19 Beav. 34.

The testator gave a residuary fund to his brothers and sisters for life, and from and after the decease of the survivor to pay the principal to their issue who should live to attain twenty-one, or the issue of such of them as should be then deceased, such class of issue, whether in the first or second degree, to take only as amongst themselves the shares which their parents would have been entitled to if living:—Held, that the children of the brothers and sisters took *per stirpes*, and that the children of one of the testator's nephews who died in the testator's lifetime took with their uncles and aunts the share which their father would have taken if then living. *Shand v. Kidd*, 19 Beav. 310.

The word "or" construed "and." *Ibid*.

Bequest (in effect) to A for life, and in default of her appointment equally amongst "her sisters or their children living at her decease":—Held, first, that the children took by substitution, and therefore that the children of a sister, who was dead at the date of the will, could not take, and, secondly, that such of the children as were entitled took *per stirpes*. *Congreve v. Palmer*, 16 Beav. 435.

Distinction between a gift to several, with remainder to their children, and one to several with a substitutionary gift to their children in respect to their children taking *per stirpes* or *per capita*. *Ibid*.

(3) Next-of-kin.

A testatrix bequeathed a fund to trustees in trust for A B for life, with remainder to her children at twenty-one; but in case she died without issue, then to pay or assign and transfer the fund to C D, if then living, but if then dead, then unto his next-of-kin in a legal course of distribution *ex parte maternâ*. C D died in the lifetime of A B. A B died without issue. At the death of C D, A B was his sole next-of-kin *ex parte paternâ*, and also his sole next-of-kin *ex parte maternâ*; at the death of A B, the then next-of-kin *ex parte maternâ* of C D claimed the fund:—Held, affirming the decision of the Court below, that the next-of-kin were to be ascertained at the death of C D, and not at that of A B, and that A B, as next-of-kin *ex parte maternâ*, was not excluded because she also filled the character of next-of-kin *ex parte paternâ*; and, therefore, her representatives were entitled to the fund. *Gundry v. Pinniger*, 21 Law J. Rep. (n.s.) Chanc. 405; 1 De Gex, M. & G. 502; affirming 20 Law J. Rep. (n.s.) Chanc. 635; 14 Beav. 94.

"Next-of-kin" means next-of-kin at the death of the party whose next-of-kin are spoken of. *Ibid*.

A testator, by his will, gave personal estate upon trust for investment and accumulation for the period of twenty-one years, and at the end of that time to be paid to his "then nearest of kin in the male line in preference to the female line." At the end of the twenty-one years the fund was claimed by an

only surviving sister of the testator, his then actual nearest of kin; by a cousin of the testator, the son of the testator's paternal uncle, the then nearest relative of the testator tracing his relationship through males only; and, thirdly, by the sons of two deceased sisters of the testator, the then nearest male relatives of the testator:—Held, (affirming the decree of the Vice Chancellor, who had decided that the gift was made to the nearest of kin *ex parte paternâ*, the testator having died without children,) that the only surviving sister was entitled to the fund. *Boys v. Bradley*, 22 Law J. Rep. (n.s.) Chanc. 617; 4 De Gex, M. & G. 58; affirming 10 Hare, 389.

Bequest of a residue to A for life, with remainder to such persons as at the death of A would be the next-of-kin of the testator under the statutes made for the distribution of the effects of intestates:—Held, that the persons entitled under this description took as tenants in common. *Horn v. Coleman*, 22 Law J. Rep. (n.s.) Chanc. 779; 1 Sm. & G. 169.

A testator gave his personal estate to trustees upon trust for his daughters, for their respective lives, in equal shares; and if any died without issue their shares were to be held in trust for the person or persons who would at their death respectively be entitled, as next-of-kin or otherwise, to their respective personal estate under the statutes made for the distribution of intestates' effects, and in the same proportions and manner as they would be entitled by virtue of such statutes if they had then respectively died intestate. One of the daughters died without leaving any child surviving:—Held, that her husband was not entitled to her share. *Milne v. Gilbert*, 23 Law J. Rep. (n.s.) Chanc. 828; 2 De Gex, M. & G. 715; 5 *Ibid*. 510.

Bequest to A for life; and afterwards in an event which happened, the testator directed advertisements to be made for his relations, to such only of whom as should claim within two months he left the property, to be divided according to the discretion of his executors. The executors died in A's lifetime:—Held, that the next-of-kin of the testator according to the statute took equally, and that the class was to be ascertained at the death of A, and not at the death of the testator. *Tiffin v. Longman*, 15 Beav. 275.

A testator bequeathed the residue to his wife for life with remainder to his children living at his death, and if there should be none (which happened) then he directed "that immediately after his wife's decease it should become the property of the person who should then become entitled to take out administration to his effects as his personal representatives" according to the Statute of Distributions, and in the proportions thereby pointed out in case he had died intestate and unmarried:—Held, that the next-of-kin at the death of the testator, and not those at the death of the tenant for life were entitled. *Cable v. Cable*, 16 Beav. 507.

Bequest to A for life, with remainder to B for life, and after their deaths to the testator's next-of-kin, but should no claimant appear within twelve months after their death, then to charities. A and B were sole next-of-kin at the testator's death:—Held, first, that the next-of-kin were to be ascertained at the testator's death; and, secondly, that A and B were not excluded from taking under the ultimate gift to the next-of-kin. *Garbell v. Davison*, 18 Beav. 556.

A bequeathed a leasehold for the benefit of B, and gave her a power to appoint it by will, and in default to A's "nearest of kindred precisely in the same manner directed by the statute made for the distribution of intestates' effects." On B's death without appointment, held that the next-of-kin of A at her own death, and not those at the death of B, were entitled. *Markham v. Ivatt*, 20 Beav. 579.

The term "nearest of kindred" with reference to the Statute of Distributions has the same meaning as next-of-kin. *Ibid*.

A gift by will of real and personal estate to L for life, and then to L's husband for life, and then to her appointees by deed or will, and in default to her "next-of-kin according to the Statute of Distributions of personal estate, and in the like shares and proportions as if she had died without having been married," with a direction to L to appoint trustees in whom the property was to be vested upon the above trusts. L died in the lifetime of the testatrix, leaving the testatrix, who was her mother, and one other person, who was the only child of her only sister, her next-of-kin according to the statute.—Held, first, that the gift to the next-of-kin had not lapsed; and, secondly, that the next-of-kin intended was not nearest of kin, but that the nephew took one moiety of the property. *Nichols v. Haviland*, 1 Kay & J. 504.

A bequest to the next-of-kin of a person who is dead at the date of the will, held to be analogous to a gift to the testator's own next-of-kin as regards the period of ascertainment. *Philips v. Evans*, 4 De Gex & Sm. 188.

Therefore, where a testatrix bequeathed her personal estate in trust for her sister for life, and after her death for the sister's daughter for her life, with limitations to the children of the daughter, and if there were none to another niece for life, with a limitation to her children, and in the event (which happened) of both nieces dying without leaving any child, the testatrix directed the residue to be paid and assigned to "the personal representative or next-of-kin" of her late father.—Held, that the case was in principle similar to *Bird v. Luckie*, and that the next-of-kin meant were those living at the testatrix's death, although they all took separately under the will. *Ibid*.

A testator gave his residuary estate to trustees upon trust to pay the dividends to J B, A L and J L for their lives and the life of the survivor of them, and on the decease of the survivor "in trust to divide the fund among the children of J L, and in default of such children for all and every my next-of-kin who shall be in equal degree, and those who legally represent them according to the statute." At the testator's death A L was his sole next-of-kin:—Held, that she was entitled to the fund. *In re the Trusts of Barber's Will*, 1 Sm. & G. 118.

(4) Representatives.

A testator gave the residue of his property to his daughter for life, and after her death one-twelfth of such residue to be equally divided amongst all his cousins german then existing "or their representatives".—Held, that the testator intended to use the word "representatives" in its ordinary legal sense, and that the executors or administrators of the cousins german, and not the next-of-kin, were en-

titled to the twelfth part of the residue. *In re Crawford's Trust*, 23 Law J. Rep. (N.S.) Chanc. 625; 2 Drew. 230.

By a gift to "personal representatives" the executors and administrators are *primæ facie* meant. *Atherton v. Crouther*, 19 Beav. 448.

Under a bequest to "personal representatives" of children to take *per stirpes*:—Held, first, that their executors and administrators were not entitled; and, secondly, (principally upon the terms of the gift over to the testator's "next-of-kin," if there should be no "representatives"), that the descendants of the children were intended. *Ibid*.

(5) Family.

A testator directed his trustees to pay the interest of certain property to his wife so long as she should continue his widow, and at her decease the principal sum to be equally divided share and share alike among his five sisters (naming them), and their respective families, if any:—Held, that on the death of the testator's widow the estate was to be divided into fifths, and as to each fifth, each sister and such children as she had living at the decease of the testator would be entitled. *In re Parkinson's Trust*, 20 Law J. Rep. (N.S.) Chanc. 224; 1 Sim. N.S. 242.

The primary meaning of the word "family" is "children," and there must be some circumstance, either in the will or in the situation of the parties, to prevent that construction. *In re Terry's Will*, 19 Beav. 580.

Legacies were given to A and B, and in case they should pre-decease the testatrix "to their respective families." A having died before the testatrix:—Held, that her children alone took under the word "family." *Ibid*.

A bequest to the family of G:—Held, not to be void for uncertainty; but construed to be a gift to the children of G (an uncle of the testator known to and on terms of intimacy with him) as joint tenants, and not to include the parents or their grandchildren. *Gregory v. Smith*, 9 Hare, 708.

(6) Offspring.

A testatrix gave property to E. Thompson for life, and at her decease the interest to be divided between her children; "but if there should not be any child or offspring left," then the sum of 20l. to the plaintiff, and the remainder to other persons. E. Thompson died without children, but left grandchildren:—Held, that there being grandchildren, the plaintiff was not entitled, since the term "offspring" meant other offspring beyond children. *Thompson v. Beasley*, 24 Law J. Rep. (N.S.) Chanc. 327; 3 Drew. 7.

(7) Issue.

Bequest of personalty to A for life, and after his death to the issue of the body of A, with a gift over if A should die without issue:—Held, that at the death of A all his issue, and not merely children, were entitled. *Hall v. Nalder*, 22 Law J. Rep. (N.S.) Chanc. 242.

The word "issue" includes all remote descendants of the person whose issue is referred to, and the burden of proof lies upon him who contends the contrary. But when the word "parent" is used in reference to his "issue," the word is confined to his "children." *Ross v. Ross*, 20 Beav. 645.

The word "issue" in reference to the word "parent" in a substitutional gift,—Held, from the context of the will not limited to "children." *Ibid.*

Bequest to C R for life, with remainder to the children of C R who should be living at her decease equally, and the issue then living of such of her children as might have died in her lifetime, the issue to take the share which their parent would have been entitled to had he survived C R, and if but one then to take "a child's share." There was a gift over on the death of C R, "without leaving a child or issue," generally. One of C R's children predeceased her, leaving no children but only a grandchild, who survived C R:—Held, that he took a child's share with C R's children. *Ibid.*

(8) Children.

A testatrix bequeathed a share of her residuary estate to trustees for H L for life, with remainder after his decease unto his "present born children, their executors, administrators and assigns, equally to be divided between them, share and share alike." The testatrix, by a codicil to her will made after the decease of one of the children, gave the same residuary estate upon the same trusts so bequeathed by her will:—Held, that the bequest was made to a class; that there was no intestacy, and that the plaintiffs as surviving children were entitled to the share to which the deceased child, if living, would have been entitled. *Leigh v. Leigh*, 23 Law J. Rep. (n.s.) Chanc. 287; 17 Beav. 605.

Bequest to a class equally, with a substituted gift, as to the shares of any who predeceased the testator, to his "children or remoter issue" *per stirpes* of their "parents" or "grandparents'" shares:—Held, that the grandchildren could not claim a share, by substitution, in competition with children; but that the children alone were entitled to the exclusion of grandchildren. *Amson v. Harris*, 19 Beav. 210.

A testator bequeathed life interests in four distinct funds to four nieces, respectively, and directed that upon the decease of any or either of them, the principal of the fund, the interest of which was to be received by her or them, should be held in trust for "the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of any other nieces hereinbefore named in equal shares." One of the nieces having died leaving two children:—Held, that her fund was divisible among those children, and among the children of the three other nieces, it being proper to give some force to the word "of," and that word being referable to the word "children," as the last antecedent. *Peacock v. Stockford*, 3 De Gex, M. & G. 73.

(9) Illegitimate Children.

A testator by his will gave a share of his residuary estate to his son for his life, and directed that, after his death, the interest should be for the maintenance of his wife and the education of his children. At his wife's death, the principal to be divided among his children. For some years previously to the date of the codicil, the son had been living with a woman to whom he was not married, and had by her four children. The testator was cognizant of these circumstances, and recognized the children as the children of the son and his own grandchildren, and

frequently had them staying with him:—Held, that the illegitimate children of the son were not included in the bequest made in favour of the children. *Warner v. Warner*, 20 Law J. Rep. (n.s.) Chanc. 273.

A testator gave the residue of his estate to B, the interest to be paid to her until her first-born son should attain the age of twenty-one years; one-half of the said principal sum then to be paid to her aforesaid son, the other half to be paid to his mother. Should his mother die before the said son, the whole to be paid to him. Should the aforesaid son die before his mother, his share to go to her. B had one illegitimate son at the date of the will, who was maintained by the testator:—Held, that this son was not entitled under the above bequest. *Durrant v. Friend*, 21 Law J. Rep. (n.s.) Chanc. 353; 5 De Gex & S. 343.

A testator recited in his will that he had nine children, whom he named and described, and he bequeathed the income of his estate to his wife for life; and, after her death, the capital to be divided among his children by his wife then living, and the issue of them who should be then dead. Various other trusts were declared by the will, and among them that the trustees should pay the interest during the life of such of his "said children" as should be a daughter in a particular manner. One of the daughters was illegitimate:—Held, (Lord Cranworth laying great stress on the latter clause, but the Lord Chief Justice considering the will sufficient without it,) that the intention of the testator was on the will manifest that the illegitimate daughter should take a share with the legitimate children. *Owen v. Bryant*, 21 Law J. Rep. (n.s.) Chanc. 860; 2 De Gex, M. & G. 697.

There is no inflexible general rule that illegitimate children cannot participate in a gift to children. *Ibid.*

A gave a legacy to "the children of Mary, the wife of W B." W B and Mary B, although not married, had cohabited together for many years, and it was believed by the members of both their families that they were married, and they were generally reputed to be so. During this time they had several children. A was the aunt of Mary B and was on intimate terms with her and her family, and they frequently visited each other. At the date of the will Mary B was past the age of child-bearing:—Held, that the children of Mary B were not entitled to the legacy. *In re Overhill's Trusts*, 22 Law J. Rep. (n.s.) Chanc. 485; 1 Sm. & G. 362.

Gift to a woman, designated by the testator as his wife, for herself and the children's benefit, held, by reference to a previous codicil, to include the child of another woman, though that woman repudiated the guardian appointed by the testator for her child. *Hart v. Tribe*, 22 Law J. Rep. (n.s.) Chanc. 890; 16 Beav. 510, nom. *Hartley v. Tribber*.

A testator gave a legacy to a woman whom he had deceived by pretended ceremonies of marriage, to be used for her own and the children's benefit, and he appointed her their guardian:—Held, with reference to a former codicil, to comprise her child and the child of another woman, both of whom were specifically named in the former codicil. *Ibid.*

A testator gave a legacy to all the children of his late nephew, J L. At the date of the will J L was

dead. J L left one legitimate and two illegitimate children:—Held, that the two illegitimate children were entitled to share in the legacy. *Leigh v. Byron*, 23 Law J. Rep. (n.s.) Chanc. 1064; 1 Sm. & G. 436.

A natural daughter being included by description in a prior class of daughters, was held entitled to take with legitimate daughters under a subsequent general gift to "my daughters." *Worts v. Cubitt*, 19 Beav. 421.

(C) WHAT PROPERTY PASSES.

(a) In general.

A testator bequeathed to his wife the interest of the capital sum of 1,000*l.* for her sole use and benefit, independent of any husband she might marry, and her receipt alone to be a sufficient discharge to his executors. He also gave his china, plate, &c. to his wife absolutely, and the residue equally between his two brothers:—Held, that the gift of the interest of 1,000*l.* was tantamount to an absolute bequest of the capital. *Humphrey v. Humphrey*, 20 Law J. Rep. (n.s.) Chanc. 425; 1 Sm. N.S. 536.

A specific enumeration of articles after a bequest to J E K of "all and everything I die possessed of," followed by a declaration that "I leave everything I die possessed of to J E K for her entire and sole use and benefit," held to be a general residuary bequest. *In re Kendall*, 21 Law J. Rep. (n.s.) Chanc. 278; 14 Beav. 608.

A testator bequeathed certain chattels to A, and afterwards insured them from loss by sea. The testator embarked with these goods in a ship, which was totally wrecked, and he and the chattels perished together:—Held, that A had no interest in the money recovered by the executors from the insurance office. *Durrant v. Friend*, 21 Law J. Rep. (n.s.) Chanc. 353; 5 De Gex & Sm. 343.

A testatrix directed her trustees to pay the dividends arising from her personal estate invested at her decease in or upon any stocks, funds or securities whatsoever, yielding interest, to certain persons mentioned in her will. The testatrix, at her death, left a balance in the hands of her banker, who was in the habit of allowing his customers interest upon the amount standing to their credit on a particular day in the year:—Held, that this balance did not come within the terms used by the testatrix, but was undisposed of by the will. *Archibald v. Hartley*, 21 Law J. Rep. (n.s.) Chanc. 399.

A testator, by his will, gave the residue of his personal estate to A, B and C, to be equally divided between them. By a codicil, he gave A the arrears of rent due to him for his real estate, and the amount of any salary due to him, and also bequeathed to A all his clothes and any other property, goods and articles belonging to him at the time of his death. By another codicil, he revoked the bequest made to B by his will:—Held, that the gift to A, by the first codicil, was a general one, and that the words "property, goods and articles" were not to be confined to articles *ejusdem generis* with clothes; and that, consequently, A was entitled to two-thirds and C to one-third of the residue. *Everall v. Browne*, 22 Law J. Rep. (n.s.) Chanc. 376; 1 Sm. & G. 368.

By the rules of an unincorporated assurance company each shareholder was required to effect an insurance of a stated amount, and it was provided

that one-third of every bonus on the policy should be added to the capital of the company. A shareholder, by his will, bequeathed all and every his shares and interest in this company, and all the advantages to be derived therefrom, and he bequeathed shares in other companies, in reference to which he also used the expression "shares and interest":—Held, that the policy effected by the testator, and the bonus which had been declared thereon, did not pass to the legatee. *Harrington v. Moffat*, 22 Law J. Rep. (n.s.) Chanc. 775; 4 De Gex, M. & G. 1.

A debt being secured by an English bond, and also collaterally by a Scotch bond, which is a heritable security, was held to pass by the will of a testator domiciled in England, who died intestate as to Scotch estates. *Cust v. Goring*, 24 Law J. Rep. (n.s.) Chanc. 308; 18 Beav. 383.

Bequest of "all the funded property in my name":—Held, to pass Irish bank stock and Irish 3*½* per cents. belonging to the testator and standing in his name jointly with three others. *Mangin v. Mangin*, 16 Beav. 300.

A testatrix having two leaseholds at X and Y bequeathed those at X to one for life, and directed that after her decease they should "form the residue of her leasehold estates thereafter bequeathed." She then bequeathed all the residue of her leaseholds "whatsoever and wheresoever" not thereinbefore otherwise disposed of:—Held, that the leaseholds at Y also passed under the residuary gift. *Markham v. Ivatt*, 20 Beav. 579.

A testator bequeathed to his daughter his twenty shares in the S. Office, or in any other office in which the same had been or should be transferred, and all his right therein or in the monies arising or that might arise from the sale thereof: negotiations of which the testator was aware were then pending for the transfer of the business of the S. Office to the A. Office, which were afterwards concluded, and in lieu of the S. shares the testator received a number of A. shares and a sum of 1,200*l.*:—Held, that the A. shares passed under the bequest, but the money did not. *Phillips v. Turner*, 17 Beav. 194.

Accruing share held to go over with the original share by force of the words "part, share and interest." *Douglas v. Andrews*, 14 Beav. 347.

A testator gave his estate to one for life, with remainder to her children equally, with a gift over (in case of the death of any child in the life of the tenant for life) of the "part and parts, share and shares and interest" of such child to his issue:—Held, that the gift over comprised the accrued as well as the original share. *Ibid*.

The general rule is, that where a fund is given to a class of persons, with a direction that on the death of any of them their "shares" are to go over, the original and not the accruing shares will go over. But a testator may express a contrary intention, thus—where he shews an intention to keep the fund "aggregate" and unsevered, the rule does not apply. *Ibid*.

Bequest of all the testator's Great Western Railway shares, and all other the railway shares of which he might be possessed at the time of his decease:—Held, to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the company, made under

the authority of an act of parliament, converted into consolidated stock; but, held, not to pass consolidated stock in the same company purchased by the testator after the date of his will. *Oakes v. Oakes*, 9 Hare, 666.

A testator was the keeper of a tavern fully furnished as such, but which he occasionally but very rarely slept in; he had also household furniture at his private dwelling-house, remote from the tavern, in which he resided and usually slept:—Held, that though the furniture at the tavern might have formed part of the testator's stock in trade, yet the furniture there, as well as that in the dwelling-house, passed under the gift as "household furniture." *Manning v. Purcell*, 2 Sm. & G. 284.

(b) Monies.

A testator, by his will, appointed A and B to be his executors, to take and receive all monies that might be in his possession or due to him at the time of his death, to be by them placed in the funds or otherwise laid out on security, the interest thereof to be paid to his wife for her life, and directed them, after her death, to divide the monies held in trust by them between his two nieces. The testator had at his death only a small balance at his bankers, and the sum of 1,200*l.* consols:—Held, that the consols were disposed of by the will under the term of monies. *Waite v. Combes*, 21 Law J. Rep. (N.S.) Chanc. 814; 5 De Gex & Sm. 676.

In May 1847, A paid B a sum of money, with a direction that he should invest it, according to his discretion, for the benefit of A. In October 1847 B died without having made any investment. A made his will, dated April 1848, and thereby gave to C all his ready money and securities for money, money in the funds, and money in the bank or banks (if any) which might be due and owing to him at the time of his death. A died in July 1848:—Held, that the debt due from B's estate to A passed to C under the above bequest. *Cooke v. Wagster*, 23 Law J. Rep. (N.S.) Chanc. 496; 2 Sm. & G. 296.

A testatrix gave to A B "the whole of my money" for his life, at his death to be divided between C D and E F, and after giving her clothes, watch and trinkets to C D and E F, declared that the longest survivor of C D and E F was "to become possessor of the whole money." At her death, the testatrix was entitled to sums of stock, and to some small sums of money:—Held, that the sums of stock did not pass to C D and E F under the above bequest. *Lowe v. Thomas*, 23 Law J. Rep. (N.S.) Chanc. 616; 5 De Gex, M. & G. 315; 23 Law J. Rep. (N.S.) Chanc. 453; Kay, 369.

A testator by his will bequeathed to his wife all his monies, household furniture, plate, books, linen, wearing apparel, &c. and his residue to his wife for life, and after her death to his children. The testator had, as a house of business, a tavern and betting office and a private residence, both containing furniture, and he lived at the latter, but sometimes slept at the former. At the time of his death, he had at a bank 2,000*l.* on a common banking account, and 5,000*l.* on a deposit account, for which latter interest was allowed; he had placed 6,000*l.* with certain stakeholders to abide the event of a bet, and after his death it was repaid to his administratrix; and he held monies for wagers, some of which were decided

in his lifetime, but others not; all of which the administratrix paid:—Held, affirming a decision of one of the Vice Chancellors, that the 2,000*l.* and the 5,000*l.* deposit account passed to the widow under the word "monies." *Manning v. Purcell*, 24 Law J. Rep. (N.S.) Chanc. 522; 23 Law J. Rep. (N.S.) Chanc. 423; 2 Sm. & G. 284.

Held, also, but reversing the same decision, that the 6,000*l.* did not so pass. *Ibid.*

Held, further, that only so much of the furniture at the tavern as was kept by the testator for his domestic or personal use passed under the gift of "household furniture." *Ibid.*

Held, also, that the payments made by the administratrix in respect of wagers decided in the testator's lifetime were unauthorized, and could not be allowed against the estate; but that those made in respect of wagers not so decided were good payments, those undecided wagers being illegal contracts which either party might determine, and which she, by payment, must be taken to have determined. *Ibid.*

(c) Dividends.

A testator bequeathed shares in companies in which he was an original shareholder to his son, when he completed his majority:—Held, that the legatee, on attaining twenty-one, was entitled to the dividends from the testator's death, and to have the shares fully paid up out of the residuary estate. *Wright v. Warren*, 4 De Gex & Sm. 367.

(D) WHAT INTEREST VESTS.

(a) Absolute.

[*Eccles v. Birkett*, 6 Law J. Dig. 389; 4 De Gex & Sm. 105.]

A testator, by his will, dated in 1837, left his entire fortune to be equally divided between his two daughters A and B, who were his only children, with a declaration that the share of his daughter A should devolve, *in case of her dying without children*, to B and her children. At the date of the will A was married, but had no children; and B was married and had two children. A died without ever having had a child:—Held, that A took an absolute interest in the personal estate bequeathed by the testator. *Bacon v. Cosby*, 20 Law J. Rep. (N.S.) Chanc. 213; 4 De Gex & Sm. 261.

A testatrix directed her executors to pay to or permit and suffer M S, or her assigns, to take, receive, &c. the interest of her residuary estate; she afterwards said, "and from and after the death of M S" she gave to several persons by name 1,000*l.*:—Held, that the bequest to M S was not confined to a life interest, but that the gift being of the interest, without limit as to its continuance, the principal passed. *Jenings v. Bailly*, 22 Law J. Rep. (N.S.) Chanc. 977; 17 Beav. 118.

A gift for the "present expenses of a wife and the children":—Held, that she was absolutely entitled, though one of the children was an adopted child, and was taken away from her. *Hart v. Tribe*, 23 Law J. Rep. (N.S.) Chanc. 462; 18 Beav. 215.

Bequest to a woman of the dividends of a sum of stock for her separate use, with a direction that at her death she might leave it to her children, or whom she might choose:—Held, an absolute gift, and that

she was entitled to payment. *Southouse v. Bate*, 16 Beav. 132.

A legacy was after certain limitations "to revert to the possessor of the estate":—Held, that the tenant for life of the estate took it absolutely. *Mangin v. Mangin*, 16 Beav. 300.

A testator gave the residue of his estate to trustees upon trust, to permit his wife to receive the rents, issues and profits, and carry on his trade for her own benefit, and to enable her to bring up, maintain and educate his children *durante viduitate*:—Held, that the wife was absolutely entitled to the business. *Jones v. Greatwood*, 16 Beav. 527.

A testator gave his personal estate to A for life, and after the decease of A he directed his executors to divide it among the six children of his late sister A J (naming them) "who should be living at the time of his decease, and the issue of such of them as should be living at his decease, and the issue of such of them as should then be dead leaving issue then living, the issue to take only such part or share as their parents, if then living, would have taken." If any of the children should die without leaving issue, his or her share was to go over to the others; and if any of the children should die leaving issue, they were to take as therein mentioned. All the six children of A J survived the testator and the tenant for life, and some of them had issue:—Held, that the six children were entitled to the fund absolutely, and that in the events which had happened their issue took nothing. *Johnson v. Cope*, 17 Beav. 561.

A testator bequeathed as follows: I will to S B "if living the interest of my property in the Three-and-a-Half per Cents., and if not living at my decease, I will the interest of that property to E S for life, and afterwards to be divided amongst her children":—Held, that S B took an absolute interest, and that the gift over only took effect in the event of S B predeceasing the testatrix. *Boosey v. Gardner*, 18 Beav. 471.

A testator bequeathed his residuary personal estate (after a life interest) to his grandson to and for his own use, but if he should die under twenty-one without leaving lawful issue, or if he should attain twenty-one and die without leaving issue, and without having disposed of the same by his will or otherwise, then over:—Held, upon the construction of the whole will, that in the event (which happened) of the grandson attaining twenty-one, he took an absolute interest. *In re Yalden*, 1 De Gex, M. & G. 53.

A testator bequeathed the interest of certain personal property to his wife for life; "at her death one-half of the said property I give to my son G M, the remaining half to be equally divided between my two daughters, and at their deaths such shares to be equally divided among their children respectively":—Held, that the son took an absolute interest in the money. *Scrivener v. Smith*, 2 De Gex, M. & G. 399.

A testator bequeathed the interest of his property in the funds to his wife for life or widowhood, and the capital at her death in equal shares unto and among the children of his brothers, J and E, and of his late brother, S, as should be living at the death or second marriage of his wife. By a codicil he declared it to be his wish that H M M (a niece) might have her share equally with his brothers, E and S's, children:—Held, that H M M took her

share absolutely and not contingently upon her surviving the tenant for life. *Biggs v. Gibbs*, 5 De Gex & Sm. 744.

(b) For Life.

If there is a valid gift over on alienation by one entitled to a life interest in personalty, it will take effect on insolvency, and the interest of the insolvent will not pass to his assignee. *Rockford v. Hackman*, 21 Law J. Rep. (N.S.) Chanc. 511; 9 Hare, 475.

A testator, by his will, directed his debts, &c. to be paid, and then gave, devised and bequeathed all and every his estate and effects whatsoever and wheresoever to his wife, for her sole and separate use and benefit; and further gave, willed and directed that, at her death, whatever remained of his said estate and effects should go to the persons therein named:—Held, that the widow was entitled to an estate for life only in the residuary personal estate of the testator after payment of his debts and funeral and testamentary expenses. *Constable v. Bull*, 22 Law J. Rep. (N.S.) Chanc. 182.

A testator directed his property to be invested in the funds, 1,000*l.* in each child's name, and 1,000*l.* in his wife's; the interest to be received by them for life, and afterwards to their descendants; except his wife's, which was, at her death, to be divided amongst them. By a codicil, he alluded to the funds being increased, and directed the same division and appropriation to be made, except that, as any share should fall in, it was to be added to the others, in case the original holder should have no children:—Held, that upon the will and codicil taken together, the children were only entitled to the interest of their respective shares for life, and that the share of any child dying without children would go over. *Bird v. Webster*, 22 Law J. Rep. (N.S.) Chanc. 483; 1 Drew. 338.

A gift to a wife "to be used for her own and the children's benefit as she shall think best," and recommending her not to diminish the principal:—Held, that the fund must be invested, and that she was entitled to the income for her life, and that the children had an interest in the capital, and that the wife had a discretion to exercise in disposing of it; and liberty was given to apply. *Hart v. Tribe*, 23 Law J. Rep. (N.S.) Chanc. 462; 18 Beav. 215.

A testator by his will gave a legacy to his daughter for life for her separate use, with remainder to her children. By a codicil headed as "instructions to his solicitor" to add to his will, he gave another legacy "to his daughter and children for their sole use and benefit, &c. &c.," and one-third of the residue "to his daughter and children for their sole use and benefit":—Held, that the daughter took a life interest in the gifts by the codicil. *Cator v. Cator*, 14 Beav. 463.

Bequest of testator's residuary personalty equally between his four children (*nominatim*), to be equally divided between them, share and share alike; and in case of the death of either of them leaving issue, the issue of such child to take the parent's share; but in the event of their dying without leaving issue, then the share or shares of the one so dying to form part of the residue:—Held, that the testator's children took for their respective lives only. *Cooper v. Cooper*, 1 Kay & J. 658.

(c) *Joint-Tenancy.*

By a gift to a person and his or her children, when children are in existence at the date of the will, the parent and children take together, either as joint tenants or tenants in common, according to the particular words of the limitation. But if there are superadded words which shew an intention to settle the property, then the parent takes a life estate only, notwithstanding the existence of children. *Mason v. Clarke*, 22 Law J. Rep. (N.S.) Chanc. 956; 17 Beav. 126.

A bequest of residuary personal estate to A for life, and should she have a child or children, then to it or them for ever. After the death of the testatrix A married and had issue:—Held, that pursuing the intent of the gift, and by analogy to estates created by way of use or devise, as distinguished from estates raised by conveyance at common law, the children of A, notwithstanding their interests vested necessarily at different times as they came into esse, took as joint tenants. *Kenworthy v. Ward*, 11 Hare, 196.

Testator, after desiring his trustees to divide a principal sum unto and equally between his nephew and four nieces, share and share alike, directed, in case any of them should die leaving issue of his, her or their body or bodies before their shares of the trust fund should become payable under his will, that the share or proportion of each of them his said nephew and nieces so dying of and in the said trust fund should be paid to his or her children respectively, the children to stand in the place or stead of their respective deceased parents, and to be entitled to receive their respective parents' shares of his trust funds accordingly:—Held, a gift to such children as joint tenants, the effect of the word "respectively" being to allot the several families of children each to its respective parent. *In re Hodgson's Trust*, 1 Kay & J. 178.

Heath v. Heath (2 Atk. 122, 123) remarked on. *Ibid.*

(d) *Trust or Beneficial.*

A testator, by his will, gave all his real and personal estate to his wife to enjoy the same "in the fullest manner, subject to the following provisions." The testator then gave certain legacies. He then desired that all his property should continue at interest, in the same situation as at the time of his death, for the benefit of his wife, and that his wife should make a will and divide the property between his and her relations, in such manner as she should think they deserved. He then declared that, if his wife should be rendered unable to make a will in the manner before suggested, this property should be sold and that the money should be divided in the manner therein mentioned. The testator then declared that the last clause was "not to do away with or prevent his wife from exercising the entire right over his property, should she be enabled to carry it into effect in the way he had left it to her, or in any other most agreeable to herself." The widow of the testator by her will gave some legacies to her relations, but did not dispose of the residue of her estate:—Held, that the testator's property had, under his will, vested absolutely in the widow, and went to her next-of-kin. *Huskinson v. Bridge*, 20

Law J. Rep. (N.S.) Chanc. 209; 4 De Gex & Sm. 245.

A testator, by his will, gave all his personal property to his wife absolutely; but a codicil in the form of a letter, addressed to his wife, contained these words, "I hope my will is so worded that everything that is not in strict settlement you will find at your command. It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children, when you can no longer enjoy it yourself. But I should be unhappy if I thought it possible that any one not of your family should be the better for what I feel confident you will so well direct the disposal of":—Held, that the testator's widow took the property absolutely. *Williams v. Williams*, 20 Law J. Rep. (N.S.) Chanc. 280; 1 Sim. N.S. 358.

A testator, by his will, bequeathed a policy of assurance on his own life to A and B upon the uses of a letter signed by them and himself. At the date of the will there was no such letter. Subsequently the testator addressed a note to his executors and signed a memorandum, by which he stated his wishes as to the disposition of the monies to be received in respect of the policy. The testator kept the policy in his possession until his death:—Held, that no trust was created by the memorandum, and that the policy formed a part of the residue. *Johnson v. Ball*, 21 Law J. Rep. (N.S.) Chanc. 210; 5 De Gex & S. 85.

A testatrix by her will gave to S P, whom she appointed her sole executrix, 3,000*l.*, and a like sum of 3,000*l.* in addition for the trouble she would have in acting as executrix; and she gave all the residue of her personal estate to S P, her executors, administrators and assigns, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." Among the papers of the testatrix were found some memorandums in writing made since the statute 1 Will. 4. c. 40. and unattested, specifying certain charitable and other bequests which the testatrix desired to be made, one of which was addressed to S P. S P by her answer denied all knowledge of the "views and wishes" of the testatrix previously to her death:—Held, affirming the decision of the Court below, that upon the words of the will S P did not take the residue beneficially, but that she was a trustee for the next-of-kin. *Briggs v. Penny*, 21 Law J. Rep. (N.S.) Chanc. 265; 3 M. & G. 546.

Quere—whether the unattested papers were admissible in evidence for the purpose of explaining the intentions of the testatrix. *Ibid.*

A testator bequeathed all his property to his widow, her heirs, executors, administrators and assigns, for her sole benefit, in full confidence that she would appropriate and apply the same for the benefit of his children:—Held, that this amounted to a gift of an estate for life in the property to the widow, with a power of appointment in favour of the children, with a gift in default of appointment to the children as joint tenants. *Wace v. Mallard*, 21 Law J. Rep. (N.S.) Chanc. 355.

A testator, by his will, bequeathed all his property of whatsoever description to his wife, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest

trust and confidence reposed in her, that she would dispose of the same to and for the joint benefit of herself and his children:—Held, that the widow of the testator was entitled to have the entire residuary property transferred and paid to her for her own use and benefit. *Webb v. Woolls*, 21 Law J. Rep. (n.s.) Chanc. 625; 2 Sim. N.S. 267.

W L, by his will, directed his executors to pay the residue of his property to M F, but in case of her death then to pay the same to the executors or executrixes which M F might appoint. M F died before W L, and by her will gave the residue of her property to I W, and appointed M L her executrix. Upon a bill filed by M L against I W,—Held, that M L did not take the residue of W L's estate beneficially, but that she took it as part of the personal estate of M F, and that she was to hold it upon the trusts and for the purposes of M F's will. *Long v. Watkinson and Long v. Long*, 21 Law J. Rep. (n.s.) Chanc. 844; 17 Beav. 471.

The expression of a testator's particular recommendation, desire and direction that his widow would at her decease will or divide amongst his children what she might have saved out of the yearly income bequeathed to her by the testator, is merely a precatory gift of an uncertain subject, and does not raise any trust in favour of the objects of the testator's wish. *Cowman v. Harrison*, 22 Law J. Rep. (n.s.) Chanc. 993; 10 Hare, 234.

A testator gave his shares in certain freehold and leasehold property to his wife for her sole use and benefit, adding, "And I beg and request that at her death she will give and bequeath the same, in such shares as she shall think proper, unto such members of her own family as she shall think most deserving of the same." The testator also gave to his wife his personal property, for her sole and separate use and benefit, requesting that she would give what should be remaining, unto such members of her own and his family as she should think most deserving and entitled to the same. By a codicil, he gave his residuary estate to his wife:—Held, that there was an absolute gift of all the testator's property to his wife, without being subject to any trust. *Green v. Marsden*, 22 Law J. Rep. (n.s.) Chanc. 1092; 1 Drew. 646.

A testator gave all his real and personal property to his widow, her heirs, &c. absolutely and for ever in the full assurance and confident hope that she would bring up, educate and provide for his children as it would have been his intention if living:—Held, that though the words "full assurance and confident hope" would create a precatory trust, yet the trusts were too obscure to carry into effect, and that the widow took absolutely. *Macnab v. Whitbread*, 17 Beav. 299.

Testatrix gave her residuary estate to A, his heirs, executors, administrators and assigns for ever for his own use and benefit, as she had full confidence in him that if he should die without lawful issue he would, after providing for his widow during her life, leave the bulk of her said residuary estate to B, C, D and E equally:—Held, that this language did not describe the subject of gift with sufficient certainty to create a precatory trust. *Palmer v. Simmonds*, 2 Drew. 221.

(e) *Separate Use.*

A testator, by his will, gave to A, a married

woman, an annuity for her life for her separate use, and, by a codicil, gave to A, in addition to the legacy mentioned in his will, the sum of 300*l*. No legacy had been given to A by the will:—Held, that A was entitled to the 300*l*. for her separate use. *Warwick v. Hawkins*, 21 Law J. Rep. (n.s.) Chanc. 796; 5 De Gex & S. 481.

In 1837 A was convicted of felony, and transported for life. A testator, who died in 1852, bequeathed a share of the residue of his estate to B, the wife of A, and, in a suit for the administration of the estate of the testator, a sum was carried over to the account of B:—Held, that B was absolutely entitled to this sum. *Atlee v. Hook*, 23 Law J. Rep. (n.s.) Chanc. 776.

(E) ON WHAT PROPERTY CHARGEABLE.

A testator directed his debts to be paid, and then gave all his real and personal estate to trustees upon trust to pay certain legacies, and then declared certain trusts of all the real, residue and remainder of his freehold, copyhold and leasehold estates, and all other his estate and effects:—Held, that the personal estate was the primary fund for the payment of the debts and legacies; and that the real estate was only charged with them as a subsidiary fund. *Blann v. Bell*, 21 Law J. Rep. (n.s.) Chanc. 811; 5 De Gex & Sm. 652.

A testatrix by will gave real and personal estate to trustees to pay debts and legacies; by a codicil she devised the said estate to her sister for life, and directed it, at her death, to be sold for payment of legacies; she then gave various legacies, amounting to 50,000*l*.—Held, upon the personal estate proving insufficient to pay the legacies, that the said estate was not made the primary fund for payment of legacies, and that, subject to the life estate of the sister, the said estate was an auxiliary fund. *Whieldon v. Spode*, 21 Law J. Rep. (n.s.) Chanc. 913; 15 Beav. 537.

A testator, after making certain pecuniary and specific bequests, gave to A B 150*l*., to be paid to her on her marriage, and after disposing of an interest in part of his real estate, gave all the residue of his estate and effects, real and personal, to C D, whom he appointed his executor. C D paid the debts and several of the legacies, but did not pay A B her legacy on her marriage. A B and her husband filed a bill against C D, and upon taking the bill *pro confesso*, it was held, that the legacy was charged upon the residuary real estate. *Francis v. Clemow*, 23 Law J. Rep. (n.s.) Chanc. 288; Kay, 435.

A testator by his will devised and bequeathed all his real and personal estate to trustees upon trust to convert his personal estate into money, and thereout to pay his debts and a legacy of 10*l*. to A, and to be possessed of the residue of his money and his real estate, upon trust out of the rents of his real estate to pay such debts as his personal estate might be insufficient to satisfy, and, subject thereto, to stand possessed of all the residue of his estate for his grandchildren. The testator made a codicil to his will, and thereby directed that the trustees or trustee acting under his will should pay a further legacy of 40*l*. to A and an annuity of 100*l*. to B:—Held, that the legacy and annuity given by the codicil were charged on the testator's real estate. *Gallemore v.*

Gill, 23 Law J. Rep. (N.S.) Chanc. 604; 2 Sm. & G. 158.

A testator gave all his real and personal estate to trustees upon certain trusts, but charged with an annuity of 500*l.*:—Held, that, as between the heir-at-law and the personal representatives of the testator, the annuity was primarily payable out of the personal estate—*dubitante Knight Bruce, L.J. Tench v. Cheese*, 24 Law J. Rep. (N.S.) Chanc. 716; 19 Beav. 3.

An annuity bequeathed by will, and directed to be paid out of a moiety of the rents, issues, profits, dividends, interest and proceeds of the real and personal estate of the testator, after the expiration of a life interest therein:—Held, not to be primarily payable out of the personal estate of the testator, but to be apportionable between the real and personal estates. *Falkner v. Grace*, 9 Hare, 282.

A legacy directed by an appointment in pursuance of a will to be raised by mortgage of the moiety of the residuary real and personal estate, on the expiration of a life interest in such moiety, and the residue of such legacy, and another legacy, directed to be raised and paid by mortgage or sale of the whole or any part of the real and personal estate, on the expiration of another life interest:—Held, not to be charges primarily payable out of the personal estate, but to be apportionable between the real and personal estate. *Ibid.*

The rule,—where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both,—that the legatees, whose legacies are so charged, shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case where one of the legacies only is charged upon real estate. *Scales v. Collins*, 9 Hare, 656.

The Court does not construe a charge upon real estate of one only of several legacies if the personal estate should not be sufficient, as intended for the exclusive benefit of that legatee, but construes the intention of the testator to be that all his legacies shall be paid: and therefore that the charge is to take effect, if the personal estate be insufficient for the payment of all the legacies. *Ibid.*

A testator bequeathed to the treasurer for the time being of the General Infirmary at Leeds the sum of 10,000*l.*, to be raised and paid out of such part of his ready money, goods and personal effects, as he could by law charge with the payment of the same; and he made other charitable bequests in similar terms, besides a number of bequests to individuals given generally, and not made payable out of any particular portion of his property. The testator's estate consisted partly of pure personalty, and partly of personalty savouring of realty; the latter being more than sufficient for the payment of the general legacies:—Held (reversing a decision of the Vice Chancellor Knight Bruce, by which the charity legacies were directed to abate in the proportion which the personal estate savouring of realty bore to the whole personal estate, and without reference to the question of what was the precise character to be attributed to the charity legacies, but having regard only to the intention of the testator to be gathered from the will), that the general legacies ought to be paid out of the personalty

savouring of realty, so as to leave the pure personalty for the payment of the charity legacies. *Robinson v. Geldard*, 3 Mac. & G. 735: reversing 18 Law J. Rep. (N.S.) Chanc. 454.

Held, also, though not as the ground of the decision, that in the present case the charity legacies were analogous to, and had the same incidents as demonstrative legacies to individuals, except so far as regards the right of satisfaction out of other assets than the fund out of which they were directed to be paid, a right from which they were debarred by the stat. 9 Geo. 2. c. 36. *Ibid.*

(F) VESTED OR CONTINGENT.

(a) *In general.*

A testator bequeathed the interest of 3,000*l.* at 5*l.* per cent. to his daughter for life, and, after her death, he gave the said sum of 3,000*l.* to trustees in trust for all the children of his daughter, share and share alike, to be paid to sons at their ages of twenty-one and daughters at their ages of twenty-one or days of marriage, with interest in the mean time on their shares for their maintenance and education, and benefit of survivorship, in the event of any of the said children dying without issue. The testator's daughter had five children living at his death, one of whom attained twenty-one and died in her lifetime without issue:—Held, that the representatives of the deceased child were entitled to his share. *Tribe v. Newland*, 21 Law J. Rep. (N.S.) Chanc. 283; 5 De Gex & S. 236.

A testator gave his residuary estate to R S, the eldest son of P S, and failing him, to the next male child of P S, and failing the male children of P S, to seven persons by name, and the survivors and survivor of them, in equal proportions, their respective shares to be at their free will and disposal. R S died in the lifetime of his father, and P S died without any other issue:—Held, on the authority of *Cripps v. Wolcott*, that the gift to the legatees named was contingent, and that the word "survivors" referred to the period of distribution; and as they had all died in the lifetime of P S, before it could be ascertained whether a child of his could claim, that the gift had failed, and that the residue passed to the next-of-kin of the testator. *Macdonald v. Bryce*, 22 Law J. Rep. (N.S.) Chanc. 779; 16 Beav. 581.

A testator bequeathed 3,000*l.* to trustees, upon trust to pay the income for the maintenance of S S and C S, and when the youngest should have been born twenty-one years to divide the principal equally between them, if they should then both be living, but if either of them should be then dead, the testator gave his moiety to the children of M B. C S died an infant. S S attained twenty-one, but died before C S, the youngest, would have been born twenty-one years:—Held, that the interest of S S was vested in one moiety of the fund, and that it passed by his will. *In re Smith's Will*, 24 Law J. Rep. (N.S.) Chanc. 466; 20 Beav. 197.

Bequest of residue equally between A and B (the wife of C), and if C survived B for him for life, and afterwards to their four children:—Held, that the children took only in the event of C surviving B. *Cattley v. Vincent*, 15 Beav. 198.

Bequest of residue to A for life, and, after her

decease, a gift of 8,000*l.* each to B and C (grand-daughters), for their absolute use; and if either of them should be dead at the decease of A, her 3,000*l.* was to go to the grand-daughter who should be then living; but in case such grand-daughter should have left children, they were to take her legacy. B died first, leaving children; C then died without issue, leaving A surviving. On the death of A,—Held, that C's legacy was vested and passed to her representatives. *In re Bright's Trust*, 21 Beav. 67.

A testatrix bequeathed her residuary estate upon trust for her sister for life, and after her sister's death to pay, divide, and apply the trust fund in manner following (that is to say): one-tenth to or for the use of R H, and another one-tenth to or for the use of C R, for their respective lives, and in case either of them should die in the lifetime of the tenant for life, or afterwards, leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go to and be equally divided among his or her children as they should attain twenty-one:—Held, that a child of C R who survived the tenant for life and attained twenty-one, but died in the lifetime of C R, took a vested interest. *Boulton v. Beard*, 3 De Gex, M. & G. 608.

The trustee of the will who, acting upon the opinion of counsel, had distributed the whole estate according to a different view, was ordered to pay to the representatives of the child the amount of the child's share and the costs of the suit. *Ibid.*

A testatrix bequeathed the interest of long annuities to her sisters, and in case of one or both of their deaths before hers, "gave the whole of interest in long annuities" to her brother for life. At his death half of the interest she gave to a daughter of the brother till she attained twenty-one, and "then to receive half the capital." Likewise the testatrix bequeathed to a son of her brother the other half:—Held, on the construction of the whole will, that the bequest to the niece and nephew were not contingent upon the sisters' deaths in the testatrix's lifetime. *Boosey v. Gardener*, 5 De Gex, M. & G. 122.

Legacies of 1,000*l.* each to the three children then living of A, the testator's daughter, with a provision for the payment of the interest for their maintenance during minority, and a bequest of 2,000*l.* to trustees upon trust for A for her life, and from and after her decease for all and every her children living at her decease equally to be divided, with a proviso that if any one or more of the children of A should die under twenty-one, without leaving issue, the original and accrued legacies and shares bequeathed to the child or children so dying should go to the others and other of the said children equally; and a declaration, that if all the children of A should die under twenty-one, and without leaving issue, the legacies of 1,000*l.* a-piece shall not be raiseable; but from and after the decease of the last surviving child, the said legacies—and from and after the decease of her daughter the 2,000*l.*—should sink into the residue:—Held, that the rights of the children of A in the legacy of 2,000*l.* were contingent upon their surviving their mother. *Farrier v. Barker*, 9 Hare, 737.

Some of the reasons, which have influenced the Court in decisions in favour of vesting legacies in children, have no application in the case of grand-

children, where there is nothing to shew that the testator had placed himself *in loco parentis*. *Ibid.*

(b) Period of Vesting.

A testator bequeathed his residuary personal estate to trustees, upon trust for A for life, and after the death of A the said trust-money and income in trust for all and every the children of A, share and share alike, to the son or sons when they should have attained the age of twenty-one, and for the daughter or daughters at that age or marriage; with a gift over, if A should die without having a child, or, having any, such children should die, being sons before twenty-one, and daughters before twenty-one or marriage. A died leaving an only child B, who died under twenty-one:—Held, that the trust property had vested in B, so that the income between the death of A and the death of B belonged to B's estate. *Ridgway v. Ridgway*, 20 Law J. Rep. (N.S.) Chanc. 256; 4 De Gex & Sm. 271.

A testator directed the proceeds of the residue of his estate to be divided between his three children in certain shares during their lives; and after the decease of any one or two of his said children, until the decease of the survivor, the shares that belonged to the parents in their lifetime were to be divided amongst the children of such one or two of his said children so dying; and after the decease of the survivor of the three children, the whole residue was to be divided between his grandchildren who should be then living equally *per capita*, and not *per stirpes*; and if any of his grandchildren should be then dead leaving issue, such issue were to stand in the place of their deceased parent, and receive the same proportion of the estate as such parent would have been entitled to if living. One of the daughters, who died first, had three children, who died in her lifetime. The trustees accumulated the shares of such daughter until the death of the survivor:—Held, that the representative of the three deceased grandchildren was entitled to such accumulations. *Horner v. Gould*, 20 Law J. Rep. (N.S.) Chanc. 657; 1 Sim. N.S. 541, nom. *Homer v. Gould*.

A testator gave 25,000*l.* to trustees upon trust to pay the income to his daughter for life, and after her death to pay the capital to the children of his daughter equally, upon their attaining their ages of twenty-one years; the interest of their shares until their becoming entitled to the principal to be applied for their maintenance; and in case any of the children should die before being entitled in possession to his, her or their shares, the shares of those so dying should go to the survivors. The testator's daughter had two children living at his death, who both attained twenty-one, one of whom died in the lifetime of her mother:—Held, that the representatives of the deceased child were entitled to a moiety of the fund. *In the matter of Yates's Trust*, 21 Law J. Rep. (N.S.) Chanc. 281.

A testator at his decease left a widow and three children, all of whom attained twenty-one and survived the wife. By his will he gave real and personal estate to trustees "to transfer to each of his children their share after the death of his wife, or as soon as they arrived at twenty-one years, but if one of the three children should die leaving no children, his or her share should be equally divided between the other two, and their heirs for ever." One of the

testator's children married, and died, leaving no children, but leaving his wife surviving:—Held, that he took a vested interest in his share of the testator's property not liable to be defeated upon his afterwards dying without leaving a child surviving. *Edwards v. Edwards*, 21 Law J. Rep. (N.S.) Chanc. 324; 15 Beav. 357.

A testator bequeathed to his son William the dividends, interest and annual produce to arise from the sum of 3,000*l.* $\frac{3}{4}$ per cent. Bank annuities for his life: and after his decease he gave the said principal sum of 3,000*l.* to all and every the child or children of his said son, to be equally divided between them, or if only one child, then the whole to such only child, to be paid on their respectively attaining the age of twenty-one: the interest in the mean time to be applied for their maintenance and education. The testator gave two further sums of 3,000*l.* to another son and daughter in similar terms: and upon the death of either of his said sons and daughter without issue, then he directed the interest, dividends and produce so given to him, her or them so dying, to be paid to the survivors and survivor in equal shares and proportions. The testator's son William had one child only, who died an infant during his father's lifetime:—Held, that the infant took a vested interest in the 3,000*l.*, liable to be divested by the death of his father without leaving issue living at his death; and that event having happened, the gift over took effect. *Westwood v. Southey*, 21 Law J. Rep. (N.S.) Chanc. 473; 2 Sim. N.S. 192.

A testator gave a leasehold house, which was let for twenty-eight years, to trustees to pay the rents and profits for the benefit of his five children, whom he named, or the survivors or survivor of them, in equal shares and proportions, share and share alike:—Held, that the words "survivors or survivor" referred to the death of any of them in his lifetime; that the words "share and share alike" referred to those children who should survive him, and created a tenancy in common, and that the interests were vested in the children on the death of the testator. *Ashford v. Haines*, 21 Law J. Rep. (N.S.) Chanc. 496.

A testator, who died in June 1837, by a will made in 1819 directed, after the decease of his wife, that one moiety of his residuary estate should be divided into five equal parts, which he gave to five several parties, whom he named, and in case of the death of any or either of them before his wife, then their respective shares to go to their respective husbands or wives; and if none, to their respective children; and on failure of children, to the survivors of them, share and share alike. And as to the other moiety, he gave 10*l.* thereof to A E, should she be then living; and as to the remainder of the moiety, he gave it to five parties whom he named, and in case of the death of any or either of them, then their respective shares to their children; and if none, then to the survivors of them, share and share alike. The testator's widow died in 1849. It appeared from the inquiries directed as to the first moiety, that all the five persons named as legatees were alive at the date of the will; three died in the lifetime of the testator, leaving children, six of whom were still living, and defendants to this suit. The remaining two legatees survived the testator, but died before the tenant for life. They both left children, seven of whom were now living, and defen-

dants to this suit. As to the second moiety, A S, one of the legatees, died before the date of the will, leaving four children, all now living, and defendants to this suit. Two others died in the life of the testator, one without issue, and the other leaving children, two of whom were now alive, and defendants to this suit; and H K, the fifth legatee, was the only one of the legatees named in the will who had survived the tenant for life:—Held, that the legatees took as tenants in common: that children of legatees who would have taken if they had survived the tenant for life, were entitled to their parents' share: that the gift to A S, who was dead at the date of the will, and in case of her death, to her children, passed her share to her children who were living at the death of the tenant for life: that the legal personal representative of a son of one of the legatees was entitled to participate with the other children of the legatee: that the children of a deceased legatee took vested interests in the parent's share whenever the class of those children was to be ascertained: and upon the death of C K, one of the legatees of the second moiety, in the life of the testator, the other legatees then living took vested interests in his share. *Ive v. King*, 21 Law J. Rep. (N.S.) Chanc. 560; 16 Beav. 46.

A testator devised real estate to A in fee, charged with an annuity to B for life, and directed that after the death of B, the estate should be charged with the payment of 100*l.* a-piece to X, Y, and Z, and that the same should be paid to them respectively within six calendar months after the death of B, or such of them as should be then living. X died in the lifetime of B:—Held, that the legacy to X had not vested, and was not payable to his representatives. *Goodman v. Drury*, 21 Law J. Rep. (N.S.) Chanc. 680.

A testator gave to his wife all his stock in trade, working jewellery and implements of every description whatsoever, and all his book debts, ready cash, money in the funds, bills, bonds, notes, or other securities whatsoever, for her life, if she should so long continue his widow; but at her death, or second marriage, he gave the said stock in trade, monies, debts and assets, and also all his household furniture, to be equally divided among the children he then had, or might thereafter have. But in case his wife should not marry again, then the testator bequeathed to her all and every his personal estate and effects whatsoever for her life, and the same to be equally divided amongst such of his children as should be living at her decease, share and share alike:—Held, that the first clause in the will was not intended to be a specific bequest, and the last a residuary bequest; but that both clauses were intended to deal with the whole property, and were applicable to different events: the first applying to the testator's widow marrying again, the latter to her dying without marrying again; and the latter event being the one which happened, the children living at her death became entitled, to the exclusion of the representatives of those who had died. *Wiggins v. Wiggins*, 21 Law J. Rep. (N.S.) Chanc. 742; 2 Sim. N.S. 226.

A testator gave to trustees a sum of money on the usual trusts for investment, and directed them to pay the income to A for life, and, after his death, to divide the principal between the children of A who should be living at the time of his (A's) death, and the issue of such as should be then dead, leaving issue, so that

the issue of such child so dying should take the part which their deceased parent would have taken if living, to be paid to such children and issue upon their attaining, and in case they should live to attain, twenty-one. A had a child B, who died in his lifetime, leaving four children. Two of these children died in their infancy, in the lifetime of A.—Held, that the class to take was all the children left by B, and that the gift had vested absolutely in all those children. *Barker v. Barker*, 21 Law J. Rep. (N.S.) Chanc. 794; 5 De Gex & Sm. 753.

Bequest of a sum of money to trustees upon trust to pay the income to A for life, and then to transfer the capital to the child or children of A, as tenants in common, when they should attain their ages of twenty-one years; and, in case any child should die before his share became payable, leaving issue, such share should go to his issue; and if any child should die before his share should become payable, leaving no issue, such share should go to the survivors; and in case A should leave no child, then that the trustees should pay the same in the manner therein mentioned. A had a child who attained twenty-one, and died in her lifetime.—Held, that the legacy had absolutely vested in A's child. *In re Thomson's Trusts*, 22 Law J. Rep. (N.S.) Chanc. 273; 5 De Gex & Sm. 667.

A testator gave his executors the sum of 20l. long annuities, upon trust to pay the same to H for life, and after her decease to apply such annuity towards the maintenance of her children till twenty-one, and then to transfer the said annuity equally between them; but if H should die without leaving issue, then upon trust to apply the annuity towards the maintenance of her brother and sister during their minorities, and on their attaining twenty-one to assign and transfer such annuity equally between them, but if either of them should be then dead, then upon trust to transfer the whole of the annuity to the survivor absolutely. And the testator gave the residue of his estate and effects to his wife and son. The brother and sister of H both attained twenty-one, but died during her lifetime.—Held, that the residuary legatees were entitled to the 20l. long annuities, and not the representatives of the brother and sister of H. *Widdicombe v. Miller*, 22 Law J. Rep. (N.S.) Chanc. 614; 1 Drew. 443.

A testator declared trusts of his estate to be for his wife for life, and after her death he gave the same estate to his first cousins by his mother's side and the issue of such of them as might happen to be dead *per stirpes*, and to their heirs, executors, administrators and assigns for ever as tenants in common.—Held, that the period for ascertaining the class to take was the death of the testator's widow. *Baldwin v. Rogers*, 22 Law J. Rep. (N.S.) Chanc. 665; 3 De Gex, M. & G. 649.

Held, also, that the first cousins *ex parte maternâ*, living at the death of the testator, took vested interests, subject to open so as to let in all other first cousins *ex parte maternâ* born before the period of distribution. *Ibid*.

A, by her will, gave legacies of 30l. each to the surviving children of her sister C N; and then gave the residue of her property to C N for life, and after her decease such property to be equally divided between her surviving children. At the death of the testatrix C N had five children living; and, at the

death of C N, four only of her children survived her:—Held, that the words "surviving children" in the gift of the residue must be construed "surviving C N," notwithstanding that in the gift of the legacies they must be construed as surviving the testatrix. *Neathway v. Reed*, 22 Law J. Rep. (N.S.) Chanc. 809; 3 De Gex, M. & G. 18.

A testator gave all his residuary estate to trustees, upon trust to pay the proceeds to his wife for life, and after her decease upon trust to sell the property and to stand possessed thereof, as to one seventh part, in trust, to lay out and invest the same in a government annuity for the life of his son, and upon further trust to pay such annuity when and as the same should become payable, not by anticipation, to his said son, for his life, for his own use; but the testator declared that in case his son should, either before or after his (the testator's) death, become bankrupt or insolvent, or should do any act to incumber the annuity, then the property was to go over to other persons. The testator's son survived the testator and died in the lifetime of the tenant for life, without having become bankrupt or insolvent, and without having done any act to incumber the annuity.—Held, that his personal representatives were entitled to the property. *Day v. Day*, 22 Law J. Rep. (N.S.) Chanc. 878; 1 Drew. 569.

A testator gave to two trustees, in trust for the child or children of his daughter-in-law, the sum of 700l. to each child, to be paid by his executors as soon as each child became of the age of twenty-one years (or by mutual agreement the trust was to continue longer after each child should have passed the age of twenty-one); the aforesaid sums to remain in the stock and possession of his executors until the whole sum be paid to the said trustees, for the sole use of the said children; but should either child or both children of his daughter-in-law die without leaving issue, then the 700l. for one child (or if both die and leave no issue living), 1,400l. for the use of other persons.—Held, that the grandchildren of the testator upon attaining twenty-one took absolute interests in the money, liable to be divested in the event of their dying without leaving issue. *Cotton v. Cotton*, 23 Law J. Rep. (N.S.) Chanc. 489.

A testator gave a portion of his property in trust for each of the seven children by name, of Mary H, by his son, W H, together with every other child thereafter to be born of Mary during the life of his son or within nine months after his decease in equal shares, with benefit of survivorship. He also directed that the trustees should apply such portion of the dividends as they should think fit for maintenance, &c. of such children until the youngest should attain the age of thirty, and then upon trust for them respectively and the survivors in equal shares absolutely; and the trustees were authorized, if they should think fit, to make the distribution sooner, provided the youngest child had attained twenty-one.—Held, that the interests of the children were to be ascertained at the death of the testator's son, and that the share of a child who died during the son's life would go to those children who should be living at his decease. *Hodson v. Micklethwaite*, 23 Law J. Rep. (N.S.) Chanc. 719; 2 Drew. 294.

Testatrix, by her will, gave her residuary estate to trustees to invest and pay the dividends to A for life; and after his decease, in case he should leave

a child or children, in trust for all and every such child or children equally at twenty-one, the share of each such child to be considered a vested interest in him or her; and, in case A should leave no such child or children, the will contained a gift over to third parties. A had one child, H E F, who attained twenty-one, and died in his father's lifetime, leaving a widow and child surviving him. On a suit by the widow of H E F claiming, as his administratrix, that he was absolutely entitled to the fund,—Held, upon appeal, affirming the decision below, that the persons claiming under the gift over were entitled. *Bythesa v. Bythesa*, 23 Law J. Rep. (N.S.) Chanc. 1004.

A testatrix gave one fourth part of her residuary property to trustees, upon trust to pay the annual income to her son for life, and after his decease, upon trust, to transfer and pay the capital of the said trust fund unto and amongst the children of her said son in manner hereinafter mentioned. Then followed a clause giving another fourth of the property to another son, in the same way as the preceding fourth, and afterwards a clause providing for the bankruptcy of either of her sons. And she subsequently declared that the shares of her sons' children should be payable at the age of twenty-one or marriage, whichever should first happen:—Held, that the first clause, comprising the gift to the son's children, and the subsequent clause, as to the time at which the shares were to be paid, did not constitute a substantive gift in the first place, with a separate direction to pay, but the two clauses formed only one general direction to pay the trust fund unto and amongst the children in manner following, that is to say, at twenty-one or marriage. The children consequently did not take vested interests until they attained twenty-one. Other parts of the will were referred to, as confirming this view of the case. *Shum v. Hobbs*, 24 Law J. Rep. (N.S.) Chanc. 377; 3 Drew. 93.

Upon a bequest to trustees upon trust to pay the income of the trust property to the testator's daughter for life, and after her decease to divide the capital equally amongst all her children then living, provided all had attained twenty-one; but if not, to apply the income towards the maintenance of all such children until the majority of the youngest, and when that should happen, to divide the capital among the children then living and the issue of such as should be dead:—Held, that the legacies vested at the death of the daughter, notwithstanding a doubt created by a subsequent part of the will. *Brocklebank v. Johnson*, 24 Law J. Rep. (N.S.) Chanc. 505; 20 Beav. 205.

A testator devised property to trustees for the maintenance of his four children until they severally attained twenty-five, at which time he devised unto such of his said children as should attain that age one-fifth of the property, to hold to them and their heirs. There was a gift over to the "survivors or survivor" if any died before attaining twenty-five and left no issue, or if they should die after attaining twenty-five and should leave no lawful issue:—Held, first, that their interest did not vest till twenty-five, and, secondly, that the words "survivors or survivor" was not to be read "other or others." *Stead v. Platt*, 18 Beav. 50.

Gift over after an absolute bequest in the event of

death, without leaving issue surviving, construed upon the context such a death under twenty-one. *Brotherton v. Bury*, 18 Beav. 65.

A testator gave his personal estate and the produce of his real estate (which was to be sold on his youngest child attaining twenty-one) between his children equally. There was a gift over if any child should die after the testator's decease without leaving issue surviving him (omitting the words under twenty-one). There were a maintenance clause out of interest and an advancement clause out of capital, until the shares should become payable and transferable, and which referred to the time when the legatees would be absolutely entitled to receive as being or attaining twenty-one. A child died after attaining twenty-one, without leaving issue:—Held, that his share did not go over, but belonged to his representatives. *Ibid*.

A testator bequeathed one-third of his residue to his daughter, her executors, &c., to be vested at twenty-one, but not to be payable until twenty-five. He declared it should not be subject to the controul of any husband, but should devolve and be settled by deed upon her as a feme sole, and that the income should not be anticipated, and that until her marriage, she should only be entitled to receive the dividends and retain the power to bequeath the capital by will. The daughter being unmarried:—Held, that she took absolutely, and was entitled to payment of the fund out of court on attaining twenty-one. *In re Young's Settlement*, 18 Beav. 199.

Bequest of 2,000*l.*, in trust to pay one half of the interest to Nathaniel for life and the other to Thomas for life, and afterwards to their wives for life; and in case at the death of Nathaniel and wife there should be issue of Nathaniel, to transfer a moiety to the children at twenty-one, and in case there should be no such issue, or they should die under twenty-one, then over, "and so in like manner upon the decease of Thomas and wife, the other half to be transferred to his lawful issue"; and in case of no such issue, or they shall all depart this life before they shall attain twenty-one, then over:—Held, that a child of Thomas, who attained twenty-one, but died in the lifetime of her mother, took no interest. *Wilson v. Mount*, 19 Beav. 292.

A testator bequeathed leaseholds to trustees to pay the rents to his wife till his son attained twenty-one, and then to assign them to his son. The wife died during the minority of the son:—Held, that her legal personal representative was entitled to the rents until the son attained twenty-one. *Laxton v. Eedle*, 19 Beav. 321.

A testator bequeathed a pecuniary legacy in trust for his sister for life, and after her decease to pay it to her children equally, to be paid at twenty-one, with benefit of survivorship in case of death under twenty-one, with a clause for maintenance. There was a gift over to other parties in case there should be no child living at the death of the sister, such parties to take in the same manner "as is hereinbefore directed had any or either of the children of my sister survived so as to become entitled thereto." There were three children; one of them only survived the sister:—Held, that such child took the whole fund. *Daniel v. Gossett*, 19 Beav. 478.

A testator gave a fund to his wife for life, with a power for her to appoint it by will amongst "A, B, C,

and their respective children"; and in default of appointment he directed the same at his wife's death to go amongst all the said children equally. The wife made no appointment:—Held, first, that the children alone took to the exclusion of their parents; secondly, that they took *per capita*; and, thirdly, that the fund vested in the children living at the death of the testator, subject to its being either divested by the exercise of the power or by the birth of other children before the death of the tenant for life. *Pattison v. Pattison*, 19 Beav. 638.

Under a pecuniary bequest, upon trust for the testator's daughter for life, with remainder in trust for her husband for life, and after the decease of the survivor to pay and divide the trust fund to and among the children of the daughter, if more than one, equally to be divided among them, share and share alike, when and as they attained twenty-one:—Held, that the children took vested interests before attaining twenty-one. *Williams v. Clark*, 4 De Gex & Sm. 472.

A testator gave his residuary estate upon trust to pay to A an annuity during her life, and to accumulate the surplus income till the expiration of six months after A's death, and then to divide the residue and accumulations into as many shares as there should be children "living" of A and of B who should have lived to attain twenty-one, or in case of any of them being dead under that age, who should have left issue, and pay and apply one share to each of the children of A and B that should have lived to attain twenty-one, and to their respective executors, administrators and assigns, and one share to the issue of each child who should have died under that age leaving lawful issue:—Held, that the word "living" was not referable to the period of distribution but to that of the testator's death, so that each child on attaining twenty-one took a vested interest absolutely. *Kidd v. North*, 3 De Gex, M. & G. 947.

A testator directed the proceeds of his real estate to be invested in stock, upon trust, to pay the dividends to his two daughters in equal shares during their natural lives, and "from and after their decease to go to their respective children for their support and maintenance until they shall attain the age of twenty-two years severally, they to receive the principal and interest as they attain such age in equal shares;" should either die before twenty-two, the shares of either of them so dying before the attainment of such age to be equally divided among the survivors or survivor of them:—Held, that the children took vested interests. The divesting clause was held to be void. *Hobbs v. Parsons*, 2 Sm. & G. 212.

A testator having given certain annuities, gave his real and personal estate to trustees on trust to pay them, and from and after the decease of the last survivor but one of the several annuitants, his children and grandchildren, upon trust to sell the same, and to render the residue of his estate into money, and to divide the same among the said survivors, whose annuity shall then cease, and all and every his grandchildren who should be living, if any should be born after the date of his will, and the children of such of his grandchildren, either the said annuitants or born after the date of his will, as tenants in common, except only that the child of any grandchild who should survive its parent should take its

parent's share. The children being all dead and two annuitants living,—Held, a great-grandson of the testator took a vested interest. *Bellamy v. Hill*, 2 Sm. & G. 328.

A bequest of residuary estate to be invested in consols, and to be held by the executors in trust for all and every the grandchildren of the testator, to be divided equally amongst them at the expiration of twenty years after his decease, held to confer immediate vested and transmissible interests to the grandchildren living at the death of the testator; subject to be opened and let in grandchildren who might be born before the expiration of the twenty years. *Oppenheim v. Henry*, 10 Hare, 441.

In a bequest of 1,000*l.* to certain persons for life, and (after their decease) of 400*l.*, part thereof, to A and B, part and part alike, viz. 200*l.* to A and 200*l.* to B, for the trouble they might have in the execution of the will; but "in case of either of their death" to the survivor, "and in case of both their deaths to the heirs, executors and administrators of such survivor 200*l.* only." The words "in case of death" were held to refer to death in the lifetime of the tenant for life of the 1,000*l.* *Green v. Barrow*, 10 Hare, 459.

Testator gave personal estate outstanding on securities to his wife for life, remainder in a moiety to six of his children, provided that if any one died before receiving his or her share without leaving lawful issue it should go over. One of the children died, after the wife's death, but before the securities were realized and the produce divided:—Held, that the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment, and that the representatives of the deceased child took a share. *In re Dodgson's Trust*, 1 Drew. 440.

A will contained a gift to children and the issue of deceased children in language that clearly did not vest it in any until the youngest child should have attained twenty-one. In a subsequent part there was a declaration as to the vesting of the shares expressed with much obscurity and partially inconsistent with the language of the gift:—Held, that it must be rejected, and the clear gift must take effect; consequently that the shares did not vest till the period prescribed, and the representatives of a child who died before the youngest attained twenty-one took nothing. *Bickford v. Chalker*, 2 Drew. 327.

Bequest of residuary estate upon trust for testator's wife during her widowhood, and after her decease or second marriage in trust for all and every his child and children who should be living at his decease as tenants in common, to become vested in them respectively after the decease or second marriage of his wife, when and as they should severally attain twenty-one, with interest on their respective shares, for maintenance and education in the mean time, and with equal benefit of survivorship in case of the death of any of them under age and without issue, with gift over in case of the death of any of the testator's children in his lifetime, or during the widowhood of his wife, leaving issue who should survive the decease or second marriage of testator's wife, to such issue of their parent's share. And the testator empowered his wife to advance to all or any of his children such sums as she might think advisable for their advancement in life, and to take

their promissory note or receipt for the same, and declared that such advances should be received by his children and accounted for to his executors as part of the share of the estate to which they would be entitled at the decease or second marriage of his wife, such advances not to exceed one-half of what they would at the time of such advances be considered as likely to be entitled to at the death or second marriage of testator's wife:—Held, having regard to the proviso for advancement, and to the circumstance that any other decision would have resulted in intestacy as to the share in question, that one of five children of the testator who attained twenty-one and died, leaving issue which died during the widowhood of the testator's wife, took a vested interest in one-fifth of the estate, which passed on his death to his personal representatives. *Walker v. Simpson*, 1 Kay & J. 713.

(G) SPECIFIC AND DEMONSTRATIVE.

Bequest of 10,000*l.* sterling, "being my share of the capital now engaged in the banking business," &c.:—Held to be a demonstrative and not a specific legacy. *Sparrow v. Josselyn*, 16 Beav. 135.

The produce of a specific legacy misapplied by A, an administrator, being traced into *post obit* securities given by B to C, the Court held that the *cestui que trust* was entitled to a charge on the securities. *Harford v. Lloyd*, 20 Beav. 310.

A specific legacy of 6,000*l.* consols bequeathed to the plaintiffs was unnecessarily and improperly sold out by the administrator, A, with the aid of B, and the produce carried partly to the banking account of A and the remainder to that of B. A series of shuffling of cheques and transfer of monies took place, but 2,908*l.* was traced to B. About this time B laid out monies in the purchase of a *post obit* security, and though the trust monies could not be distinctly traced into the securities, yet the Court held, from the suspicious character of the transactions, that such was the just inference so far as to throw on the other side the onus of disproving it, and this not having been done, the Court held that the plaintiffs had a charge on the securities for the 2,908*l.* and interest. *Ibid.*

In addition to this, B had sold and transferred the securities to C in consideration of a debt then owing; C had notice that the money by which the securities had been obtained had been derived from A, though she had no notice of the breach of trust:—Held, that C could not set up an adverse title as against A, and *à fortiori* that she could not do so as against the plaintiffs (A's *cestuis que trust*). *Ibid.*

Where, in a residuary gift, specific property is bequeathed, the bequest may, nevertheless, be specific as to that particular property, though general as to the rest. *Mills v. Brown*, 21 Beav. 1.

A testator bequeathed his consols to A, and directed his executors to sell all such parts of his estate and effects as should not consist of ready money or money in the funds, "and to stand possessed of the monies to arise thereby, with such ready money and the money he might have in the Long Annuities upon trust" for A, B and C:—Held, that the Long Annuities were specifically bequeathed, and not liable to contribute towards the payment of general legacies. *Ibid.*

A legacy of a sum of money owing to the testator

by A B upon a mortgage of certain premises therein mentioned, and which mortgage was paid off in the testator's lifetime, after the date of the will, held to be a specific and not a merely demonstrative legacy, and to be redeemed by such payment. *Sidebotham v. Watson*, 11 Hare, 170.

The testator placed part of the mortgage money received by him from A B in a bank, and afterwards drew out a part of such deposit, leaving in the bank at the time of his death a balance amounting to a moiety of the sum which had constituted the mortgage debt; but it was held, that the specific legatee of the mortgage debt was not entitled in respect of such legacy to the money so remaining in the bank. *Ibid.*

Leasehold property was charged with two demonstrative legacies, being a fixed sum to the executrix and another fixed sum, the estimated remainder of its value, to a legatee, who had also the option of purchasing at the estimated value. The property was held of an ecclesiastical corporation for forty years, renewable every fourteen years, and the executrix twice renewed the term out of her own money, but at the end of thirty years she declined to renew a third time. The executrix, on passing the residuary account, had valued the leasehold property at the price fixed by her testatrix; upon this statement a very small general residue appeared. The legatee, who was also tenant of the property, did not exercise the option of purchasing, but he retained the interest on his legacy, and paid the balance of rent, which did not keep down the interest on her legacy, to the executrix. On a suit by the legatee, —Held, that there was an admission that the particular property, not the general assets, was sufficient for payment of the legacy, and that the executrix was not personally liable, but that by the course of her conduct for thirty years she had lost her priority. *Severs v. Severs*, 1 Sm. & G. 400.

A will contained an absolute specific bequest to an individual, and a limited gift of the residue to the same individual; the Court, seeing that the absolute specific bequest and the general bequest contained each a distinct and specific subject and object of gift, —Held, that there was an absolute specific bequest, and a limited gift of the residue. *Manning v. Purcell*, 2 Sm. & G. 284.

(H) CUMULATIVE OR SUBSTITUTIONAL.

A testator by his will gave to each of two daughters the sum of 1,000*l.*, as and when they should respectively attain the age of twenty-five years, or be married with the consent of his executors; but in case either should die under the age of twenty-five years, or should marry without consent, he directed that the legacy to such one as should die under that age or marry without consent should, after such decease of them respectively, or their respectively marrying without consent, fall into the residue of his estate:—Held, that the legacies vested respectively on the happening of either alternative, and were not contingent on the happening of both alternatives, namely, marrying with consent and attaining twenty-five. *Thompson v. Teulon and Teulon v. Teulon*, 22 Law J. Rep. (n.s.) Chanc. 243.

The testator by the same will directed the sum of 1,000*l.* to be invested, as and when each of the same daughters should respectively attain twenty-five, to

be settled upon trust for them respectively for life, with remainder to their respective children, with a proviso that, if either should die without leaving issue, the trustees of the will should stand possessed of the last-mentioned trust property in trust for the survivor upon the trusts of her original bequest:—Held, that the legacies directed to be settled were cumulative upon, and not substitutionary for, the legacies of the same amount previously given, but that they were respectively contingent upon the daughters respectively attaining twenty-five years of age; and therefore that the daughter who attained twenty-five, and had issue, did not take any interest in the legacy directed to be settled upon the other daughter, who died without issue and without having attained twenty-five. *Ibid.*

Bequest of 500*l.* each to the four children of his niece A B, *nominatim*, followed by a like gift to each of the children "that may be born" to any nephew or niece:—Held, not to include a fifth child of A B, born at the date of, but not named in the will. *Earley v. Middleton*, 14 Beav. 453.

Held also, on the same will, by *Sir John Leach*, that a child born after the testator's death was not entitled, and by *Sir J. L. Knight Bruce*, that the four children did not take cumulative legacies. *Ibid.*

A testator bequeathed to his daughter A 1,000*l.* and 100*l.* banking shares, and to his daughter B 3,000*l.* and 100*l.* shares. By a codicil he revoked both gifts to A, and bequeathed to her 500*l.* and the 100*l.* shares specified in his will; but as to B, he revoked the 3,000*l.* only, and gave to her 1,800*l.* and 100*l.* shares:—Held, that B was entitled to 200*l.* shares, the legacies being cumulative. *Lobley v. Stocks*, 19 Beav. 392.

A testator directed two trustees to stand possessed of 5,000*l.* in a certain event, upon such trusts as were thereafter declared concerning the sum of 20,000*l.* thereafter bequeathed in trust for the benefit of his son William, his wife and children. He afterwards bequeathed to two other trustees 20,000*l.* in trust upon a different event to pay William's wife an annuity of 200*l.* a year:—Held, by the Master of the Rolls, that she was entitled to two annuities, one out of each fund, if the income were adequate. *Hindle v. Taylor*, 20 Beav. 109: reversed 25 Law J. Rep. (N.S.) Chanc. 78.

By her will a testatrix gave 1,000*l.* stock to trustees upon trust to apply the dividends for the maintenance of her granddaughter until she attained twenty-two, and then in trust for her absolutely; but if she died under twenty-two, then in trust for the testatrix's children living at the granddaughter's death. By a codicil the testatrix revoked the above trusts, and in lieu thereof directed the trustees to apply the dividends for the maintenance of the granddaughter until she attained twenty-two, and then in trust for her for life, for her separate use; and in the event of her dying either above or under twenty-two, leaving lawful issue, in trust for her children equally; but if she should die without leaving lawful issue, then in trust for the testatrix's children living at the granddaughter's death, and the children of any child who had previously died. By a subsequent codicil the testatrix declared that she had altered her views respecting her granddaughter as to the 1,000*l.* left in the will, which (the testatrix now thought) might prove a snare for her, and the testatrix left 500*l.* for

schooling and board:—Held, that the legacy of 500*l.* was given in addition to, and not in substitution for, that of 1,000*l.* given by the codicil. *Sawrey v. Rumney*, 5 De Gex & Sm. 698.

(I) CONDITIONAL.

A testator, by a codicil to his will, declared that in case his daughter should carry out her intention of taking the veil, becoming a nun, continuing to reside in a convent, or in any other way associating herself permanently with any Roman Catholic establishment of that nature, she should forfeit all claim to, or benefit from, the bequest of 10,000*l.* given her by his will for life, and afterwards to her children; and he thereby in that case revoked the said bequest; and in order to prevent any portion of his property from being appropriated to other purposes than the benefit of his family, he excluded his said daughter from all reversionary advantages whatever from his said will. The testator's daughter having associated herself with a convent of nuns at Hammersmith, the trustees of the will paid the 10,000*l.* into court under the Trustee Act. Upon petition by the daughter, that the said sum might be paid out for her benefit, it was held, that the condition imposed was a lawful condition, although the will contained no bequest over, and the legatee had forfeited all claim to the legacy. Petition dismissed. *In re Dickson*, 20 Law J. Rep. (N.S.) Chanc. 33; 1 Sim. N.S. 37.

A testator, by will, directed his executors to pay to A 5,000*l.* upon her marriage, with all the accumulations of interest thereon from the time of his death:—Held, that the marriage of A was a condition precedent to the vesting of the legacy. *Morgan v. Morgan*, 20 Law J. Rep. (N.S.) Chanc. 109; 4 De Gex & Sm. 164.

A testator gave a legacy to A, with the accumulations of interest from his death, upon a certain contingency, and gave the income of the residue of his estate to H for life, with remainders over. Some years after the death of the testator it was ascertained that the contingency never could happen:—Held, that H was entitled to the interest of the legacy from the death of the testator until that period. *Ibid.*

A testator directed his executors to sell the whole of his real and personal estate, and invest the proceeds in some government annuity for the benefit of his wife and M L, to be equally divided between them, and at the death of either of them her share was to pass to the survivor, and in case either his widow or M L should marry or live in a state of adultery, then her share to pass to the other, but if they both should marry, then their shares to go to his nephew. The testator also directed his wife and M L out of their annuity to keep in good repair the tomb in which he was buried:—Held, that the restriction upon marriage was good as related to the widow, but was not good with respect to M L, who was a single woman. *Lloyd v. Lloyd*, 21 Law J. Rep. (N.S.) Chanc. 596; 2 Sim. N.S. 255.

Held, also, that the direction to the testator's widow and M L to repair the tomb, which was confined to the lives of the annuitants, was not void on the ground of perpetuity. *Ibid.*

A testator gave the residue of his estate to trustees, upon the usual trusts for conversion and investment, and directed them to pay such sums for the maintenance and education of his sons M and N, during

their minorities, or for apprenticing them, as his trustees should think proper; and declared that, when his sons should have attained their ages of twenty-one years, his trustees should pay the then residue of the monies unto his two sons, provided that they should be, in the opinion of his trustees, of competent understanding and sufficient discretion to manage and take due care thereof. M and N were both lunatic at the time of their attaining their majority:—Held, that the qualification as to the sons being of competent understanding did not make the gift to them conditional, and that the testator's estate vested in them absolutely. *Wright v. Wright*, 21 Law J. Rep. (N.S.) Chanc. 775.

A testator, by his will, gave to trustees a sum of money, upon trust to invest and pay the income to his nephew for his life, weekly, monthly or quarterly, as they should think fit. The testator declared that his nephew should not have power to anticipate, assign or incur the income or his interest therein, or any part thereof, and declared that if he did so, or attempted to do so, the trust should be void. The testator declared that from and after his nephew's death, or any such attempt, the trustees should hold the capital as part of the residue. The income was in arrear and the nephew assigned, as a security for money lent (so far as he lawfully could without creating a forfeiture of his interest in the income of the legacy), all money due to him on account of the income, but not any future income:—Held, overruling the decision of the Court below, that the restraint did not apply to income due at the time of the assignment, but only to future income, and that the assignment, so far as it applied to only past income, was valid. *In re Stultz*, 22 Law J. Rep. (N.S.) Chanc. 917; 4 De Gex, M. & G. 404.

A testator directed his trustees to pay an annuity to a single woman, by whom he had an illegitimate child, during her life, provided that she should continue single, and that she should neither cohabit nor have connexion with any man; his reason being that if she were to marry, her child would be neglected; and for a further reason, that no man should have the spending of his hard-earned money. The annuitant having married, it was held, that the proviso against marriage was valid, the condition being incorporated with the gift, and the object being to protect the child of the testator. *Potter v. Richards*, 24 Law J. Rep. (N.S.) Chanc. 488.

In a gift to A (without any limitation of interest), "and if he should happen to die leaving lawful issue," then to such issue, the contingency has reference to the death of A, and not to that of the testator. A therefore does not take an absolute interest. *Gosling v. Townsend*, 17 Beav. 245.

A testator directed his property to be placed in the funds, and the income to be paid to his wife for her life; after her death he bequeathed two legacies of 6,000*l.* and 1,000*l.*; the remainder of his property he left "at the disposal" of his wife if she remained a widow. If she should marry she was to have no control over his property, but the executors were to pay her an annuity during her life, and the remainder of the testator's property after paying the above legacies was to be divided among his nephews and nieces:—Held, that the widow, who did not marry again, took the capital of the residue, subject to the legacies. *Novolan v. Walsh*, 4 De Gex & S. 584.

By deed a fund was limited in trust for two brothers, Thomas (who was in India) and William, in equal shares; and in case Thomas should die intestate without leaving a child before he should return to England, then the whole was to be in trust for William. William died having bequeathed all his property to Thomas, and made him his executor. The trustees paid the money into court under the Trustees' Relief Act. On the petition of Thomas, —Held, that the condition was capable of release, and that the will of William operated as a release of the condition. *Ex parte Palmer*, 5 De Gex & S. 649.

Whether *Ross v. Ross* and *Cuthbert v. Purrier* be reconcilable with *Doe v. Glover*—*quære*. *Ibid*.

(J) SURVIVORSHIP.

A legacy to A for life, remainder to two persons, by name, share and share alike, with remainder to the issue of such as should be dead, and in case either should die in the lifetime of A without leaving issue, remainder to the survivor:—Held, that the one surviving the tenant for life was entitled to the whole fund, though the other died in the life of the testator. *In re Domville's Trusts*, 22 Law J. Rep. (N.S.) Chanc. 947.

A testatrix directed her trustees to place out a sum of 1,000*l.*, and to pay the interest to B R for life, and after his decease the principal to be divided between his son and daughter; but in case of the decease of either of them before the same should be payable, then such principal and interest to be paid to the survivor of them. The daughter of B R died before the testatrix:—Held, that the daughter's share in the 1,000*l.* did not lapse, but that the whole legacy was vested in the son, subject to his father's life interest, and was not liable to be divested by the death of the son during the life of his father. *Hues v. Jackson*, 23 Law J. Rep. (N.S.) Chanc. 51.

Bequest to A for life, and at her decease to her surviving children when they have attained twenty-one:—Held, that the survivorship had reference to the death of A, and that those children only who survived her were entitled. *Huffam v. Hubbard*, 16 Beav. 579.

A gift of residuary estate to A, and such of the children of B as should be living at the death of C, their respective heirs, executors, &c. in equal shares as tenants in common, and not as joint tenants; but if any such children should die under twenty-one, their shares to be in trust for the survivor or survivors, and other or others of them the said children of B and the said A living at the decease of C, and his and their respective heirs, executors, &c., in equal shares as tenants in common, and not as joint tenants, so and in such manner that the children of B attaining twenty-one and surviving C and the said A, in case A survive C, should take equally *per capita*:—Held, that A surviving the testator and dying in the lifetime of C took, nevertheless, with the children of B, who survived C, a vested share in the residuary estate. *Falkner v. Grace*, 9 Hare, 282.

(K) PAYMENT OF.

The testator bequeathed certain pecuniary legacies, and he gave his leasehold estates to his executors to sell and apply the proceeds in part payment of the legacies:—Held, that the leaseholds were to

be applied as far as they would extend in payment of the legacies, and that the deficiency was to be paid out of the general personal estate. *Bunting v. Marriott*, 19 Beav. 163.

Bequests to the sons and daughters of D of 200*l.* each, also to the children of a son of D 200*l.*, to be equally divided among them, to be paid twelve months after the decease of the testator's widow:—Held, to be postponed as to all the bequests till after the widow's death. *Child v. Elsworth*, 2 De Gex, M. & G. 679.

(L) INVESTMENT.

A testator devised his real and personal estate to trustees upon trust to sell and put out one-ninth of the produce in government or real securities, and to pay the interest to A for life, and afterwards to her children. By a codicil he bequeathed a leasehold to the trustees to hold upon the same trusts in all respects, and for the same persons, and subject to the same powers, provisos, conditions and limitations, as the above one-ninth:—Held, that A was not entitled to enjoy the leasehold in specie, but that it must be sold and invested for the benefit of the persons entitled in succession. *Murton v. Markby*, 18 Beav. 196.

(M) ABATEMENT.

A, having become possessed of property under the will of E H, expressed a desire in his will to make gifts to her relations. He then gave legacies to several persons by name, and added, "but if the personal estate and effects I became entitled to under the will of E H should fall short in paying these legacies, my desire is that 500*l.* out of any other part of my personal estate shall be applied for that purpose." The legacies given amounted to 2,800*l.*; the personal estate of E H amounted only to 1,279*l.* 5*s.* 6*d.*, and after adding the 500*l.* was insufficient to pay the legacies in full by 1,020*l.* 14*s.* 6*d.*:—Held, that the general personal estate of the testator was not liable to make up the deficiency. That the sums of 1,279*l.* 5*s.* 6*d.* and 500*l.* were alone applicable to pay the legacies, and that they must abate proportionately. *Read v. Strangways*, 20 Law J. Rep. (N.S.) Chanc. 487; 14 Beav. 139.

A testator gave all his property to trustees in trust to pay his debts and funeral and testamentary expenses, and to invest the residue in the funds, and out of the interest and dividends to pay certain annuities to his daughter and other persons, and after payment thereof to pay the remainder of the interest and dividends to his wife for life; and after her decease, in case his daughter should have no child, to pay to his daughter a further annuity during her life; but if his daughter should have a child living at the decease of his wife, or born afterwards, her annuities should cease, and his trustees were to raise 20,000*l.* out of his trust estate, and hold it in trust for his daughter for life, and after her death for her children; and if the children should die under twenty-one, that it should sink into his residuary estate thereafter disposed of; and he further directed that after the decease of his wife, his trustees should pay the sum of 5,000*l.*, part of his residuary estate, to such person as his wife should appoint by will, and he gave his wife power to dispose of 1,000*l.* either by gift in her lifetime or

by will to her three co-trustees. The estate was insufficient to pay the annuities and sums of 5,000*l.* and 1,000*l.* in full:—Held, reversing the decision of the Court below, that the annuities and legacies must abate proportionably, and that the annuitants were not entitled to have their annuities made up out of the corpus of the estate. *Miller v. Huddleston*, 21 Law J. Rep. (N.S.) Chanc. 1; 3 Mac. & G. 513: reversing 17 Sim. 71.

A testator having a power of appointment by will over a sum of stock, bequeathed two sums of 5,000*l.* and 500*l.* sterling thereout to A and B, and the residue to his son. The stock became in equity liable to his debts, and by payment thereof and of the costs of the suit, the fund became less than 5,500*l.* sterling:—Held, that the pecuniary and residuary legatees were not liable to abate proportionably, but that the residuary gift failed altogether. *Petre v. Petre*, 14 Beav. 197.

A bequest of an annuity to an executor for his trouble in the conduct and management of the testator's affairs, has no priority over other legacies, in case of a deficiency, and it must abate. *Duncan v. Watts*, 16 Beav. 204.

Legacies directed to be invested and to become payable and paid in a certain order with interest from the testator's death. The assets being deficient, the Court, on the context,—Held, that they were payable *pari passu*. *Lord Dunboyne v. Brander*, 18 Beav. 313.

A testator by his will directed 60,000*l.* to be invested in lieu of 6,000*l.* secured by his marriage settlement, and the interest to be paid to his wife for life, and after her decease the principal to be applied as therein mentioned. He then directed sundry legacies to be invested for certain relatives to be paid within a year after his death, if they should be of age; and if not, upon coming of age, with interest in the mean time; but the principal sums were not to be paid till after the payment or investment of the 60,000*l.* He then gave other legacies, and directed that the several sums given by his will, and not thereinbefore particularly directed, "should be invested in the order, and become payable and paid in the manner thereinafter mentioned;" and that the 60,000*l.* should be the sum first paid and invested; that a legacy to one of his sisters should be next paid and invested, and so on:—Held, that, except as to the 60,000*l.*, the priority intended was a priority of administration or realization of assets, and not of rights and interests; and, therefore (the estate being insufficient), that all the legacies, except the 60,000*l.*, abated *pro rata*. *Ibid*.

The testatrix by will "out of the residue of her property" gave a legacy to A. By a codicil, she directed her executors "out of the residue of her estate, in case there should be sufficient," to invest a legacy for B. The residue being deficient,—Held, that these legacies must abate *pari passu*. *Eavestaff v. Austin*, 19 Beav. 591.

(N) ADEMPMENT AND SATISFACTION.

The doctrine of ademption is of a purely equitable character, and does not prevail in a court of law. *Jamieson v. Trevelyan*, 10 Exch. Rep. 269.

By the settlement made on the marriage of A and B, their trustees D, E and F were directed to stand possessed of 10,000*l.*, 4*l.* per cent. consols, which

had been transferred into their names, on trust for B for life, with remainder for the children of the marriage. D was the father of B. D, E and F lent 2,000*l.*, part of the trust funds, to A, who became insolvent. D, by his will, directed 6,000*l.*, 3½ per cent. annuities, to be placed in the names of the trustees of the settlement of his daughter B, and in the name of C, his executor, whom he appointed a trustee in his place:—Held, that the legacy of 6,000*l.* was a satisfaction of the debt of 2,000*l.* due from D to the trust estate in respect of the breach of trust. *Bensusan v. Nehemias*, 20 Law J. Rep. (N.S.) Chanc. 536; 4 De Gex & S. 381.

A testator gave to his wife the dividends which should happen to become due and payable in her lifetime, upon several specific sums of stock standing in the names of three persons, and after the decease of his wife he gave all subsequent dividends upon the said sums of stock to be applied for certain charitable purposes for ever. After the date of the will one of the persons in whose name the specific sums of stock were standing died, and thereupon the testator became absolutely entitled to such sums of stock, and caused them to be transferred into his own name:—Held, that there had been no ademption of the specific legacies of the stock; that the gift of the dividends of stock for charitable purposes for ever passed the corpus of the fund, and that there must be an apportionment of dividends, in which the widow took a life interest, for the period intervening between her death and the half-yearly days of payment. *Tyrrell v. Clark*, 23 Law J. Rep. (N.S.) Chanc. 283; 2 Drew. 86.

A testator gave one-third part of the "amount of money" that might accrue from his claim on a testator's estate in course of administration in Chancery to his son, and the other two-third parts thereof to his wife and son-in-law for their lives, with remainder to his son. The larger part of the amount was, after the date of the will, received by the testator, under orders of the Court, and invested in his name in consols; some small part of which he sold, but afterwards re-purchased in part. The executrix on the testator's death treating this stock as the subject of the legacy, transferred the son's one-third to him, and she also transferred the two-third parts to trustees who paid the income to her and to the son-in-law:—Held, on the principle of the Civil Law, that the testator having set apart a specific fund received by him in order that it may be expressly reserved for the benefit of the legatee, it was not adeemed. *Clark v. Browne*, 2 Sm. & G. 524.

Held, also, that the acts and course of dealing for a period of thirty-two years, with the fund as appropriated to answer the legacy, was a circumstance of great weight in rebutting the case of ademption, and the claim on the footing of a resulting trust. *Ibid.*

The confirmation of a will by a codicil, does not revive a legacy adeemed in the interval between the will and codicil. *Montague v. Montague*, 15 Beav. 565.

A testator bequeathed "the principal sum" secured to him by a mortgage in fee. It was afterwards voluntarily paid off in the testator's lifetime:—Held, that the legacy was adeemed. *Phillips v. Turner*, 17 Beav. 194.

A bequest to the trustees of a chapel towards the

reduction of their debt on that chapel,—Held, to be payable to the trustees, though the debt incurred in building the chapel had long before been paid off, and the only debt since incurred was one owing by the trustees in respect of the chapel, but upon their own individual responsibility. *Bunting v. Marriott*, 19 Beav. 163.

"After payment of his debts" the testator gave certain legacies, one of 150*l.* to E B, and he directed his executors to pay "my bequest only to the individuals herein named." The testator owed E B 150*l.*:—Held, that the legacy was not a satisfaction of the debt, but that E B was entitled to both. *Jefferies v. Michell*, 20 Beav. 15.

(O) REMISSION OF DEBT.

By an indenture, dated in May 1850, A conveyed all his real and personal estate to trustees upon the usual trusts for sale, and directed them to apply the proceeds in the payment rateably of the debts in the schedule to the deed set opposite to the names of certain specified creditors; and such creditors covenanted with A that they would not bring any action, &c. against A in respect of such debts, and that, if any action, &c. should be brought, the deed might be pleaded as a release. B, one of A's creditors, executed this deed in respect of a certain debt, and made his will in June 1850, whereby he gave a legacy to A, and directed that, if any legatee should be found indebted to him in any sum on bond, &c. or otherwise, such sum should be taken as part of his legacy. B died in December 1850. B's executors received only 7*s.* in the pound on the debt:—Held, that B's executors were not authorized to set off the difference between the debt and the composition from A's legacy. *Golds v. Greenfield*, 23 Law J. Rep. (N.S.) Chanc. 639; 2 Sm. & G. 476.

(P) ASSENT OF EXECUTOR.

T F the elder bequeathed certain leasehold premises to T F the younger, in trust to sell the same, and out of the proceeds to retain for his own use 150*l.*, to reimburse himself funeral expenses, &c., and to divide the surplus, if any, amongst the testator's children and grandchild. T F did not take out probate of his father's will, but entered into possession of the premises in question, and retained them till his death, having, by his will, bequeathed them to his executors, who demised them to the defendant. The plaintiff having taken out administration with the will annexed of T F the elder, and brought ejectment to recover the premises,—Held, that he was not entitled to recover, as the act of bequeathing the premises by T F the younger was evidence of the latter having elected to take the premises as legatee. *Fenton v. Clegg*, 23 Law J. Rep. (N.S.) Exch. 197; 9 Exch. Rep. 680.

The widow of a testator, who was his executrix and also legatee for life of certain leaseholds, with a limitation over on her death to the testator's children, entered into possession of the leaseholds, and received and applied the rents to her own use. From the Master's report, it appeared that the widow, during the whole of her life, had been in advance to the testator's estate:—Held, upon appeal, confirming the decision below, that, under the circumstances, such receipt and application of the rents

did not constitute an implied assent to the legacy. *Trail v. Bull*, 22 Law J. Rep. (N.S.) Chanc. 1082.

(Q) FORFEITURE.

A testator gave certain shares in his property to his nephews and nieces, and he revoked all legacies and bequests which any of his legatees should endeavour to sell, mortgage, or in any way anticipate; and in case any of his nephews or nieces should at any time before their respective legacies became due and payable, become bankrupt or compound with his or their creditors, then he revoked the legacy to such person. One of the nephews, before his share became payable, executed a deed assigning all his stock-in-trade, &c., and all his property and estate, both real and personal, of which he was possessed, or to which he was entitled, to trustees, to make an inventory thereof, and to proceed to sell the same for the benefit of his creditors: Held, that the deed was not a composition with creditors; that there was no forfeiture of the legacy; and that it did not pass under the deed of assignment, but went to the representatives of the nephew. *In re Waley's Trust*, 24 Law J. Rep. (N.S.) Chanc. 499; 3 Drew. 165.

(R) VOID.

A testator directed his trustees to set apart sufficient stock to produce 700*l.* a year, and pay, among others, an annuity of 200*l.* a year to his brother Thomas for life, and after his decease to continue it among his brother's children then living, in equal shares, during their lives, and, at the decease of any of them, the stock, from which the 200*l.* a year arose, was to be sold, and the produce divided equally amongst the children of him or her so dying, as they should severally attain twenty-one, with interest in the mean time to be applied for their benefit; and he said, "I give them vested interests therein;" and if any of his brother's children should at his decease be dead, and have left issue, such issue should be entitled amongst them to the money they would eventually have been entitled to had their parent outlived his brother. If any of the parties anticipated the payment, or sold his interest before due, it was declared to be forfeited, and applied as if such parties had died before the legacy fell due. The testator then appointed his trustees, executors and residuary legatees. 23,333*l.* 6*s.* 8*d.* was set aside to answer the 700*l.* a year. The testator's brother Thomas died leaving six children, of whom Richard was one, living at the date of the will, and he, after the decease of his father until his death, received an annuity of 33*l.* 6*s.* 8*d.*, being one-sixth of the 200*l.* a year. Richard died leaving three children surviving, one of whom was born in the lifetime of the original testator:—Held, that the children of Richard were not entitled to the money representing the annuity to which he was entitled, but that it fell into the testator's residuary estate. *Greenwood v. Roberts*, 21 Law J. Rep. (N.S.) Chanc. 262; 15 Beav. 92.

A testator directed trustees to pay the interest of a sum of 1,000*l.* to A for life, and, after her death, to divide the principal between the child and children of A, and if there should be only one child, then the whole to such child, to be a vested interest or vested interests on their respectively attaining the age of thirty years, and directed that, if any

child should die under thirty years, without lawful issue, the share of him or her so dying should go to the survivors or survivor, and become vested at the same time as their original shares. B, one of the children of A, died in the lifetime of A under thirty years of age:—Held, that the gift to B as one of the children of A was a valid bequest, and that the gift over on the death of B without issue was void for remoteness, and therefore that the representatives of B were entitled to a share of the fund. *Taylor v. Frobisher*, 21 Law J. Rep. (N.S.) Chanc. 605; 5 De Gex & Sm. 191.

Gift to trustees for E W for life, and after his decease to assign, &c. to all his children who should be living at his decease, and who should be or live to attain twenty-five, and to apply the income in the mean time for their maintenance. E W died in 1837, leaving eleven children; the testator died in 1845. Four only of the children of E W survived: the youngest attained twenty-five in 1848:—Held, (following *Williams v. Teale*, 6 Hare, 239), that the gift was void for remoteness. *Southern v. Wollaston*, 22 Law J. Rep. (N.S.) Chanc. 664; 16 Beav. 166, 276.

A testator, who was an Armenian merchant, by his will, made in India in the year 1791, directed that his property of every description should be administered according to the law of England. He then gave various legacies and directed the residue of his estate and effects to be divided into sixteen shares, six of which were to be placed in the government funds of Great Britain, there to remain for ever in the testator's name, and the interest thereof to be received by his three sons, Alexander, John and Lewis, successively for life, and after the death of the survivor of his three sons the interest to be received by the first and other sons of Alexander and their issue in succession for life; and in default of issue of Alexander the interest to be received by the first and other sons of John and their issue in succession for life, with a similar direction in default of issue of John, for the benefit of the issue of Lewis:—Held, that after the life estates to the testator's three sons, the rest of the gifts were void for remoteness. *Raphael v. Boehm*; *Cockburn v. Raphael*, 22 Law J. Rep. (N.S.) Chanc. 299.

A testator, by his will, gave the residue of his estate to his children for their lives; and declared that if any daughter should die, leaving a husband, her share should be paid to him for his life, and, after his death, should be divided between the children of such daughter then living in equal shares:—Held, that the gift to the children of such daughter was void for remoteness. *Lett v. Randall*, 24 Law J. Rep. (N.S.) Chanc. 708; 3 Sm. & G. 83.

A testatrix appointed a trust fund to two trustees in trust to pay the dividends to A for life, and after his decease she gave the dividends to two others, B and C, for life; and after the decease of the survivor she gave, bequeathed, willed and directed the principal to be divided into two parts, and one of them to be "transferred or paid" to the children of those two persons respectively at the age of twenty-five years:—Held, that the gift to the children was void for remoteness. *Chance v. Chance*, 16 Beav. 572.

Bequest of personal estate to A for life, remainder to the children of A equally, and in default of issue of A upon trust to sell and divide equally amongst

B and C and all their children "then" living, share and share alike:—Held, that the gift was too remote, and that B and C and their children, living at the death of A, alone took the personal estate as tenants in common absolutely. B died before A, but nevertheless she was held to take a share both in the realty and personalty. *Cormack v. Copous*, 17 Beav. 397.

A testator bequeathed the income of his residuary estate between his three children, and when any child died, his part to be equally divided amongst the testator's surviving grandchildren; and likewise, if any of his grandchildren died, their part to be divided amongst the survivors of his other grandchildren:—Held, that the gift over upon the death of a grandchild to the surviving grandchildren was void for remoteness. *Courtier v. Oram*, 21 Beav. 91.

Gift by the testator to his wife for life, or until her second marriage, of the interest of his real and personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself and children; and if she married again, he declared that her power and benefit under his will should cease; and when thirty years were expired, he ordered all his property, both freehold and leasehold, to be sold, and two-thirds to be divided amongst his children living at that period or to their heirs, and one-third to be invested for the benefit of his wife; and after her decease he bequeathed such third to his children then living and to their heirs:—Held, that the gift at the end of thirty years was not liable to objection on the ground of remoteness; that there was no substitution of the legatee created by the gift to the children "or to their heirs," but that the word "or" must be read "and," and that the children of the testator living at the end of thirty years (who were also the same children as were living at the death of the widow) were entitled to the proceeds of the sale of the estate, and also to the intermediate rents after the death of the widow and before the expiration of the thirty years. *Lachlan v. Reynolds*, 9 Hare, 796.

(S) REVOKED.

H W, by his will, gave the use, income, and enjoyment of his personal estate to his brother, F O W, for life, and, after his death, the testator gave all his property to the eldest son then living of Capt. W, who had three sons, of whom W was the eldest. By a codicil, the testator said, "I revoke so much of my will as relates to W, and I leave my brother F O W in full enjoyment of all my property."—Held, that the codicil revoked the gift to the eldest son of Capt. W, and F O W took all the property absolutely. *Wells v. Wells*, 23 Law J. Rep. (N.S.) Chanc. 691; 17 Beav. 490.

A testator bequeathed one moiety of his personal estate to pay certain legacies, and then to pay the residue of such moiety to J J, and in the event of the death of J J, living H, then over, provided if J J left a widow, to pay to her 200*l.*, part of the monies so given to J J. By a codicil the testator revoked the gift of the moiety to J J:—Held, that the 200*l.* legacy to his widow was revoked by the revocation of the gift of the monies out of which it was to be paid. *Grice v. Funnell*, 1 Sm. & G. 120.

A codicil revoked valid bequests in a will, and be-

queathed the property to a fund which was being raised for the purpose of buying land for a charity:—Held, that although the gift by the codicil failed, the revocation, nevertheless, took effect. *Onions v. Tyrrer* (1 P. Wms. 343) distinguished. *Trupper v. Trupper*, 1 Kay & J. 665.

(T) LAPSED.

A testatrix gave her residuary estate, after the death of three persons, upon trust to pay and assign it equally between G B and E B, their executors, administrators and assigns; but if neither of them should be living at the death of the survivor of the tenants for life, she gave the same to F H. G B died in the lifetime of the testatrix, but E B survived the tenants for life:—Held, that the gift lapsed as to a moiety of the residuary estate; that no joint estate was created between G B and E B; that no right by survivorship arose by implication; that the event had not happened upon which the gift over was to take effect; and that one moiety of the residuary estate was undisposed of and belonged to the next-of-kin of the testatrix, and that the costs must be paid out of her estate. *Baxter v. Losh*, 21 Law J. Rep. (N.S.) Chanc. 55; 14 Beav. 612.

A testator by his will recited that on his marriage he had entered into a bond to leave his wife the sum of 800*l.* on his death, and that he intended shortly to distribute a sum of 6,000*l.* in his lifetime amongst her relations, in lieu of any claims under the bond. The testator then directed that, in case of his death before carrying his intention into effect, the said sum of 6,000*l.* should be divided between and amongst the said relations of his wife in such manner, shares and proportions as would have been the case if his wife had died possessed of the said sum a spinster and intestate. The testator's wife had died before the date of his will, and had left sixteen next-of-kin, five of whom died before the testator:—Held, that the eleven surviving next-of-kin took each one sixteenth of the 6,000*l.*, and that the shares which the other five would have taken had they lived lapsed, and went to the testator's residuary legatees. *In re Ham's Trust*, 21 Law J. Rep. (N.S.) Chanc. 217; 2 Sim. N.S. 106.

Held, also, that the lapsed shares, being the only residuary property over which the Court had power, should bear the costs of the petition for determining the question raised upon the construction of the will. *Ibid.*

A bequeathed a legacy of 5,000*l.* to B, with a declaration that if B died in his lifetime, the legacy should not lapse, but should go and devolve on his personal representatives. B died in A's lifetime, having, by his will, appointed C, his widow, and D his executor and executrix, and given all his personal estate to C, and leaving C and three children his next-of-kin according to the Statute of Distributions. C and D both proved the will:—Held, that C in her own right was alone entitled to the legacy of 5,000*l.* *Hewitson v. Todhunter*, 22 Law J. Rep. (N.S.) Chanc. 76.

A testator, by his will, dated in 1822, appointed A (his widow) and B his executors, and gave B a legacy for his trouble, and bequeathed his personal estate to A and B, on the usual trusts for conversion, and directed that the income of the proceeds should be paid to A for life, and that after her death, his

trustees, or the survivor of them, or the executors or administrators of such survivor, should stand possessed of one-half of the capital for A, her executors, administrators and assigns. A died in the lifetime of the testator. The testator had been illegitimate:—Held, that the lapsed part of the testator's estate belonged to the Crown, and not to B, the executor. *Powell v. Marett*, 22 Law J. Rep. (N.S.) Chanc. 408; 1 Sm. & G. 381, nom. *Powell v. Merrett*.

A testator bequeathed a sum of 5,000*l.* in trust for his widow for life, with remainder to the separate use of his two nieces equally, or in the alternative to the children, living at the death of the tenant for life, of such of the nieces as should die in her lifetime, as tenants in common. The testator also bequeathed the residue of his funded property in trust for his widow for life, with remainder in trust for the benefit of his two nieces in the manner thereinbefore directed as to the sum of 5,000*l.* One of the nieces pre-deceased the testator, leaving three children:—Held, that the children of the deceased niece were not entitled to the moiety of the residuary funded property bequeathed to her, and that the testator died intestate as to that moiety, except as to his widow's life interest therein. *Lumley v. Robbins*, 22 Law J. Rep. (N.S.) Chanc. 869; 10 Hare, 621.

(U) RESIDUE.

[*Lichfield v. Baker*, 4 Law J. Dig. 345; 13 Beav. 447. *Mapp v. Elcock*, 6 Law J. Dig. 399: affirmed 3 H.L. Cas. 492.]

A testator, by his will, devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trusts for sale and conversion into money, and directed them to pay certain legacies, but did not make any residuary bequest. The testator, by an unattested codicil, gave other legacies out of the mixed fund, and appointed A, B and C his residuary legatees:—Held, that A, B and C were entitled to the surplus produce of the copyhold estates. *Wildes v. Davies*, 22 Law J. Rep. (N.S.) Chanc. 495; 1 Sm. & G. 475.

As to the residue "of his estate and effects, whatsoever and wheresoever, canal shares, plate, linen, china and furniture," the testator devised and bequeathed the same to his wife:—Held, that the residuary personal estate passed, and that the general words were not limited to things *ejusdem generis* with canal shares, &c. *Fisher v. Hepburn*, 14 Beav. 626.

Under the law prior to the 1 Will. 4. c. 40, the gift of a legacy to the wife of the executor does not prevent his taking the undisposed-of residue beneficially. *Fruer v. Bouquet*, 21 Beav. 33.

(V) INTEREST ON.

Legacies given by will which directed them to be paid within three months after a testator's decease will bear interest at 4*l.* per cent. from the expiration of the time at which by the will they were so directed to be paid, although the fund out of which they were made payable and their manner of payment were varied by codicil. *Lord Lonsborough v. Somerville*, 23 Law J. Rep. (N.S.) Chanc. 646; 19 Beav. 295.

The allowance of interest upon a legacy charged upon real estate, and due upwards of six years, is to

be calculated from the filing of the bill, and not from the date of the decree, though the bill is not filed by the legatee. *Chappell v. Rees*, 1 De Gex, M. & G. 393.

A bequest of a legacy upon trust to apply so much of the interest as the trustees should think proper in the maintenance of the testator's grandson until twenty-one; and upon his attaining that age to pay the whole of the interest of the legacy to the grandson for his life; and a direction that after the decease of the grandson the trustees were to stand possessed of the legacy and interest, and all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over:—Held, that the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, shewed that the interest was intended for him; that the legacy vested in interest (although not in enjoyment) before the grandson attained twenty-one; and that the grandson was therefore entitled to the interest which accrued during his minority, and was not applied in his maintenance. That the unapplied accumulations during the minority of the grandson did not go with the capital of the legacy, because the disposition of the capital after the grandson attained twenty-one was of the interest and certain specific accumulations, not including the accumulations during the minority. *In re Rouse's Estate*, 9 Hare, 649.

A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not necessarily carry interest. *Ibid.*

(W) ANNUITY.

A testator, by his will, gave to E L "50*l.* per year for she and her children, and after her decease the money shall be paid to each of them as they attain the age of one-and-twenty; but if either of them die, to be paid to the survivor":—Held, affirming a decision of the Master of the Rolls, that the bequest was of a perpetual annuity. *Potter v. Baker*, 21 Law J. Rep. (N.S.) Chanc. 11: affirming 13 Beav. 273. See also 15 Beav. 489.

A testator gave an annuity of 100*l.* to his son for life, and he died leaving a child him surviving; he continued the same annuity for such child's benefit, to be paid to his or her mother:—Held, upon appeal, reversing the decision of the Court below, that the son's child took an annuity for life only, to be paid during minority to the mother. *Yates v. Maddam*, 21 Law J. Rep. (N.S.) Chanc. 24; 3 Mac. & G. 532: reversing 18 Law J. Rep. (N.S.) Chanc. 310; 16 Sim. 613.

An annuity of 500*l.* given by a father to a son, by a will, and made payable generally out of the rents of real estate,—Held, to be no satisfaction of an annuity given by deed and charged upon real estate. *Lethbridge v. Thurlow*, 21 Law J. Rep. (N.S.) Chanc. 538; 15 Beav. 334.

The gift of an annuity "clear of legacy duty and every other deduction whatsoever," or "without any deduction for legacy duty or otherwise," will not authorize the payment of the income-tax out of the testator's estate. *Ibid.*

A testator devised real estate to B, charged with an annuity to A for her life, with powers of distress and entry. The rents fell short of the annuity, and an arrear became due to A. A sum of money (less than the arrear) was paid into court by a railway company in respect of a part of the estate which had been taken by them:—Held, that A was entitled to this sum in respect of her arrears. *In the matter of Tinkler's Trusts*, 21 Law J. Rep. (n.s.) Chanc. 672; 5 De Gex & Sm. 722.

A testator directed three trustees to raise a fund sufficient to pay an annuity to one of them, and gave power to resort to the residue if the fund should become deficient. The three trustees invested more than enough on mortgage, and paid the annuity out of it. On the mortgage being paid off, the annuitant (a trustee) received the money, and misapplied it. The annuity had been assigned, and the assignment recited the appropriation. The purchaser filed a bill against all the trustees to compel them to pay the money misapplied, or for a resort to the residue to make good the same:—Held, that there had been an appropriation, that the recital was binding on the purchaser as to appropriation, and that the purchaser had no claim upon the residue, the fund not having become deficient within the meaning of the will. *Barnett v. Sheffield*, 21 Law J. Rep. (n.s.) Chanc. 692; 1 De Gex, M. & G. 371.

A testator directed the investment of personal estate sufficient to pay 2l. a week to J W during his life; and after his death, the capital to fall into the residue. He directed that when his youngest child attained twenty-one, the residue of his personal estate should be divided equally among his, the testator's, children, except J W, and in like manner, on the death of J W, to divide the fund invested for the annuity among all the testator's other children then living, and the issue of such as were then dead equally. The residue was invested, and was not sufficient for payment of the annuity. The Court below held, that, as the corpus was given in a subsequent clause of the will to different persons than the residue, the annuitant was only entitled to the dividends of the fund, for that there was no specific gift of the annuity charged on the whole personal estate; but, on appeal,—Held, that the annuitant was entitled to his annuity in full, and to have the arrears and future payments made good by a sale, from time to time, of the capital of the appropriated fund. *Wright v. Callender*, 21 Law J. Rep. (n.s.) Chanc. 787; 2 De Gex, M. & G. 652.

A testator, having real estate and personal estate invested in foreign funds, by his will, gave certain pecuniary legacies, and proceeded: "I desire that my executors shall purchase annuities for each of my two sisters, A and B, of 100l. a year each, the said annuities to be purchased in the British funds." And, after giving several other annuities, he directed his real estate to be sold, and the produce to go "in carrying out" the said annuities; and should such produce not be sufficient, the remainder was to be made up out of his personal property; and after directing a sale of his personal property, he desired that after the annuities had been "effected," the remainder of his personal property should be laid out in the purchase of an annual income in the 3l. per cent. consols for the benefit of the Middlesex Hospital:—Held, upon appeal, reversing the decision

below (*dissentiente Lord Cranworth*), that the annuities given to A and B were perpetual annuities. *Kerr v. the Middlesex Hospital*, 22 Law J. Rep. (n.s.) Chanc. 355; 2 De Gex, M. & G. 576.

A direction to purchase an annuity in "the British funds" cannot be construed as a direction to purchase a government annuity. *Ibid.*

A testator bequeathed an annuity to an unmarried woman for the term of her natural life, if she should so long remain unmarried:—Held, that the words created a limitation, and were not a condition, and that on the marriage of the annuitant the annuity ceased. *Heath v. Lewis*, 22 Law J. Rep. (n.s.) Chanc. 721; 3 De Gex, M. & G. 954.

A testatrix gave A B an annuity for life, and after her "death the principal reverts to her father and his children." The investments were not to be altered without her consent, the overplus of the income to go to the father and his children:—Held, overruling a decision of the Court below, that this was a gift of an annuity for life, and a gift over of the property subject to the annuity; that the case was that of annuitant and residuary legatee, and not that of tenant for life and remainderman. *Croly v. Weld*, 22 Law J. Rep. (n.s.) Chanc. 916; 3 De Gex, M. & G. 993.

A testatrix directed her trustees, as soon as possible after her decease, to invest in consols such a sum of money as might be necessary to realize such an amount of dividend as would be fully sufficient, with the rent of her land at Kenilworth at that time payable, to make up the sum of 50l. per annum, which she directed to be paid to T J during his life, and after his decease the principal to go in the manner pointed out by her will:—Held, that the investment was to take place from the expiration of one year after the death of the testatrix. No provision was to be made for future reduction in the rent of the land at Kenilworth, and no deduction to be calculated in respect of land-tax or other taxes. *Hues v. Jackson*, 23 Law J. Rep. (n.s.) Chanc. 51.

In a suit instituted to carry into effect the trusts of a will, the Court refused to allow interest upon the arrears of an annuity granted upon the marriage of the testator's son, though it was secured by his bond. *Lainson v. Lainson*, 23 Law J. Rep. (n.s.) Chanc. 170; 18 Beav. 7.

A testator directed an annuity to be purchased for the life of his two sisters, to be equally divided between them:—Held, that the annuity was only to continue during the joint lives of the two sisters. *Grant v. Winbolt*, 23 Law J. Rep. (n.s.) Chanc. 282.

If a trust is existing, and an estate is to be administered in this court, a claim against that estate will not be barred by the Statute of Limitations, especially if litigation in other courts has prevented the effectual prosecution of the claim. *Playfair v. Cooper*, 23 Law J. Rep. (n.s.) Chanc. 341.

A testatrix, in execution of a power in her marriage settlement, directed the trustees of her will to raise 100l. a year out of the income, and pay it to R P for life, and to pay the residue to F C for life. The income was insufficient to pay the whole annuity:—Held, that the arrears were a charge upon the income and corpus of the settled estate, and that the administratrix was entitled to payment. *Ibid.*

A testatrix, by her will, dated in 1832, gave to trustees the sum of 20l. per annum, Bank long an-

nuities, or "an amount or yearly sum equal thereto," upon trust to pay the same to A B for her life, and after her decease to transfer the principal stock or money, which should be set apart for the payment of the said yearly sum unto A B's children who should be living at A B's decease. At the date of her will the testatrix had 50*l.* long annuities, and she continued to possess the same until her death. These long annuities being terminable in 1860, it was held that the testatrix intended to give a permanent annuity of 20*l.*, and that the trustees were bound on behalf of the children of A B to take the course most beneficial for them, and to have a permanent fund invested, producing 20*l.* per annum. *Haggar v. Neaby*, 23 Law J. Rep. (N.S.) Chanc. 455; Kay, 379.

The gift of an annuity "from my funded property,"—Held, to be a gift from income, and an investment was directed out of the residuary estate to make up the deficiency. *Atwater v. Atwater*, 23 Law J. Rep. (N.S.) Chanc. 692; 18 Beav. 330.

A gift of 60*l.* a year out of 4*l.* per cent. stock, which was not to be sold till after the death of the annuitant, &c.,—Held, to be a gift of a perpetual annuity. *Pawson v. Pawson*, 23 Law J. Rep. (N.S.) Chanc. 954; 19 Beav. 146.

A testator, by his will, gave all his real and personal estate to trustees, upon trust to pay his widow an annuity of 1,200*l.* for her life, and after her death to divide the said sum of 1,200*l.* per annum between his children who should be then living, share and share alike:—Held, that the annuity of 1,200*l.* a year was not a perpetual annuity, but was limited to the lives of the widow and children. *Lett v. Randall*, 24 Law J. Rep. (N.S.) Chanc. 708; 3 Sm. & G. 83.

A testatrix being entitled to an annuity during the life of B, effected an assurance on B's life, and bequeathed the annuity to C:—Held, that the policy did not pass. *Hamilton v. Baldwin*, 15 Beav. 232.

Bequest in 1829 of 40*l.* a year to each of the seven children now living of J S Y. He had nine children then living:—Held, that they all took. *Yeats v. Yeats*, 16 Beav. 170.

A testator directed the investment of a sufficient sum "to raise and pay an annuity or clear yearly sum of 100*l.*," which was given to parties in succession:—Held, that it was not free from legacy duty. *Pridie v. Field*, 19 Beav. 497.

Distinction between such a gift and a direct bequest of a "clear annuity." *Ibid.*

A life estate and a life annuity charged on the same estate, and devised to the same person:—Held, not to have merged. *Byam v. Sutton*, 19 Beav. 556.

A testatrix devised to the defendant, a married woman, a reversionary life interest in an estate, and she bequeathed to the defendant for life, and for her separate use, an annuity charged on the same estate, and to commence immediately. She also bequeathed other annuities similarly charged. At the death of the testatrix, the prior limitation having failed, the defendant became tenant for life in possession. The defendant afterwards became discover, and the property having become insufficient to pay all the annuities,—Held, that a merger of the defendant's annuity in her life estate by operation of law would not be presumed. *Ibid.*

The corpus of an estate charged with annuities was held liable to their payment. *Ibid.*

The testator gave his real and personal estate on trust to raise such a sum of money as, when invested, the dividends would realize the clear annual sum of 200*l.* a year, and to pay such dividends to his widow for life, and afterwards to stand possessed of the principal or trust monies in trust for his brothers and sisters. There was a gift to the same persons of the residue, "after raising thereout the money sufficient to realize the annuity to his wife." On a deficiency of assets,—Held, that the corpus was liable to make good the widow's annuity. *In re Baker, Baker v. Baker*, 20 Beav. 548.

The testator directed the investment in the funds of sufficient to produce 40*l.* a year, and the dividends to be paid to his wife for life; and he bequeathed his general residue, and the fund invested (after her death), to other persons. An investment was made in five per cents. which were reduced, and produced less than 40*l.*:—Held, that the widow was entitled to have the deficiency made good out of the corpus of the fund. *Mills v. Drewitt*, 20 Beav. 632.

The widow had received less than 40*l.* for thirty-three years:—Held, that there had been no laches or acquiescence, the question now relating to the respective rights of parties to an existing trust fund. *Ibid.*

A testator entitled to freehold estates and to a leasehold for years, determinable on lives, charged by his will an annuity on both rateably, and directed that in the event of his interest in the leasehold expiring before the annuity, the proportion of the annuity chargeable on the leasehold should thenceforth issue out of designated freehold estate. Subject to the annuity, he devised and bequeathed the freeholds and leasehold to different persons. The legatee of the leasehold surrendered the lease, and took a new one, determinable on different lives:—Held, that the new lease was not for the purpose of the annuity substituted for the old, but that on the death of the last *cestui que vie* named in the surrendered lease, the leasehold ceased to be charged with the annuity, and that the part apportioned to the leasehold became charged on the designated freehold. *Kempe v. Kempe*, 5 De Gex, M. & G. 346.

A testator gave an annuity and declared that it should be yearly issuing out of his lands and hereditaments, and empowered his executors at their discretion out of his personal estate, or his real estate, to appropriate sufficient monies to answer the annuity, declaring that thereupon the hereditaments should be discharged; and he proceeded to devise certain parts of his freehold and leasehold property specifically, and to devise the residue of both (but as to the whole real estate, charged in aid of his personal estate with his pecuniary legacies), and if the funeral and testamentary expenses, debts and pecuniary legacies, and any money appropriated to answer the annuity should absorb the whole residuary real and personal estate, the deficiency should be made good out of the specific devises, and that the whole of the annuity, or so much thereof as should not be provided for by any such appropriation, should be charged upon the specific devises rateably. The executors did not appropriate any fund to answer the annuity:—Held, that it was

primarily payable out of the specifically devised estates. *Woodhead v. Turner*, 4 De Gex & S. 429.

A testator after bequeathing two pecuniary legacies, bequeathed three "clear" annuities for the lives of the annuitants. He then bequeathed his residuary estate in trust to pay a clear annuity of 1,000*l.* to his widow, and upon trust, after payment of the four annuities, to pay the residue of the income, during the life of the widow, to A. The capital of the residue after the widow's death was to be held as to 5,000*l.* upon such trusts as the widow should appoint, and subject to her appointment the 5,000*l.* was to be held in trust for B for life, and after her death to fall into the general residue; and subject to such disposition as aforesaid, and as to the residue of the testator's estate and effects after the widow's death, and subject as to the 5,000*l.*, and the interest thereof as aforesaid, upon trust to pay certain legacies amounting to 1,000*l.* with an ultimate residuary gift to E. And there was a direction that, upon the deaths of the several annuitants, the funds on which the annuities were secured should follow the ultimate destination of the residue:—Held,—1. That the two first-mentioned pecuniary legacies, and three annuities, had priority over every other gift. 2. That the annuities were given free of legacy duty. 3. That the annuities were charged on the capital of the residue, but that A was entitled to retain the surplus income paid to her in one year, and to receive the surplus for another, although the income was in the subsequent years insufficient to answer the annuities. 4. That on the death of an annuitant in the lifetime of the widow, the ultimate residuary legatee did not become at once entitled to the fund set apart to answer the annuity. 5. That after the widow's death the 5,000*l.* would have no priority over the other reversionary legacies. 6. That the reversionary legatees were not entitled to have any surplus income during the widow's life set apart to secure payment of their legacies. *Haynes v. Haynes*, 3 De Gex, M. & G. 590.

A testator bequeathed so much of his personal estate as when invested in stock would produce 125*l.* a year to trustees upon trust to pay the dividends of such stock to A for life, with a direction that the capital stock should at A's death fall into the residue of his (the testator's) estate, and a provision that if the stock should before the trusts were fully performed, be paid off or reduced, by which any loss or deficiency might arise, the persons respectively interested therein should bear and sustain such loss or deficiency out of their respective interests, upon their becoming entitled thereto. The dividends on the stock were reduced during the life of A:—Held, that A was not entitled to have the reduced dividends made up to 125*l.* a year by sale of a portion of the capital of the stock. *Bayne v. Dumergue*, 10 Hare, 462.

Amongst several gifts of sums of 300*l.* each to the grand-nephews and nieces of the testator, some of which were to be paid at different ages, and others to be sunk in annuities for the lives of the respective legatees, occurred two bequests as follows:—"Joseph Walker, 300*l.* annuity for life; Martha —, 300*l.*, an annuity for life".—Held, that Joseph and Martha were each entitled to annuities of 300*l.* for life. *Walker v. Tipping*, 9 Hare, 800.

A testator gave an annuity of 250*l.* to his widow,

and directed that a competent part of his money should be invested to the intent that the widow might receive the annuity "out of the interest, dividends, proceeds and produce" thereof; and he gave the monies to secure, but subject to, the annuity, and his residuary personal estate to the plaintiffs:—Held, that the annuity was a charge on the capital, and that the assets being deficient, the executors had properly paid the annuity out of the capital. *Miner v. Baldwin*, 1 Sm. & G. 522.

(X) RECOVERY OF LEGACY.

A testator bequeathed his property to C M and J. Wilson, their executors, &c., in trust for certain purposes, and the residue of his property he bequeathed to the same parties, upon trust, as to one-sixth part, to pay the same equally between the four children of his sister. He then appointed C M and J. Wilson executors and trustees of his will. He afterwards added a codicil, whereby he appointed S E an executor of his will, in the room of C M deceased, and to act in conjunction with the other "executor in his said will." The plaintiff's late wife was one of the four children of the testator's sister; and the plaintiff as her administrator brought an action in the county court, to recover from the defendant, J. Wilson, "a fourth part of the sixth share of the residue," and the action in the county court was described in those terms in the summons and in the particulars of demand. A motion for a prohibition after sentence having been made on the ground that the bequest amounted to a trust and not to a legacy, and, therefore, was not within the jurisdiction of the county court.—Held, first, that this was a legacy to the plaintiff within the meaning of the act, and not a legacy to the executors in trust; and, therefore, that the county court Judge had jurisdiction. *Pears v. Wilson*, 20 Law J. Rep. (n.s.) Exch. 381; 6 Exch. Rep. 833; 2 L. M. & P. P.C. 515.

The Wills Act (1 Vict. c. 26.) does not enable a testator to bequeath a chose in action so as to pass the right of suing to the legatee. *Bishop v. Curtis*, 21 Law J. Rep. (n.s.) Q.B. 391.

(Y) RIGHTS AND LIABILITIES OF THE LEGATEE.

A testatrix bequeathed leasehold property to R A absolutely during the residue of her term, subject to the payment of the rent and performance of the covenants reserved and contained in the lease; and, as to her residuary estate, subject to the payment of her debts, &c., she gave the same to J B absolutely:—Held, upon appeal, reversing the decree below, that R A took the leaseholds *cum onere*, namely, with the liability to make good the dilapidations that had accrued during the life of the testatrix; and that R A should indemnify the executors against liability under the covenant to repair before he was let into possession. *Hickling v. Boyer*, 21 Law J. Rep. (n.s.) Chanc. 388; 3 Mac. & G. 635; 1 De Gex, M. & G. 762.

A testator gave to his wife during her life the interest and annual income arising from all his shares in the P and O Company. A dividend was declared some days before the testator's death, but the warrants were not issued nor was the dividend payable until after his death. After the testator's death, also, a call was made in respect of some of the shares.

By the company's deed, it was provided that shareholders should not receive any dividend after they ceased to be proprietors, but that the dividend should remain in suspense until some person should have become proprietor of the shares:—Held, that the calls were payable out of the testator's general personal estate, and not by the legatee for life. *Olive v. Olive*, 23 Law J. Rep. (N.S.) Chanc. 981; Kay, 600.

Held, also, that the legatee for life was entitled to the dividend. *Ibid*.

Where the interest of a testator in the subject-matter which he professes to bequeath is complete, the future calls fall on the legatee and not on the general personal estate; but when further payments are required to make perfect that interest, the general personal estate is applicable for that purpose. *Armstrong v. Burnet*, 24 Law J. Rep. (N.S.) Chanc. 473; 20 Beav. 424.

A testator bequeathed shares in a banking company, upon which all calls had been paid, and which, at his decease, was complete and carrying on business; five years after his decease a further call was required:—Held, that the legatees must pay the call, and that it was not a charge upon the general personal estate of the testator. *Ibid*.

(Z) LEGACY DUTY.

[See 16 & 17 Vict. c. 51.]

Prior to the alteration of the law by Mr. Gladstone's Act, legacy duty was not chargeable upon real estate except where its conversion into personalty took place under some imperative trust or direction to that effect. Hence, where the conversion was a thing done at discretion, for the convenience or benefit of the parties, the claim of the Crown did not arise. In such cases the words "to pay" did not necessarily denote conversion. They might be taken for "to transfer." *The Advocate General v. Smith*, 1 Macq. H.L. Cas. 760.

The case *In re Evans*, before Lord Chief Baron Lyndhurst, held by Lord St. Leonards not to have been overruled either by *Attorney General v. Simcox* or by *Attorney General v. Mangles*. *Ibid*.

An officer in Her Majesty's army serving in the East Indies died there intestate, leaving the whole of his property, except 92*l*. due to him from the War Office, actually situate there. His widow took out letters of administration in Bombay, paid the debts, funeral expenses, &c. and invested the residue there for the benefit of herself and child as next-of-kin. A year and a half afterwards she returned to England, and took out letters of administration in this country for the purpose of recovering the sum of 92*l*.:—Held, that as the intestate was domiciled in this country, the widow was bound to account for and pay legacy duty on the whole of the property in the East Indies. *Attorney General v. Napier*, 20 Law J. Rep. (N.S.) Exch. 173; 6 Exch. Rep. 217.

A B, and C his eldest son and heir apparent, by indenture dated the 9th of January 1800, joined in conveying certain lands and hereditaments of A B to trustees for a term of 100 years, subject to certain trusts during the joint lives of A B, and C, and with power of revocation, and with divers remainders over. By indenture of the 18th of May 1814 reciting (*inter alia*) that A B was not possessed of sufficient personal estate to pay the debts he might owe and

the legacies he might bequeath at his death, without the sale of his family pictures, &c., A B, and C, after revoking the trusts of the deed of the 9th of January 1800, appointed that the said lands, &c. should be held by certain trustees, in trust, to sell within six months after the death of A B so much as would raise a sum necessary for the payment of his debts and legacies, not exceeding 50,000*l*., the same to be paid to his executors and applied in aid of his personal estate, (only certain portions of which personal estate were by deed-poll of the 18th of May 1814 directed to be used prior to such 50,000*l*. being raised) with a further trust to convey what should not be sold to C for life, with certain remainders and limitations, and in default of such taking effect with remainder as to one undivided third to Lady S and S, a daughter of A B for life, with remainders to her sons in tail, and as to the two other undivided thirds to D and E, two other daughters of A B, severally, with divers remainders over. By will, dated the 25th of June 1814, and several subsequent codicils, A B appointed M and other executors, and bequeathed to them two sums of 10,000*l*. in trust for such purposes as notwithstanding her coverture Lady S and S should appoint, and in default of appointment to her separate use. C died in the lifetime of A B without issue, and A B himself died the 25th of December 1824 without altering his said will and codicils, and leaving Lady S and S, D and E respectively married and surviving. The personal estate of A B was insufficient for the payment of his debts and legacies without part of the 50,000*l*. being raised. By virtue of common recoveries the respective estates tail of the sons of Lady S and S, C, D, and E were barred, and by deed dated the 11th of July 1826, between all necessary parties, it was agreed that a partition of the estates mentioned in the deed of the 18th of May 1814 should take place. The partition was accordingly effected by deed of the 21st of July 1826, and by indenture of the 20th of September 1826 one undivided third part was settled to such uses as Lady S and S, her husband and her eldest son J F, &c. or the survivor of them should appoint. By deed of January 1827 between Lady S and S, D and E, and their respective husbands and other necessary parties, after reciting that a partition had taken place and certain lands, &c. were allotted to Lady S and S; that the debts and legacies had been paid, except the two sums of 10,000*l*., which were raiseable by sale of so much of the estate as might be required, but that the parties had agreed that instead of a sale taking place each undivided third part should be charged with one third of such legacies; that certain sums had been paid to the executors of A B in part satisfaction of two of the respective third parts, it was witnessed that certain lands specified in a schedule annexed to the deed marked A were conveyed to the use of the executors of the will of A B for a term of 1,000 years, and subject thereto to the uses declared by the indenture of the 20th of September 1826, upon trust to raise by mortgage or sale the sum of 14,166*l*. 13*s*. 4*d*., being the amount left unpaid of the two legacies of 10,000*l*. to Lady S and S. By deed, dated the 6th of February 1827, Lady S and S appointed the sum of 5,833*l*. 6*s*. 8*d*., which had been received by the executors as above mentioned, to her husband, and also the residue in default of further appointment, and died on the 6th of October 1834, without having

made any such appointment, leaving her husband her surviving; but prior to her death the 14,166*l.* was by further payments reduced to 11,452*l.* 5*s.* 3*d.* By indenture, dated the 12th of August 1836, made between Lord S and S, and T F his eldest son, the lands, &c. comprised in the said schedule A, were conveyed subject to the said term of 1,000 years for securing the said sum of 11,452*l.* 5*s.* 3*d.* to the use of the said Lord S and S and T F, and the survivor of them. On the 13th of November 1844 Lord S and S died, whereupon the said son T F became seised of the lands, &c. comprised in the deed of the 12th of August 1836, and was entitled as residuary legatee under the will of his father to the said residue of the two legacies of 10,000*l.* By deed of the 10th of July 1845, made between the surviving executors of A B and T F (then become Lord S and S) the said term created by the deed of the 6th of January 1827 was surrendered and became merged in the inheritance, and Lord T F accepted the said merger in full satisfaction and discharge of the legacies of 10,000*l.* and 10,000*l.*, and the said residue was thereby satisfied and discharged:—Held, that the legacy duty was payable by the executors of A B upon the whole 20,000*l.*, as so much of the 50,000*l.* as was required was personalty, and the transaction by which the term was merged amounted to a payment of the residue of the legacies. *Attorney General v. Metcalfe*, 20 Law J. Rep. (n.s.) Exch. 329; 6 Exch. Rep. 26.

A testator made his will in these terms:—"I give and bequeath all my property of whatsoever description to my wife for the maintenance of herself and our children," naming them, and making her sole executrix:—Held, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to account. *In re Harris*, 21 Law J. Rep. (n.s.) Exch. 92; 7 Exch. Rep. 344.

The first Lord H, by his will, directed the purchase of estates in Suffolk to be made with the proceeds of estates in Essex. The will contained a clause enabling the tenant for life, who should be entitled to the rents and profits of the estates, to direct them to be sold and a deed of settlement to be made of them, and that there should be inserted therein a power that the tenant for life should be entitled to the rents and should have power to charge such estates with an annual sum, not exceeding one-third part of the annual value thereof, for the benefit of any woman whom he might marry. The first Lord H was succeeded by his son the second Lord H, who, by his will, charged the Suffolk estates with an annuity for the benefit of his wife during her life; the said sum to be in the nature of and in full for her jointure, and to be in bar, lieu, or satisfaction of and for her dower or thirds at common law, &c. The defendant was in possession of the estates, and was heir of the deceased Lord H. No deed of settlement was ever executed:—Held, that the defendant was liable to pay legacy duty in respect of the value of the annuity, as the grant of it could not be considered as a purchase of Lady H's right to dower, but was a gift of a legacy in execution of the power in the will of the first Lord H, though upon a condition imposed by the second Lord H. *Henniker v. Attorney General* (in error), 22 Law J. Rep. (n.s.) Exch. 41; 8 Exch. Rep. 257: in the Court below, *Attorney General v. Henniker*, 21 Law J. Rep. (n.s.) Exch. 293; 7 Exch. Rep. 331.

S H by will, after directing payment of his debts and legacies out of his personal estate, devised his real estate to his executors as trustees, upon trust by mortgage or sale, or out of the rents and profits, or by other means, to pay the said debts and legacies, so far as his personal estate should not extend, and on further trust, to pay yearly two annuities of 300*l.* each to his daughters H H and L H. The will also provided for raising certain portions for the children of his said daughters, according as they should appoint, and that if the sums so raised should not be appointed as portions pursuant to the will, then they should fall into and be considered as part of the residue of the testator's real estate. The will then directed that, subject to the trusts aforesaid, the trustees should stand seised of the real estates in trust for G H for life, with remainders over; but that, notwithstanding any of the said trusts, it should be lawful for the trustees, with the consent of G H, during his life or after his death, with the consent of the persons beneficially entitled in reversion or remainder, to sell the whole or part of the said real estate, and invest the proceeds to pay the said annuities. Part of the real estate was sold under the will to pay debts and legacies, and the rents of the residue being found insufficient to pay the annuities, a bill was filed in the Court of Chancery by G H and his children, who were infants, against the executors and the two daughters, H H and L H, praying for a sale of the residue, and stating that the trustees had refused to sell. Under a decree of the Court in this suit, the real estate was sold, and the proceeds invested in Bank annuities, and an annuity account of 20,000*l.* Bank annuities was opened, and out of the interest the two annuities of 300*l.* were paid, and the interest of the surplus was paid to G H during his life. By the deaths of G H, L H and H H the children of G H became entitled to the 20,000*l.* Bank annuities. On a case stated as to whether legacy duty was payable,—Held, that if the sale was ordered by the Court, under their general power of ordering sales of real estate, to secure the payment of an annuity charged thereon, the legacy duty was not payable; but that if the Court acted on the clause in the testator's will, and compelled the trustees to execute the discretionary power given to them, the legacy duty was payable. *Hobson v. Neale*, 22 Law J. Rep. (n.s.) Exch. 175; 8 Exch. Rep. 368.

J T mortgaged his real estates, covenanting in the usual way to pay the mortgage monies, and at his death devised all his real estate to his brother B T, whom he also appointed executor. His personal estate was insufficient to pay his simple contract debts. B T entered into possession of the real estates, but did not pay off the mortgages, although he kept down the interest. By his will B T gave all his real and personal estate to his two sons J T and B T, who paid off the mortgages out of his personal estate:—Held, that legacy duty was payable in respect of the amount so applied. *In re Taylor*, 22 Law J. Rep. (n.s.) Exch. 211; 8 Exch. Rep. 384.

A testator, after devising his real estate to trustees upon trust for certain persons in tail male, empowered his trustees at any time after his death to sell or exchange such real estate, and to invest the monies arising from such sale in the purchase of other real estate to be settled and conveyed upon

the same trusts. The will also empowered the trustees, until such purchases were made, to invest the produce of the sale in the funds, or on mortgage of real estate. The trustees having sold part of the estate under this power, invested the produce in the funds:—Held, that legacy duty was not payable in respect of the money so invested. *Heale v. Knight and Mules v. Jennings*, 22 Law J. Rep. (n.s.) Exch. 358; 8 Exch. Rep. 830.

In a Chancery suit, filed by the trustees for the establishment and performance of a will containing similar clauses, a decree was made accordingly, and one of the trustees having prayed a sale of part of the real estate it was referred to the Master, who reported favourably, and although there were no debts, an order for sale was made. The produce of the sale was paid into the Bank of England to the credit of the cause, and subsequently laid out in consols, and the interest paid to the tenant for life. On his death a decree was made for transferring the stock to the party absolutely entitled to the real estate according to the terms of the will:—Held, in this case also, that legacy duty did not attach. *Ibid.*

A testator, by his will, directed his executors to assign the residue of his personal estate to the trustees of the settlement of his niece Mrs. A, the wife of W A, on trust out of the annual income to pay to her during the joint lives of herself and husband an annuity of 2,000*l.* for her separate use, and that they should stand possessed of the residue upon such trusts and for such persons, interests, &c., as were expressed in a deed of settlement of the said Mrs. A. The deed of settlement provided that the trustees should stand possessed of the settled property upon trust, during the joint lives of the said W A and his intended wife Mrs. A, to pay her an annuity of 500*l.*, upon trust to pay the residue or surplus of the dividends and annual produce of the stocks, funds, &c. unto W A, and authorized him to receive the same during his life, and after the decease of either of them, to pay the dividends to the survivor, and authorized him, her or them to receive the same during the life of the survivor. The 36 Geo. 3. c. 52, imposing duties on legacies, by section 8. enacts that the value of any legacy given by way of annuity for life or for years determinable on any life or for years or other period of time shall be calculated, and the duty charged according to the tables in the schedule:—Held, that the duty was to be charged on the value of 2,000*l.* a year to Mrs. A. for the joint lives of herself and her husband W A, and on the value of the residue of the income for the single life of W A. *Attorney General v. Wynford*, 23 Law J. Rep. (n.s.) Exch. 223; 9 Exch. Rep. 746.

A testator having large sums of stock invested in the joint names of himself and his wife made his will, by which he gave several specific legacies to his wife, to whom he also devised certain real estates. He also made several devises and bequests of real and personal estate to trustees, upon trust for his wife for life, and after her decease for the benefit of other persons; he also gave a legacy of 10,000*l.* to his daughter for life, with remainder to her children, and he appointed his wife sole executrix. Upon the decease of the testator his personal estate was found wholly insufficient to pay several specialty debts and

the legacies given by his will, and under a deed executed by his wife reciting these facts, she transferred 36,000*l.*, and 10,500*l.* stock, part of the funds which had been invested in the joint names of herself and her husband, to the trustees of his will, for the purpose of being applied to satisfy the debts, among others the legacy of 10,000*l.* The Commissioners of Stamps and Taxes claimed legacy duty in respect of this payment; but upon a petition by the executors of the testator and his wife, who had since died, to obtain the opinion of the Court,—Held, that no claim for legacy duty had arisen under the 36 Geo. 3. c. 52, or the 45 Geo. 3. c. 28, and that none was payable. *Laurie v. Clutton*, 21 Law J. Rep. (n.s.) Chanc. 226; 15 Beav. 131.

A testator gave real and personal estate, subject to one "clear" yearly rent-charge or annuity of 100*l.* a year to S G:—Held, that it was to be paid without any deduction for legacy duty, and that the legacy duty was to be paid out of the real estate, as the personal estate of the testator was exhausted. *Bailey v. Boul*, 21 Law J. Rep. (n.s.) Chanc. 277; 14 Beav. 595.

A testator bequeathed the residue of his personal estate to his executors, in trust for his wife for life, and, after her decease, for his nephews and nieces, whereby legacy duty would be payable at the death of the wife,—Held, that under the 36 Geo. 3. c. 52. s. 13. the executrix of the surviving executor might, during the life of the widow, transfer the trust fund to new trustees of the will appointed by the Court. *In re Jones's Trust*, 21 Law J. Rep. (n.s.) Chanc. 566.

A testator devised certain freehold estates to trustees, to the use of his son for life, and then to his son's children. The will contained a power to his son to charge the estates with a jointure for any wife he might marry, such jointure to be in bar of dower. The son executed the power, and charged the estates with the jointure. He died in 1841, and a suit was afterwards instituted to administer his estate. The Attorney General presented a petition, praying that the receiver appointed in the suit might be ordered to pay the legacy duty in respect of the jointure, at the rate of 10*l.* per cent.—Held, that the jointure was to be treated as a legacy given by the original testator, and that legacy duty was payable at the rate of 10*l.* per cent., the son's wife being a stranger in blood to the testator: and the petition was granted, with costs. *Sweeting v. Sweeting*, 22 Law J. Rep. (n.s.) Chanc. 441; 1 Drew. 331.

A testatrix by her will gave the whole of her property to her sister, but the will being improperly witnessed, the gift was void. Before her death the testatrix had transferred a sum of stock in the Bank of England into the names of herself and her sister, in order, as she declared, to save her sister the payment of legacy duty:—Held, that the stock so transferred formed no part of the property of the testatrix, but that it belonged to her sister as the survivor of the two. *Deacon v. Colquhoun*, 23 Law J. Rep. (n.s.) Chanc. 16; 2 Drew. 21.

Legacy duty on income arising from a residue directed to be laid out in land must be paid by the tenant for life entitled to such income, although the will contained a direction for payment of the duty on all annuities and legacies out of the general personal estate. *Lord Lonsborough v. Somerville*,

23 Law J. Rep. (n.s.) Chanc. 646; 19 Beav. 295.

The Legacy Duty Acts are to be construed strictly and in favour of the subject. *Hobson v. Neale*, 17 Beav. 178.

A will empowered the trustees, with the consent of A, to sell the real estate, and invest a sufficient sum to answer two annuities. The rents being deficient to pay the annuities, the Court ordered a sale out of the produce, and 20,000*l.* consols were purchased to provide for the annuities. Legacy duty being claimed on the corpus of the consols:—Held, that the validity of this claim depended on whether the sale had taken place under the general jurisdiction of this Court, or under the power in the will; and the Court, having held the former, determined that no legacy duty was payable. *Ibid.*

The Attorney General attended in a cause, to which he was not a party, to support a claim for legacy duty upon a fund in court. The claim failed:—Held, that the Crown was not entitled to costs. *Ibid.*

LIBEL.

[See SLANDER.]

- (A) PUBLICATION.
 - (a) Generally.
 - (b) In Newspapers.
 - (c) Reports of Judicial Proceedings.
 - (d) Privileged Communications.
 - (e) Justification of.
- (B) ACTION FOR.
 - (a) Pleadings.
 - (b) Evidence of Authorship.
- (C) SCIRE FACIAS ON RECOGNIZANCES.
- (D) INFORMATION FOR.

(A) PUBLICATION.

(a) Generally.

The defendant had lodged at the plaintiff's house, and on leaving missed a memorandum book and other articles, whereupon he wrote to the plaintiff's wife a letter in which he accused the plaintiff of having taken them, and threatened to expose him if he did not return them; the jury found that the letter was a libel, but that there was no malice in fact:—Held, first, that sending the letter to the wife was a publication; and, secondly, that it was not justified by the occasion. *Wenman v. Ash*, 22 Law J. Rep. (n.s.) C.P. 190; 13 Com. B. Rep. 836.

(b) In Newspapers.

In an action for libel, the defendant pleaded the general issue and also a plea, under the 6 & 7 Vict. c. 96, denying actual malice, and stating an apology. On the trial, the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of:—Held, that these publications were admissible in evidence. *Bowett v. Long*, 3 H.L. Cas. 395.

If J H and M Y be registered at the stamp office as "the sole proprietors" of a newspaper, "that is

to say, the said J H as legal owner as mortgagee and M Y as owner of the equity of redemption," this is sufficient to fix J H as a proprietor of the newspaper in an action for a libel contained in it. *Brunswick v. Harmer*, 3 Car. & K. 10.

(c) Reports of Judicial Proceedings.

By the law of England a fair account of what takes place in a court of justice may be published, but the reporter ought not to mix up with it comments of his own. And if the report contains only a fair account of what takes place in a court of justice, the person who publishes it has only to prove that fact under the general issue, and he is entitled to entire immunity. It is not essential that every word of the evidence, of the speeches, and of what was said by the Judge should be inserted, if the report is substantially a fair and correct report of what took place in a court of justice. *Andrews v. Chapman*, 3 Car. & K. 286.

(d) Privileged Communications.

[See *Wenman v. Ash*, ante, (a).]

A schoolmaster of a national school belonging to a parish having been dismissed, proposed to set up a school on his own account in the same parish. The rector of the parish thereupon printed a letter addressed to his parishioners. It professed to contain a few words of warning against the projected new school, and stated as the cause of the schoolmaster's dismissal his refusal to teach the Sunday as well as the national school, and objected to his setting up an opposition school in the parish. Then followed the observations which the schoolmaster complained of as libellous:—"The very attempt betrays a spirit of opposition to authority," &c. "No rightly-disposed Christian who receives in simple faith the teachings of inspiration, 'Obey them who have the rule over you and submit yourselves,' can expect God's blessing to rest upon such an undertaking, under the circumstances. I conceive it to be my duty to warn all my parishioners against affording any countenance whatever to the projected new school, either in the case of the richer by subscriptions or of the poor by sending their children to it for instruction. It will be to all intents and purposes a schismatical school, for its tendency will be to produce disunion and schism in a matter which of all others requires union, the education of the poor. Those who aid and abet him in any way will be partakers with him in his evil deeds. Mark them which cause divisions and offences, and avoid them." On the trial of the action for libel, it was shewn that the defendant, the rector, had given one copy to a parishioner and another to a person in the adjoining parish, who had sent her children to the plaintiff's school:—Held, that the letter was not a privileged communication; that even if it were, there was evidence from the facts proved of express malice for the consideration of the jury, and that the jury were at liberty to look at the letter and consider its expressions with a view to the question of malice. *Gilpin v. Fowler* (in error), 23 Law J. Rep. (n.s.) Exch. 152; 9 Exch. Rep. 615.

(e) Justification of.

[See post, (D).]

In an action for libel, it is no justification that the

libellous matter was previously published by a third person, and that the defendant, at the time of his publication, disclosed the name of that person, and believed all the statements contained in the libel to be true. *Tidman v. Ainslie*, 10 Exch. Rep. 63.

(B) ACTION FOR.

(a) Pleadings.

[See Stat. 15 & 16 Vict. c. 76. s. 61; and schedule (B) Nos. 32, 33.]

In an action for a libel imputing to the plaintiff the commission of a crime under aggravated circumstances, it is necessary to justify the aggravating portion as well as the substantial charge of crime. *Helsham v. Blackwood*, 20 Law J. Rep. (N.S.) C.P. 187; 11 Com. B. Rep. 111.

So, where the declaration set out a libel in which it was alleged that the plaintiff was tried for murder, and that "it was understood that the counsel for the prosecution were in possession of a damning piece of evidence, viz. that he had spent nearly the whole of the night preceding the duel in practising pistol-firing"; and the plea stated that the plaintiff had committed murder, but did not shew that he had practised pistol-firing the night before, it was held that the justification was insufficient. *Ibid*.

Semble—that a replication to such a plea by way of estoppel, stating that the plaintiff was tried and acquitted, is not good. *Ibid*.

Action for a libel. Plea justifying, as true, part of the libel, which comprised several libellous allegations. Replication *de injuriâ*. On the trial, the Judge asked the jury to find separately as to the truth of the several allegations justified. The jury found that some of the allegations were not true, and that others, forming an important part of the libel, were true. A general verdict was entered for the plaintiff. A Judge made an order that the Master should not allow plaintiff the costs of the witnesses called only to disprove that part of the plea which was found to be true. On a motion to rescind this order,—Held, by Lord Campbell, C.J., Patteson, J. and Coleridge, J., that the order was improper, the issue being indivisible; *Erle, J. dissentiente*. *Biddulph v. Chamberlayne*, 17 Com. B. Rep. 351.

(b) Evidence of Authorship.

For the purpose of proving a document in which a word is spelt in a particular manner, *ex. gr.* Titchborne for Tichborne, to be in the handwriting of a party, other documents not in evidence in the cause, but proved to be in the handwriting of the party, and in which the word is similarly spelt, are admissible in evidence. *Brookes v. Titchborne*, 20 Law J. Rep. (N.S.) Exch. 69; 5 Exch. Rep. 929.

(C) SCIRE FACIAS ON RECOGNIZANCES.

Where writs of execution have been sued out without effect, on a judgment in an action for libel against the publisher of a newspaper—*quare*, whether a *scire facias* will be issued on the recognizances of the sureties taken under 60 Geo. 3. c. 9. and 1 Will. 4. c. 73. without the fiat of the Attorney General. *Ex parte Brunswick, in re Lowe*, 21 Law J. Rep. (N.S.) Exch. 113; 6 Exch. Rep. 22.

Semble—*per Parke, B.*, that it may be so issued ;

but, *per Pollock, C.B., Alderson, B. and Platt, B.*, that the fiat of the Attorney General is requisite. *Ibid*.

A plaintiff having obtained a verdict, with damages, against a newspaper proprietor, for whom the defendants had become sureties for the payment of fines and damages under the 60 Geo. 3. c. 9. s. 8, the Crown, at the instance of the plaintiff, issued a *scire facias* against the sureties for the recovery of such damages, under the 1 Will. 4. c. 73. s. 3. The plaintiff having subsequently become an outlaw, the defendants pleaded that the *scire facias* had issued at the instance of and for the benefit of the plaintiff, and not of the Crown. The Crown having demurred, and having taken no steps to bring on the demurrer for argument, but the plaintiff having obtained a rule for the appointment of a day for the argument, the Court, on the application of the defendants, stayed the argument of the demurrer, on the ground that the application for the hearing of the demurrer was made not on the part of the Crown, but for the benefit of the plaintiff, who was an outlaw. *Regina v. Lowe*, 22 Law J. Rep. (N.S.) Exch. 262; 8 Exch. Rep. 697.

(D) INFORMATION FOR.

[See title COSTS IN CRIMINAL CASES, (B).]

On the trial of an information for a libel containing imputations upon the character of the prosecutor, to which there is a plea justifying the libel as true under the 6 & 7 Vict. c. 96. evidence that the same imputations on the prosecutor had been previously published, is not admissible on the part of the defendant. *Regina v. Newman*, 22 Law J. Rep. (N.S.) Q.B. 156; 1 E. & B. 268; 1 Dears. C.C. 85; 3 Car. & K. 252.

To a criminal information for a libel containing several distinct charges against the prosecutor, the defendant pleaded not guilty, and also a plea under the 6 & 7 Vict. c. 96. s. 6, alleging the truth of all the matters complained of as libellous, and averring that it was for the public benefit that they should be published. To this plea the prosecutor replied, that the defendant wrongfully published the libel without the cause alleged, and issue was joined on this replication. At the trial, evidence was given by the defendant in support of some only of the matters alleged in the plea of justification, and the jury found that only one of the charges was true, and a general verdict was entered on this issue for the Crown. A new trial being afterwards moved for, on the ground that the verdict was against evidence, it not being suggested that any evidence could be given in support of the charges which had not been attempted to be proved, the Court refused to grant a new trial, as, admitting that the verdict was wrong in respect of some of the charges, the Crown would still be entitled to have the issue found for it on the ground that the whole of the plea of justification was not proved, and that the issue could not be found distributively. *Ibid*.

Where a plea of justification is pleaded to a criminal prosecution under the 6 & 7 Vict. c. 96. s. 6, if the defendant fail in proving the plea, the Court, in pronouncing sentence, is to consider whether his guilt is aggravated or mitigated by the plea and the evidence given to prove or disprove it, and to apportion the punishment accordingly. *Ibid*.

Where a new trial is moved for in a criminal case, it must be moved, or a notice that counsel is prepared to make the motion be given, within the first four days of term. *Ibid.*

LICENCE.

[See titles **ALE AND BEERHOUSES** — **PUBLIC ENTERTAINMENTS** — **TRESPASS** — **TROVER**. Also, *Adams v. Andrews*, title **CHURCH**, (B) **Pews**.]

An auctioneer employed to sell goods on the premises of the proprietor has not such an interest in the goods as will make a licence to enter on the premises irrevocable. *Taplin v. Florence*, 20 Law J. Rep. (N.S.) C.P. 137; 10 Com. B. Rep. 744.

A parol agreement, by which a person is authorized to enter on premises cannot make the licence to enter irrevocable. *Ibid.*

The declaration stated that the plaintiff had been tenant to one B, and during his tenancy had put up certain fixtures; that before the expiration of the tenancy B granted to the plaintiff leave and licence to keep the said fixtures on the premises after the expiration of the tenancy, in order that he might sell them to the incoming tenant, and to enter and recover them if such tenant would not purchase them; that the defendant subsequently became tenant; that he would neither purchase the fixtures nor allow the plaintiff to enter and remove them. The defendant traversed that B granted such licence to the plaintiff. At the trial the plaintiff gave in evidence the following letter written to him by B's attorney: "Mr. B has no objection to your leaving the fixtures on the premises and making the best terms with the incoming tenant":—Held, that this document, if it gave a licence at all, gave one coupled with an interest in land; and that therefore, not being under seal, it could not be enforced against the incoming tenant. *Ruffey v. Henderson*, 21 Law J. Rep. (N.S.) Q.B. 49; 17 Q.B. Rep. 574.

Trover will not lie for fixtures which a tenant has left annexed to the freehold after he has quitted possession, with the leave of his landlord, for the purpose of enabling him to make terms as to their purchase by the incoming tenant. *Ibid.*

The following stipulation in a lease not under seal, "All the hedges, trees, thorn bushes, fences, with the lop and top, are reserved to the landlord," is evidence for the landlord under a plea of leave and licence in an action against him by his tenant for entering the close and drawing the trees when cut down over the close. *Hewitt v. Isham*, 21 Law J. Rep. (N.S.) Exch. 35; 7 Exch. Rep. 77.

LIEN.

[See *Chilton v. Carrington*, title **CONTRACT**, (C) (a)—and title **INNKEEPER**.]

On a lease being granted the lessee deposited it with the lessor's solicitors (who acted for the lessor and lessee), together with a bill of exchange, as a security for the costs of preparing the lease, which the lessee was to pay. The lessee afterwards mortgaged the term, and the defendants (who were his

solicitors on that occasion), in order to obtain the lease, paid the bill of costs of the lessor's solicitors and received from them, without any authority of the lessee, the lease and bill of exchange:—Held, first, that without express contract the defendants acquired no lien on the bill of exchange beyond the amount which they had paid to the lessor's solicitors; secondly, that evidence of an express contract would not support such a lien without proof that the defendants had explained to their client, the lessee, his rights independently of express contract. *Gibson v. May*, 4 De Gex, M. & G. 512.

LIGHT.

[See title **WATER AND WATERCOURSE**.]

If the occupier of a house pay rent under a parol agreement to the owner of the adjoining land for the liberty of keeping windows open looking upon the land, the occupier of the house will, after twenty years' enjoyment of the lights, acquire the right to such enjoyment, and the owner of the land cannot after that period obstruct such lights, as the payment of the rent is not an interruption of the enjoyment under the statute 2 & 3 Will. 4. c. 71. s. 3. *The Plasterers Co. v. the Parish Clerks Co.* (in error), 20 Law J. Rep. (N.S.) Exch. 362; 6 Exch. Rep. 630.

Where a party who has a right to the access of light and air through certain ancient windows, makes an alteration in the size of his windows, so as to exceed the limits of his ancient right, he thereby acquires nothing in addition to his former right; and if the excess cannot be obstructed by his neighbour in the exercise of his lawful rights on his own land, without at the same time obstructing the ancient right, such party must be considered as having by his own act suspended and lost for the time his former right. *Renshaw v. Bean*, 21 Law J. Rep. (N.S.) Q.B. 219; 18 Q.B. Rep. 112.

Quære—whether the former right is entirely destroyed by the alteration. *Ibid.*

The plaintiff, being the owner of a house in which there were ancient windows, rebuilt it within twenty years, and in so doing raised it a story, putting windows in the new story, and altered the position of and enlarged the lower windows, so that portions of them occupied spaces where there had before been no aperture. The defendant, who occupied a house separated from the plaintiff's by a passage belonging to the plaintiff, also rebuilt and raised his premises within twenty years after the rebuilding of the plaintiff's house, and thereby obstructed the windows in the upper story of the plaintiff's house, as well as those in the lower stories:—Held, in an action against the defendant for this obstruction that the defendant was justified in so obstructing the new lights, and that the plaintiff could not complain that as a necessary consequence the privileged windows were also darkened. *Ibid.*

Held, also, that this defence was well raised, under a traverse of the plaintiff's right to the windows. *Ibid.*

LIMITATIONS, STATUTE OF.

(A) WHEN AVAILABLE.

- (a) *In general.*
- (b) *In Actions and Suits relating to Real Property under 3 & 4 Will. 4. c. 27.*
- (c) *In Actions on Specialties under 3 & 4 Will. 4. c. 42.*
- (d) *Local and Personal Statutes under 5 & 6 Vict. c. 97.*

(B) COMPUTATION OF TIME.

(C) HOW THE STATUTE MAY BE BARRED.

- (a) *Promise or Acknowledgment.*
- (b) *Part Payment.*

(D) PLEADING AND EVIDENCE.

(A) WHEN AVAILABLE.

(a) *In general.*

The Scotch statute of 1617, c. 12, respecting prescription does not contain the words *positive* and *negative*. Whether these words have not tended to perplex the subject,—*quære*. *The Trustees of Dundee Harbour v. Dougall*, 1 Macq. H.L. Cas. 317.

General policy of statutes of prescription. The old English Statutes of Limitation barred the remedy only, not the right; but the modern ones cut off the right as well as the remedy. *Ibid*.

Public corporations are not less liable to the operation of prescription than private persons. *Ibid*.

Immunity or exemption may be prescribed for by dereliction or non-user for forty years. *Ibid*.

Although a variance is introduced in the judgment complained of, the House may award costs to the respondent where it appears that the variance would have been granted by the Court below if applied to for the purpose. *Ibid*.

(b) *In Actions and Suits relating to Real Property under 3 & 4 Will. 4. c. 27.*

The 7 Will. 4. & 1 Vict. c. 28. is not confined to cases where the mortgagor has been in possession of the mortgaged premises, but its object was to protect mortgagees generally, and to make mortgages an available security wherever they are valid in their inception, and the mortgagee having received payment of his interest cannot be charged with any laches. *Doe d. Palmer v. Eyre*, 20 Law J. Rep. (n.s.) Q.B. 431; 17 Q.B. Rep. 366.

A, in 1821, became entitled to the possession in fee simple of real property of which he had never been in actual possession, but which had been occupied by the defendant as tenant at will to him for more than twenty years before action brought. In 1823 A mortgaged the property to B, who afterwards assigned the mortgage to the lessor of the plaintiff. A had paid interest upon his mortgage within twenty years before the action was commenced, but had done so without the knowledge of the defendant:—Held, that under these circumstances, the 7 Will. 4. & 1 Vict. c. 28. applied, and that the lessor of the plaintiff having brought his action within twenty years next after the last payment of interest upon the mortgage, was not barred, although more than

twenty years had elapsed since the time at which the right to bring such action first accrued. *Ibid*.

In 1822, W, a lessee for years of certain premises, (including Greenacre) mortgaged them for the residue of the term to B G. In 1834, the mortgage was paid off by R C, who took an assignment of the legal interest of the mortgagees, and at the same time purchased the equity of redemption of W. In 1838, the premises were sold by the executors of R C to W F. In 1846, the same premises were assigned by the executors of W F to R B, one of the lessors of the plaintiff, and in the same year they were mortgaged by R B to A W, the other lessor of the plaintiff. In 1829, the defendant took a lease of part of the premises contiguous to Greenacre of W for twenty-one years. Soon afterwards he applied for a lease of Greenacre, but W refused, alleging that he had granted a right of way over it to persons to whom he had sold houses in an adjoining square; he at the same time told him that if he took possession of it it must be at his own risk, but that if he did he would not interfere. The defendant then took possession of it, and built a workshop on it. In 1850, the lease of the demised premises having expired, the defendant surrendered them to the plaintiffs, but refused to give up Greenacre. In an action of ejectment to recover Greenacre,—Held, first, that it could not be considered as forming part of the demised premises in respect of which rent was paid, and that as there had been no rent paid or any acknowledgment given, the statute 3 & 4 Will. 4. c. 27. s. 2. would be a bar as against W, or those claiming under him other than a mortgagee. Secondly, that although the mortgage of 1822 had been paid off, the lessors were "*parties claiming under a mortgage*," within the meaning of 7 Will. 4 & 1 Vict. c. 28, and therefore entitled to recover. *Doe d. Baddeley v. Massey*, 20 Law J. Rep. (n.s.) Q.B. 434; 17 Q.B. Rep. 373.

In 1824 B was let into possession of a cottage under an agreement, purporting to be a demise by the churchwardens and overseers of the poor of the parish of P, at the rent of 1s. 6d. per week, B to quit on one month's notice being given, &c. This agreement was signed only by one of the then overseers. The churchwardens did not sign, nor was there any evidence to shew that they had assented to the agreement. B never paid any rent or made any acknowledgment. B afterwards sold the premises to the defendant:—Held, in an action of ejectment brought, after twenty years, by the churchwardens and overseers for the time being against the defendant, that as the agreement did not pass an interest, it did not amount to a lease in writing within the meaning of the 3 & 4 Will. 4. c. 27. s. 8, and that, consequently, the claim of the lessor of the plaintiff was barred by twenty years' adverse possession. *Doe d. Lansdell v. Gower*, 21 Law J. Rep. (n.s.) Q.B. 557; 17 Q.B. Rep. 589.

Quære—whether extrinsic evidence would be admissible to shew that the agreement was executed by the overseer on behalf of the whole body of churchwardens and overseers. *Ibid*.

Trespass for breaking and entering the plaintiff's closes and digging minerals therein. Pleas, first, not possessed; and, secondly, "plea justifying the trespasses by the defendant as assignee of a lease of the minerals, and of the right to work them for ninety-nine years granted by the owner of the fee in 1821.

Replication, that the right to make an entry did not first accrue to the defendant or those through whom he claimed within twenty years next before the entry by the defendant, and that the defendant's right was, therefore, barred by the 3 & 4 Will. 4. c. 27. Issue was taken on this replication. It appeared that in 1821, while B was in possession, as tenant from year to year, of a farm, including the close in question, the owner of the fee by indenture demised the coal lying beneath the farm to B and P for ninety-nine years, with liberty to work the same. The interest of B and P under this demise became vested by various mesne assignments in the defendant, who in 1847 (during the term) worked the coal. Up to 1847 no coal had ever been worked under the demise:—Held, first, that B must be presumed to have been in possession of the minerals, as well as of the surface, when the lease for ninety-nine years was granted, which thus became a lease in possession and not a mere *interesse termini*, and that this possession of the minerals continued and passed to the defendant without any actual entry under the lease of 1821. Secondly, that the possession of B enured for the benefit of himself and P. Thirdly, that the second plea, confessing that the plaintiff was *de facto* in possession when the trespasses were committed, would be satisfied by a dispossession of the lessees within twenty years before the defendant entered to commit the trespasses in question; and that the defendant might rely on the right of entry which accrued on such dispossession, and not upon a right of entry accruing as upon a grant of an *interesse termini* in 1821. *Keyse v. Powell*, 22 Law J. Rep. (n.s.) Q.B. 305; 2 E. & B. 132.

The plaintiff, a parish pauper, was put into possession of a cottage by parish officers at Whitsuntide 1818, and continued in possession without paying rent until April 1839, when the parish officers took proceedings to obtain possession, and turned the plaintiff and his family out of the cottage, and removed nearly the whole of his goods. On the same day the plaintiff resumed possession and continued in possession until the 24th of July 1852, when the parish officers entered the cottage, and upon the plaintiff's refusal to deliver it up, destroyed it. The plaintiff thereupon brought an action of trespass against the parish officers, and upon the trial the jury found that neither upon the plaintiff's resuming possession in 1839, nor afterwards, did he become a weekly tenant or tenant at will to the parish officers:—Held, that there was an actual determination of the tenancy in April 1839; and that when the plaintiff afterwards resumed possession, a new right to make an entry within twenty years from that time, accrued to the parish officers under the 3 & 4 Will. 4. c. 27, in exercise of which, it was to be supposed, they entered in 1852, and therefore that the action of trespass could not be maintained. *Randall v. Stevens*, 23 Law J. Rep. (n.s.) Q.B. 68; 2 E. & B. 641.

A claimant in ejectment proved that his grandfather being seised in fee of a farm, devised it to the claimant's father, as tenant in tail, and died in 1799, and that the father received the rents and profits up to the year 1807, and died in 1850:—Held, that the claimant's father having been barred under the 3 & 4 Will. 4, the claimant was barred also. *Austin v. Leveillyn*, 23 Law J. Rep. (n.s.) Exch. 11; 9 Exch. Rep. 276.

The 3 & 4 Will. 4. c. 27. s. 3. does not apply to the mere want of actual possession by the owner, but to cases where the owner has been out of possession, and some other person has been in possession. Therefore, where in 1725 the owner in fee of a close, with a stratum of coal and other minerals under it, conveyed the surface to A (under whom the plaintiff claimed), reserving the minerals and a right of entry to get them to B (under whom the defendant claimed), and the right of entry had not been exercised for more than forty years, but no other person had worked or been in possession of the mines,—it was held, that the title of the grantees of the mines was not barred by the 2 & 3 Will. 4. c. 27. s. 3. *Smith v. Lloyd*, 23 Law J. Rep. (n.s.) Exch. 194; 9 Exch. Rep. 562.

A mortgage-deed was dated the 27th of October 1827, but not executed until the 23rd of August 1834, and it contained a covenant by the mortgagor admitting the title to be in the mortgagee, his heirs and assigns:—Held, that this was a sufficient acknowledgment of title under the 3 & 4 Will. 4. c. 27. s. 14. to enable the mortgagee to recover within twenty years of the execution of the deed. *Jaynes v. Hughes*, 24 Law J. Rep. (n.s.) Exch. 115; 10 Exch. Rep. 430.

The 3 & 4 Will. 4. c. 27. limiting the period within which an action may be brought "to recover any land or rent," does not apply to an action on a covenant to pay a rent charged upon land. *Manning v. Phelps*, 24 Law J. Rep. (n.s.) Exch. 62; 10 Exch. Rep. 59.

Tenant in tail in 1798 made a feoffment of the lands entailed, and received none of the profits of the lands up to his death in 1831:—Held, that his issue in tail was entitled to his writ of *formedon* within twenty years of the death of the tenant in tail. *Cannon v. Rimington*, 21 Law J. Rep. (n.s.) C.P. 137; 12 Com. B. Rep. 514.

Report of the Master on the claim of the committee of a lunatic's person, in a matter to which the heir-at-law of the lunatic is not a party, will not as against the heir take such out of the Statute of Limitations. *Wilkinson v. Wilkinson*, 22 Law J. Rep. (n.s.) Chanc. 155; 9 Hare, 204.

A testator charged by will, under a power, the real estate of his son with 5,000*l.*, and died in 1835. Certain judgment creditors of the son filed a bill in 1840 to charge their debts on his real estate. In 1845 the executors of the testator carried in a state of facts and claim under the decree made in the suit, to which they were not parties, for the 5,000*l.*, and interest at 4*l.* per cent., from the death of their testator:—Held, that the proceedings took the case of the executors out of the 42nd section of the Statute of Limitations, but that they were only entitled to interest for six years prior to carrying in their claim. *Greenway v. Bromfield and Handley v. Wood*, 22 Law J. Rep. (n.s.) Chanc. 162; 9 Hare, 201.

A testator, by his will, gave to the plaintiff certain annuities, and devised his real estates to trustees upon trust for securing the same. Some of the annuities had fallen into arrear for eighteen years and upwards:—Held, that the term being a subsisting term, the plaintiff was entitled to recover the entire arrears. *Cox v. Dolman*, 22 Law J. Rep. (n.s.) Chanc. 427; 2 De Gex, M. & G. 592.

An estate directed to be sold is converted into per-

sonalty, and the mere entry and enjoyment of the estate by the person entitled to the proceeds of the sale will not operate to discharge the trust for sale, and restore it to real estate. The institution of a suit without proceeding with it will have no effect against adverse possession for twenty years, or stop the running of the Statute of Limitations. Adverse possession must be continuous in one person, or assuming his possession legal, by persons claiming through him. If the Court is in possession of an estate, non-claim for twenty years will not be a bar to the rightful owner. The costs of the suit were ordered to be paid by the parties declared entitled to the estate in moieties, and costs, &c. were given to the heir of the trustee, but the costs of a suit instituted and not prosecuted by the trustee were refused, though he had become a lunatic during its progress. *Dixon v. Gayfere and Fluker v. Gordon*, 23 Law J. Rep. (N.S.) Chanc. 60; 17 Beav. 421.

Upon an information filed on the 31st of January 1852 to recover certain charity estates aliened by the rectors, churchwardens, and four of the principal inhabitants of two parishes by a deed dated the 3rd of March 1790:—Held, that a breach of trust had been committed. That the rector, the churchwardens, or the poor of the parish could not individually have instituted any suit to redress the wrong inflicted upon the parishes. That the Attorney General is not a "person" within the 3 & 4 Will. 4. c. 27, entitled to any estate or interest in the land or rent sought to be recovered by him *ex officio*. That the right of the Attorney General to sue is by immemorial custom, whether it is to enforce the individual rights of the Crown or as representing the Crown as *parens patriæ*, and the words of the statute do not impose any limitation upon suits instituted by him or bar his right to proceed, whether they are instituted *ex officio* or on the relation of others:—and notwithstanding the lapse of time, a decree was made declaring the conveyance void and directing it to be delivered up to be cancelled, and an account was directed of the rents and profits since filing the information, but directing just allowances, but no order was made for the allowance of permanent improvements, as no account of the back rents and profits was directed. *Attorney General v. Magdalen College*, 23 Law J. Rep. (N.S.) Chanc. 844; 18 Beav. 223.

Whether the produce of real estate directed to be sold is a "sum charged upon or payable out of land" within the meaning of the 40th section of the Statute of Limitations (3 & 4 Will. 4. c. 27.)—*quære*. *Parvey v. Barnes*, 20 Law J. Rep. (N.S.) Chanc. 393.

By virtue of a settlement an estate stood limited to A in tail, with remainder to his three sisters as tenants in tail, with cross remainders in tail between them. A sold the estate, and the purchaser had been in possession more than twenty years since the death of A, but no conveyance was ever executed. On the death of A one of his sisters, who was a married woman, became entitled to one-third, another sister, unmarried, became entitled to another third, but she lived for one year only, and her share then devolved upon the married sister. A died three years before the Statute of Limitations (3 & 4 Will. 4. c. 27.) was passed:—Held, that the 21st and 22nd sections of that act were retrospective; that

the married sister of A, as to her own share, was not barred by the statute, she having been under disability and her rights being saved by the 16th section; but that she was barred as to the share which devolved upon her after the death of her unmarried sister, by reason that the statute having commenced running against a tenant in tail, it would continue to run against the remainder-man, although he might be under disability. *Goodall v. Skerratt*, 24 Law J. Rep. (N.S.) Chanc. 323; 3 Drew. 216.

Real estate was settled to the use that A should take an annuity of 400*l.* during the lives of A and B, with remainder to trustees for a term of 1,000 years to secure it, with remainder to the use of B for life, with remainder to the use of A in fee. By a deed, dated in 1823, A granted an annuity of 45*l.* to C, for certain uses, and charged it on the annuity of 400*l.* and the settled estate, and demised the settled estate to D, as trustee, for a term of 1,000 years, upon trust for better securing it. The deed contained the usual proviso for cesser. The last payment of the annuity of 45*l.* was made in 1833. B died in 1844. In a foreclosure suit, instituted by a mortgagee of the settled estate, a reference was made to the Master to inquire and state incumbrances, and their priorities. C claimed, before the Master, to be entitled to the arrears and future payments of the annuity of 45*l.*:—Held, that C was not barred by the Statute of Limitations, and was entitled to such arrears and future payments. *The Earl of Mansfield v. Ogle*, 24 Law J. Rep. (N.S.) Chanc. 700.

In a case unaffected by Lord Tenterden's Act, the words "interest on this note paid up to the 13th day of May, 1825," indorsed upon a promissory note in the handwriting of a person who was in the habit of transacting for both the maker and payee of the note, was held sufficient to take the note out of the operation of the statute. *Briggs v. Wilson*, 17 Beav. 330.

The maker of the note died in 1829, having charged his real estate with payment of his debts; the payee died in 1851; but, after the death of the former, an arrangement was made by the trustee of his will with the payee, that interest should not be payable till the death of the latter:—Held, that the remedy was not barred. *Ibid*.

A testator died in 1821, having devised and bequeathed his real and personal estate to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trusts, as to the personal estate. In 1847 a supplemental bill was filed, raising questions on the will as to the real estate in which the heir, who was then unknown, was interested; and in 1849 another supplemental bill was filed to bring the heir, who was then ascertained, before the Court:—Held, that the heir was barred by lapse of time from claiming the real estate adversely to the trustees, but that he was not barred from claiming part of the real estate, as being in the events that had happened undisposed of, and held by the trustees in trust for him. *Simmmons v. Rudall*, 1 Sim. N.S. 115.

A renewable leasehold for lives was vested in A in trust for B for life, with remainder, in the events that happened, to C and his heirs. Afterwards, on the marriage of B, a settlement was made (on the construction of which it was doubtful whether the leasehold passed) on B for life, remainder to the sons of that marriage in tail, under which D would

be entitled. The lease being still subsisting in A, B took a renewal in his own name, without noticing the trust; and after the death of B, D entered and took a renewal in his own name, and the property continued to be enjoyed by him, and those claiming under him for a time much beyond the period of limitation, and more than twenty years before the commencement of the suit by those claiming under C. D, on his marriage, assigned the leaseholds to the trustees of his marriage settlement, and they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed, on the construction of which the doubts arose, took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained these transactions were dead. There was much ground for believing that the parties had intended the deed to include the leaseholds:—Held, first, that, assuming the possession of D and those claiming under him to have been originally wrongful, he and they were not express trustees within the 25th section of the Statute of Limitations, and might set up the statute as a bar. Secondly, that even if there had been an express trust, those claiming under the settlement by D could, as purchasers, set up the statute. *Petre v. Petre*, 1 Drew. 371.

(c) *In Actions on Specialties, under 3 & 4 Will. 4. c. 42.*

An action of debt for a penalty due under a by-law made by virtue of a charter, is "an action of debt grounded upon a contract without specialty," and is barred by 21 Jac. 1. c. 16. s. 3. if not commenced within six years after the penalty becomes due. *The Company of Tobacco-pipe Makers v. Loder*, 20 Law J. Rep. (N.S.) Q.B. 414; 16 Q.B. Rep. 765.

Where the plaintiffs stated in the declaration that the defendant was indebted to them for calls on shares by virtue of the Companies Clauses Consolidation Act and the Railway Act, the defendants being under terms to plead issuably, pleaded that the action was upon contracts without specialty, and that the action did not accrue within six years:—Held, that this case was an issuable plea, and not a frivolous one on account of which the plaintiffs were entitled to sign judgment. *The Cork and Bandon Rail. Co. v. Goode*, 22 Law J. Rep. (N.S.) C.P. 147; 13 Com. B. Rep. 827.

The abstract accompanying a rule to plead several matters described this plea as the Statute of Limitations, but the plea was held not to be objectionable on that account. *Ibid.*

An action against a shareholder of a company for calls, in which the company declares in the general form given in the 26th section of the Companies Clauses Consolidation Act, 1845, is an action on the statute; and therefore a plea alleging that the action is on contracts without specialty, and that the causes of action accrued within six years, is bad. *The Cork and Bandon Rail. Co. v. Goode*, 22 Law J. Rep. (N.S.) C.P. 198; 13 Com. B. Rep. 826.

R B deposited 110*l.* with Messrs. H B L, C F, E L, & C S F, bankers, upon a deposit note, payable twenty days after sight. In June 1833, H B L died, having, by his will, devised his real and personal estate to trustees, one of whom was his son, H L, upon trust to raise money to pay his debts,

&c., and subject thereto upon trust for H L, whom he appointed sole executor. H L was admitted a partner in the bank. In 1835 E L died, and in 1843 C F died. C S F and H L continued the business, but became bankrupts in 1847. R B, from the death of H B L, received interest at the bank upon his deposit note until the bankruptcy, when he proved his debt against the bankrupt's estate; and on a bill filed to make the real and personal estate of H B L liable to the payment of the 110*l.*—Held, that the interest was not paid by the continuing partners, as agents of H B L, the testator; that no agency could be implied; that the interest was paid on account of the firm; that all claim against the real and personal estate was barred by the Statute of Limitations in six years; that R B had accepted the surviving partners as his debtors, and the devise made by H B L, for payment of debts, was satisfied, and the bill was dismissed, with costs. *Brown v. Gordon*, 22 Law J. Rep. (N.S.) Chanc. 65; 16 Beav. 302.

In 1842 an order to tax the costs of solicitors, incurred in a lunacy, was made, and by the same order an inquiry was directed whether it would be fit and proper to raise these costs by sale or mortgage of the lunatic's real estate. In 1848 the lunatic died, but these costs were not taxed until 1853, under an order obtained in 1852:—Held, that the solicitors were entitled to claim, but as simple contract creditors only, against the lunatic's estate, notwithstanding the lapse of six years since the costs were incurred. *Stedman v. Hart*, 23 Law J. Rep. (N.S.) Chanc. 908; Kay, 607.

(d) *Local and Personal Acts, under 5 & 6 Vict. c. 97.*

The Ramsgate Harbour Acts, 32 Geo. 3. c. lxxiv. and 55 Geo. 3. c. lxxiv. are local and personal acts, within the meaning of the 5 & 6 Vict. c. 97, which gives a period of two years for the bringing of actions for anything done under the authority of such acts. *Sharp v. Shepherd*, and *Moore v. Shepherd*, 24 Law J. Rep. (N.S.) Exch. 28; 10 Exch. Rep. 424.

(B) COMPUTATION OF TIME.

The plaintiff and the defendant were the payee and drawer of three bills of exchange, drawn upon and accepted by W K, who at the time was indebted to the plaintiff and the defendant, and also to a banking company, to whom the bills were delivered as a security for the debt due to them. The bills became due on the 4th of May 1843, and in 1847 the bank sued the plaintiff upon the bills, and signed judgment in December 1850, and early in 1851 the plaintiff finally settled that action:—Held, that the Statute of Limitations was a bar to the plaintiff's recovering in an action subsequently brought against the defendant as drawer of the bills. *Webster v. Kirk*, 21 Law J. Rep. (N.S.) Q.B. 159; 17 Q.B. Rep. 944.

An attorney or solicitor retained in a suit at law or in equity is bound to carry it on to its termination, unless he gives a notice that he shall discontinue if he be not paid or supplied with the necessary funds, or the client dies; and the Statute of Limitations does not begin to run against his right to sue for his bill of costs until the happening of one of those events. *Whitehead v. Lord*, 21 Law J. Rep. (N.S.) Exch. 239; 7 Exch. Rep. 691.

The plaintiff had, prior to 1840, been retained by A (whose administratrix the defendant was) to appear for her in a suit in equity to which she had been made defendant by bill of revivor. In 1840 the suit was heard, and a supplemental bill ordered to be filed to make certain next-of-kin parties, but such bill was not filed nor any other step taken in the cause prior to the death of A, which took place in June 1851:—Held, that the Statute of Limitations did not begin to run until the death of A. *Ibid.*

The defendant, in 1840, gave S, for value, his acceptance in blank, on a 5s. stamp. S, in 1852, and, as the jury found, not within a reasonable time, filled in his own name as drawer, for 200l. at five months. The defendant, being sued on the bill by an innocent indorsee for value, pleaded, first, that he did not accept; secondly, the Statute of Limitations:—Held, that the plaintiff was entitled to the verdict on both issues, notwithstanding the finding of the jury. *Montague v. Perkins*, 22 Law J. Rep. (N.S.) C.P. 187.

A foreigner has the time limited by the Statute of Limitations, 21 Jac. 1. c. 16, to bring his action after first coming to this country—confirming *Strithorst v. Græme*. Therefore, where the plaintiff replied to a plea of the Statute of Limitations, that he was abroad at the time of the accruing of the causes of action, and afterwards returned to this country, and within six years after his return brought his action, the Court refused to allow the defendant to rejoin (under the 15 & 16 Vict. c. 76. s. 81), in addition to a traverse, that the plaintiff was a Frenchman, born in France and domiciled there when the action accrued, and that the right of action accrued more than six years before action brought:—Held, also, *per Jervis, C.J.*, that a rejoinder to the effect that the plaintiff was a Frenchman and domiciled in France, where the causes of action accrued, and that he recovered against the defendant in France, and the causes of action were thereby, by the law of France, extinguished, and that the defendant has been domiciled in England for more than six years since the action accrued, was bad as being a departure from the plea. *Lufond v. Raddock*, 22 Law J. Rep. (N.S.) C.P. 217; 13 Com. B. Rep. 813.

The fraudulent concealment of the cause of action by the party liable does not prevent the Statute of Limitations running, from the accrual of the right of action. *The Imperial Gas Co. v. the London Gas Co.*, 23 Law J. Rep. (N.S.) Exch. 303.

A cause of action on simple contract accrued against the defendant and G jointly, while both were abroad. G having died abroad, an action was commenced against the defendant within six years from G's death, but more than six years from the defendant's return to this country:—Held, that the 4 Ann. c. 16. s. 19. saved the action from being barred by the Statute of Limitations, 21 Jac. 1. c. 16. *Townes v. Mead*, 24 Law J. Rep. (N.S.) C.P. 89; 16 Com. B. Rep. 123.

Quære—whether the application of the 21 Jac. 1. c. 16. to such a case is not excluded altogether by the 4 Ann. c. 16. s. 19. *Ibid.*

The law of prescription, or limitation, is a law relating to procedure, having reference only to the *lex fori*. *Rackmaboe v. Mottichund*, 8 Moore P.C. 4; 5 Moore Ind. App. 234.

Where a Court entertains a cause of action which

originated in a foreign country, the rule is to adjudge according to the law of that country, yet the Court proceeds according to the prescription of the country in which it exercises jurisdiction. *Ibid.*

The words in the Statute of Limitations, 21 Jac. 1. c. 16. s. 7, "beyond the seas," are synonymous, in legal import, with the words "out of the realm," or "out of the land," or "out of the territories," and are not to be construed literally. *Ibid.*

Trover for 200 chests of opium; both parties were Hindoos. The defendant pleaded in bar the English Statute of Limitations, 21 Jac. 1. c. 16, in the ordinary form. Replication, that the plaintiff resided during the period of prescription in Malwa, in India, without the territories of the government of the East India Company, and without the jurisdiction of the Supreme Court of Bombay. Rejoinder, that the defendant, though not personally resident at Bombay, carried on business there by a Mooneem or Gomastah, an inhabitant of Bombay, and subject to the jurisdiction of the Supreme Court, and that the goods were the property of defendant. General demurrer to rejoinder. The Supreme Court at Bombay held, first, that as the Statute of Limitation, 21 Jac. 1. c. 16. and 4 Ann. c. 16, applied to Bombay and to Hindoos, the fact of the plaintiff being resident at Malwa was not "beyond the seas," so as to bring the plaintiff within the 7th section of the 21 Jac. 1. c. 16; and, secondly, that the carrying on business at Bombay amounted to a constructive inhabitancy at Bombay, so as to exclude her from the benefit of the exception in the Statute. Upon appeal,—Held, by the Judicial Committee, reversing the judgment of the Supreme Court, first, that the saving words of the statute, 21 Jac. 1. c. 16. s. 7, "beyond the seas," were not to be construed literally, those words being in legal import and effect synonymous with the words, "without the territories," and that the replication disclosed a valid answer to the defendant's plea. And as the words of the replication, "without the territories," were equivalent to the words "beyond the seas," the plaintiff was within the express provision of the 7th section, and that the plea, setting up the statute, was no bar. Secondly, that the rejoinder, that the plaintiff might sue or be sued during the time by reason of a constructive inhabitancy, was no answer in law to the replication; for although it might give the Court jurisdiction, yet it did not prevent the express operation of the 7th section of the 21 Jac. 1. c. 16. *Ibid.*

(C) HOW THE STATUTE MAY BE BARRED.

(a) Promise or Acknowledgment.

The following letter was written by the defendant to the plaintiff, in respect of a debt more than six years due:—"I am much surprised at receiving a letter from H K this morning for the recovery of your debt. I must candidly tell you once for all I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechonicon by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F was in town":—Held, not sufficient to take the case out of the Statute of Limitations. *Cawley v. Funnell*, 20 Law J. Rep. (N.S.) C.P. 197; 12 Com. B. Rep. 291.

T owed to P & Co. on their bankruptcy 275l. as surviving partner of the firm of T & Y, and 6,565l.

as partner in the firm of T & J. For 5,000*l.* part of this latter sum he had given a mortgage as security. The official assignee of P & Co. wrote to T demanding payment of the 275*l.* standing in the bankrupts' books against the firm of T & Y. T, in answer, wrote "You have no occasion to blame yourself respecting any claim on me for the estate of P & Co.; the matter has been arranged at the different interviews and meetings with the assignees here," &c. "It was arranged that I should pay 450*l.* on the 20th of May, 450*l.* on the 20th of August, 450*l.* on the 20th of November, and 450*l.* on the 20th of February next, after which I am in hopes that I shall be able to transfer the 5,000*l.* mortgage to enable me to clear off the whole that may be standing against me." It was admitted that the instalments of 450*l.* were to be paid in respect of the debt of 6,565*l.*—Held, that the letters did not contain a sufficient acknowledgment or promise to take the case as to the debt of 275*l.* out of the Statute of Limitations. *Smith v. Thorne* (in error), 21 Law J. Rep. (N.S.) Q.B. 199; 18 Q.B. Rep. 134.

W J, who had previously lent to the plaintiff 200*l.*, which was secured by the promissory note of the plaintiff and two sureties, had goods from the plaintiff's shop to the value of 17*l.* The plaintiff, on remitting to W J 10*l.* for interest on the money borrowed, sent in with it his bill for 17*l.* for the shop goods. W J answered: "I beg to acknowledge the receipt of 10*l.* cash and the bill amounting to 17*l.*, both of which sums I have placed to your credit. I have inclosed your bill; receipt it, and return it me by post." After the death of W J, and more than six years after the supplying of the goods, and after one of the sureties had paid the defendants the amount of the promissory note, the plaintiff sued the defendants, as representatives of W J, to recover the 17*l.* The defendants relied on the Statute of Limitations:—Held, that the letter of W J was a sufficient acknowledgment to take the case out of the statute. *Evans v. Simon*, 23 Law J. Rep. (N.S.) Exch. 16; 9 Exch. Rep. 282.

An acknowledgment in writing given by an infant of a debt due for necessities, is effective for the purpose of taking the debt out of the operation of the Statute of Limitations. *Williams, or Willins, v. Smith*, 24 Law J. Rep. (N.S.) Q.B. 62; 4 E. & B. 180.

A testator devised his real estates to A B in fee, charged with the payment of his debts. A B in 1811 contracted with C D to sell part of the real estate, the purchase-money to be paid two months after. C D was immediately let into possession. The purchase-money was not paid. In January 1812 A B was declared a bankrupt. In October in the same year, C D contracted to sell part of the same real estate to E F, who was let into possession, but his purchase-money was not paid. C D made his will in 1817, by which he devised his real and personal estate to trustees upon trust to pay his debts, and then upon trust for his children, and died in 1827. The trustees refused to act, and the widow of C D and her children filed a bill for the appointment of trustees, and in that suit J S and W R were appointed new trustees. In 1834 the attorney for J S and W R gave notice to the assignees of A B (J T and J C) that the purchase-money for the

property comprised in the contract of 1811, and interest, or rent in respect of the land, were ready to be paid, for the express purpose of completing the agreement. In 1844, the money not having been paid, the assignees filed a bill against J S and W R, the trustees of the will of C D, and against the parties beneficially interested thereunder, and against E F the sub-purchaser and others, praying a declaration that the plaintiffs had a lien on the estate for the unpaid purchase-money:—Held, that the notice from the attorney of J S and W R was an acknowledgment in writing within the meaning of the 40th section of the statute 3 & 4 Will. 4. c. 27; that a person by whom "the money is payable," means, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed, and that this acknowledgment being by devisees in trust for payment of debts was good as against the *cestui que trust* under the same will. *Toft v. Stephenson*, 23 Law J. Rep. (N.S.) Chanc. 129; 1 De Gex, M. & G. 28; 7 Hare, 1.

There being no proof as against the *cestui que trust* that the attorney who wrote the notice was in fact the agent of the devisees in trust, the Court granted an inquiry. *Ibid.*

Upon an application for payment of 450*l.* due upon two bills of exchange dated the 25th of March 1836, upon which interest had been paid up to the 25th of March 1841, a letter was written by the creditor on the 13th of January 1846, stating, "I hope to be in H very soon, when I trust everything will be arranged with Mrs. W agreeable to her wishes":—Held, a promise to pay, which would take the debt out of the Statute of Limitations, and exceptions to the Master's report allowing the debt were overruled. *Edmonds v. Goater*, 21 Law J. Rep. (N.S.) Chanc. 290; 15 Beav. 415.

Acknowledgment of a testator's debt by payment of interest by an executor will prevent the operation of the Statute of Limitations to the extent of the executor's beneficial interest in the testator's estate. *Fordham v. Wallis*, 22 Law J. Rep. (N.S.) Chanc. 548; 10 Hare, 217.

Acknowledgment by executor of his testator's debt, which prevents the operation of the Statute of Limitations, will prevent the statute being pleaded in bar by residuary legatees amongst whom the residue has been distributed whilst the debt was unpaid. *Ibid.*

Acknowledgment by executor, in his character of executor, of testator's debt will not affect the testator's real estate (not charged with payment of debts) of which the executor is also devisee in trust, nor prevent the operation of the Statute of Limitations in regard to such real estate and the interest therein of the *cestui que trust*. *Ibid.*

The Court will not marshal the assets of a testator at the instance of a creditor whose immediate right against the real estate is barred by the Statute of Limitations. *Ibid.*

A B owed C D three sums on three several promissory notes. More than six years after the dates of two of the notes C D applied for interest, and A B paid 5*l.* on account of interest generally. A few days afterwards, C D, without the knowledge or concurrence of A B, made a memorandum on the third note of the payment having been made on account of interest thereon:—Held, that this pay-

ment was not such an unequivocal acknowledgment of the third debt as to prevent the operation of the Statute of Limitations. *Nash v. Hodgson*, 23 Law J. Rep. (N.S.) Chanc. 780; Kay, 650.

A and B had an unsettled account together. In 1845 A signed the following memorandum—"It is agreed that B in his general account shall give credit to A for 174*l.* for bricks delivered in 1834." A died in 1847, having, by his will, charged his debts on his real estates, and a suit was instituted for the administration of his estate:—Held (overruling a decision of one of the Vice-Chancellors), that this was not such an acknowledgment, within section 1. of Lord Tenterden's Act, as to give B a right to an account against A's estate for more than six years before A's death. *Hughes v. Paramore*, 24 Law J. Rep. (N.S.) Chanc. 681.

Where an indorsement on a promissory note of payment of interest made by the authority of a deceased holder, appears to have been made after the Statute of Limitations had run, it is not evidence to exclude the operation of the statute. *Briggs v. Wilson*, 5 De Gex, M. & G. 12; 17 Beav. 330.

Where the Statute of Limitations had run against a debt due from the testator before his death, and the executor wrote thus to the creditor:—"The legatees object to my paying the claim, though I think it just;" and "I not only do not dispute the claim, but admit it, thinking it just, but am compelled to refuse payment without an order of the Court:"—Held, that the debt was not revived, and that the real estates could not be subjected to it by any act of the devisees in trust, though they were also executors. *Ibid.*

Where an executor does not set up the Statute of Limitations on a creditor's administration summons, the residuary legatees cannot set it up against the plaintiff. *Ibid.*

Secus as to *cestuis que trust* of devised estates who would have been necessary defendants, but for the Chancery Amendment Act. *Ibid.*

Evidence of verbal admissions in 1850 by A, since deceased, that he owed a debt of 2,300*l.* to B's estate, the interest of which he had managed to discharge, and was discharging, by paying two annuities bequeathed by B's will, together with a statement in an affidavit made by B's executor in 1850, which was inserted in the draft affidavit from the dictation of A, to the effect that B's executor had received in August 1850 from A, a half-year's interest on 2,300*l.*, and had paid the said annuities the same half-year:—Held, sufficient to take the debt of 2,300*l.* out of the Statute of Limitations. *Edwards v. Jones*, 1 Kay & J. 534.

To prevent the right to have an account from being barred by the Statute of Limitations, it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that the account is pending, and a promise to pay the balance if it shall be found to be against the accounting party. *Prance v. Sympton*, Kay, 678.

A having a claim for an account against B and C, in respect of a former partnership between them, wrote to B: "C, before he goes ought to settle the Bridgewater and Minehead account, because if he is under any idea that there is a balance due to him he is grossly mistaken, as such balance is due to yours

ever A." B answered, "My dear A.—Bridgewater and Minehead: I have had a long talk with my partner about this matter; he says, and insists, that there is a large balance coming to him, but I have put the matter right with him, and you and I must go into it and settle the account. It is necessary that we should sit down to this matter and put it on the square":—Held, that this was sufficient acknowledgment of the right to an account, and promise to pay anything that might be due, to save the right to sue for an account in equity from being barred by the statute. *Ibid.*

A gave to B a promissory note, dated October 1834, for 837*l.* 1*s.* 6*d.*, payable on demand. In December 1834 demand was made, and A then promised to pay interest, and signed an unstamped memorandum, dated the 2nd of December 1834, as follows:—"I promise to pay to B 837*l.*, with 4*l.* per cent. interest thereon, A." Neither principal nor interest was paid; but in January 1848, A wrote to B a letter referring to a promissory note for a debt which he acknowledged and promised thereby to pay:—Held, that the memorandum of December 1834, and a letter accompanying it, shewed that interest was running, and that though in form a promissory note, and unstamped, it could be looked at to see to what debt this interest was to be referred; and that as no other debt was proved to exist, the 837*l.* there mentioned was to be assumed to be part of the 837*l.* 1*s.* 6*d.* secured by the former promissory note. *Spickernell v. Hotham*, Kay, 669.

Held, also, that in the absence of proof of the existence of any other promissory note, to which it could relate, the letter of 1848 must be taken to refer to the promissory note of October 1834, and thus to take it out of the Statute of Limitations. *Ibid.*

By a marriage settlement, dated in 1828, A covenanted to transfer a sum of stock belonging to him to trustees, upon trust to pay the dividends to himself for life, and then upon trusts for the benefit of the intended wife and the issue of the marriage. The stock was not transferred:—Held, that A was not a trustee of it within the exception of the Statute of Limitations, but that it was a debt from him; and that, notwithstanding his life interest, time began to run against this debt from the execution of the settlement. *Ibid.*

In 1825 A borrowed from the executors in trust of a will, a fund which was thereby bequeathed to them in trust for himself for life, and then for other persons, and gave to them a promissory note for the repayment of this sum to them as "executors in trust, with lawful interest":—Held, that A borrowed the fund and promised to repay it as trust money, and therefore that lapse of time was no bar to the claim against him for payment. *Ibid.*

(b) Part Payment.

In 1832 A employed B and C, then in partnership as attorneys, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid the 500*l.* to C, who, however did not inform either B, his partner, or A of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838;

but both before and after the dissolution, and after the death of A, which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A and his representatives up to 1848 by C. In 1846 the 300*l.* was paid to C, and the mortgage deed was given up by C, but no re-conveyance was ever executed. Neither A nor his representatives had any knowledge of these facts until 1848. Entries had been made by C in the partnership books of the receipts and payments, but B had no knowledge of the transaction subsequent to the original advance of the 500*l.*:—Held, in an action by the executors of A against B and C, that the Statute of Limitations was a bar to the action. And, *semble*, that B was not liable for these acts of C, as they were not within the scope of his partnership authority. *Sims v. Bruton*, 20 Law J. Rep. (N.S.) Exch. 41; 5 Exch. Rep. 802.

A parol admission made by a party that he has within six years paid part of the principal or interest of a debt accrued more than six years ago, is sufficient to take the case out of the Statute of Limitations; overruling *Willis v. Newham*. *Cleave v. Jones* (in error), 20 Law J. Rep. (N.S.) Exch. 238; 6 Exch. Rep. 573.

Assumpsit. First count on a promissory note of the defendant for 500*l.*, dated the 7th of December 1845; second count on a similar note, dated 20th of January 1846, both payable on demand to J. Clark the testator; third count, money lent; fourth count, account stated. Pleas to the first and second counts, first, payment; second, that after the making of the notes, and before demand of the principal or interest, and before any breach of the promises, J. Clark exonerated and discharged the defendant from payment of the notes; third, that after making the notes it was agreed between J. Clark and the defendant that the latter should purchase with his own money a piece of paper marked with a 10*s.* receipt stamp, and should fill up and write on it thus:—"Hull, Feb. 16, 1846.—Received of R. Dawber (the defendant) the sum of 1,080*l.*, being the principal and interest on two notes, dated December 1845 and January 1846, in full of all demands;" that the defendant should suffer J. Clark to sign his name, and that such purchase of the paper and such writing out and filling up, and permitting J. Clark to sign it, should be accepted by J. Clark in full satisfaction and discharge of the said causes of action. Fourth plea, to the third and fourth counts, non assumpsit; fifth, to the same, payment; sixth, to the same, the Statute of Limitations; seventh, to the same, a plea similar to the third plea. In 1835 J. Clark agreed to lend the defendant 1,000*l.* on receiving two promissory notes of 500*l.* each. The notes were given, and the interest thereupon regularly paid by the defendant to J. Clark, who on receiving it was in the habit of indorsing a memorandum on the back of the notes. The backs of the notes being at length entirely covered, J. Clark proposed that the notes should be cancelled and others substituted, which was accordingly done and the notes in question given by the defendant. In February 1846 J. Clark, expressing a wish to make the defendant a present of the 1,000*l.*, directed him to buy a 10*s.* stamp and draw out a receipt for 1,000*l.*, and 80*l.* for interest, which having been done and the receipt having been signed by Clark, no further interest was paid. J. Clark sub-

sequently died, having previously bequeathed the notes in question to his executors, with certain directions as to the investment of the proceeds:—Held, that the giving of the receipt was not a part payment or acknowledgment of the debt, so as to take the case out of the Statute of Limitations; and that the renewal of the two notes in January 1846 could not be considered as a promise so as to render the defendant liable by a new promise to pay the original notes. *Foster v. Dauber*, 20 Law J. Rep. (N.S.) Exch. 385; 6 Exch. Rep. 839.

A declaration against husband and wife stated that the wife *dum sola*, together with J. A., made their joint and several promissory note payable to the plaintiff, and the wife *dum sola* promised to pay the same to the plaintiff. The declaration was (after issue) amended by adding, that the husband after the marriage, in consideration of the premises, promised to pay the plaintiff the said note. The defendants pleaded the Statute of Limitations. The evidence was, that the note was made in 1837, and that interest was paid on it regularly until 1843, when the defendants married. On the 10th of August 1844, a year's interest was paid by the female defendant, but without her husband's privity. The action was commenced on the 2nd of August 1850:—Held, that, under these circumstances, no promise was proved within six years, as none could have been made by the wife *dum sola* within that period, and as the payment made by the wife within six years was without her husband's privity, no promise by him could be inferred. *Neve v. Holland*, 21 Law J. Rep. (N.S.) Q.B. 289.

Semble—that the declaration as amended was bad in arrest of judgment. *Ibid*.

One of three makers of a joint and several promissory note having become insolvent, the name of the plaintiff as holder was duly inserted in his schedule, and a dividend was subsequently paid to him by the assignee of the insolvent in respect of the note:—Held, that this was not a part payment to take the case out of the Statute of Limitations as against the other makers. *Davies v. Edwards*, 21 Law J. Rep. (N.S.) Exch. 4; 7 Exch. Rep. 22.

Payment of interest on a promissory note payable on demand, is a sufficient acknowledgment to bar the Statute of Limitations, although no previous demand has been made. *Bradfield, or Bamfield, v. Tupper*, 21 Law J. Rep. (N.S.) Exch. 6; 7 Exch. Rep. 27.

In an action by the executor of the payee of a promissory note against the maker, where the plaintiff, in order to take the case out of the Statute of Limitations, produced a book in which he had made memorandums by the direction of the testatrix, of payments of interest by the defendant to the testatrix within six years, the evidence was held admissible, and not excluded by the 9 Geo. 4. c. 14. s. 3. *Bradley v. James*, 22 Law J. Rep. (N.S.) C.P. 193; 13 Com. B. Rep. 822.

F, a mortgagor, assigned the equity of redemption by a deed, which contained a recital that all the interest had been paid upon the mortgage up to a period within twenty years of the commencement of the action, and a covenant by the assignee to pay the principal and future interest to the mortgagee, and to indemnify the mortgagor in case of default. The mortgagee was no party to the deed, but continued to receive the interest upon the mortgage from the

assignee of the equity of redemption:—Held, in an action by the mortgagee against the mortgagor on the covenant, that the recital in the deed was evidence of an acknowledgment by part payment of interest within twenty years. *Forsyth v. Bristowe*, 22 Law J. Rep. (N.S.) Exch. 255; 8 Exch. Rep. 716.

Held, also, that payment of the interest by the assignee of the equity of redemption was a sufficient acknowledgment to take the case out of the statute as against the mortgagor. *Ibid*.

Quære—whether the recital in the deed was an acknowledgment in writing of the debt being due to take the case out of the statute, it not being made to the person entitled thereto. *Ibid*.

Where a bill of exchange is delivered by a debtor to his creditor in payment on account of a larger sum then due, under such circumstances as to raise the implication of a promise to pay the remainder, it amounts to a payment within the meaning of the exception in the 9 Geo. 4. c. 14. s. 1, and answers the Statute of Limitations as from the time of such delivery, whether the bill be subsequently honoured or not. *Turney v. Dodwell*, 23 Law J. Rep. (N.S.) Q.B. 137; 3 E. & B. 136.

In January 1833 A gave B, then a *feme sole*, his note for 246*l*. B, after having received part of the amount, died in 1834, leaving her husband, the plaintiff, surviving and one child. The plaintiff did not then take out letters of administration, but arranged with A that the interest on the note should go towards the maintenance of B's child, then under the care of A. In September 1839 A and the plaintiff settled their accounts, and A indorsed on the note a memorandum that all the interest was paid up to that date, but no money passed. In 1848 the child died. In 1853 the plaintiff took out letters of administration, and brought an action, as administrator, against A to recover the amount of the note, alleging a promise by A to himself as administrator after the death of B:—Held, *per Alderson, B., Platt, B. and Martin, B. (dubitante Parke, B.)* that there was a payment of interest sufficient to take the case out of the Statute of Limitations, the maintenance of the child being treated by the parties as a money payment equivalent to the interest. *Bodger v. Arch*, 24 Law J. Rep. (N.S.) Exch. 19; 10 Exch. Rep. 333.

(D) PLEADING AND EVIDENCE.

[See Stat. 15 & 16 Vict. c. 76. s. 12.]

Upon a replication to a plea of the Statute of Limitations, stating that the cause of action did accrue within six years next before the commencement of the suit, in order to prove that issue for the plaintiff where the writ actually served has been issued subsequently to the expiration of the six years, it must be shewn that the writ served had upon it at the time of service the indorsement required by the 2 Will. 4. c. 39. s. 10—confirming *Medlicott v. Hunter*. *Pritchard v. Bagshawe*, 20 Law J. Rep. (N.S.) C.P. 161; 11 Com. B. Rep. 459; 2 L. M. & P. P.C. 323.

The above requirement is not satisfied by the mere production of the writ at the trial, containing the proper indorsement. *Ibid*.

Nor is the roll containing an entry of the several writs, and stating with reference to the writ served that "such writ contains the indorsement," evidence that it contained the indorsement when it was served. *Walker v. Collick* explained. *Ibid*.

Quære—whether, in the same case, the indorsements on the several writs are required by section 10. of the 2 Will. 4. c. 39. to be made by the party or his attorney, and whether they must be proved to have been so made in order to save the Statute of Limitations. *Ibid*.

Debt. Plea, set-off alleging that the amount due from the plaintiff to the defendant equalled the plaintiff's claim. Replication, as to the plea, so far as it related to 49*l*. 16*s*. 10*d*. parcel, &c., the Statute of Limitations, concluding with a verification, and as to the residue that the plaintiff was not nor is indebted *modo et forma*:—Held, on special demurrer, that the replication was bad. *Mead v. Bashford*, 20 Law J. Rep. (N.S.) Exch. 190.

The proper replication in such case would be, that part of the set-off was barred by the Statute of Limitations, and that the plaintiff was not indebted to the defendant in any sum which (with the part so barred) equalled the amount of his demand. *Ibid*.

A bill was filed against a lunatic and his committee, in respect of a pecuniary claim against the lunatic, and the answer was filed in June 1848. The lunatic died in June 1849, and a bill of revivor and supplement was filed against his administrator in September 1849, whose answer was filed in December 1849, in which the benefit of the Statute of Limitations was claimed. In March 1849, while witnesses were in the course of being examined, a motion was made that a supplemental answer might be put in to the original bill, claiming the benefit of the Statute of Limitations. The motion was refused. *Percival v. Camey*, 20 Law J. Rep. (N.S.) Chanc. 42.

Whether the benefit of the Statute of Limitations might be claimed at the hearing of the causes under the above circumstances—*quære*. *Ibid*.

A testator devised and bequeathed his personal estate and a portion of his real estate to his executor, the plaintiff, subject to debts. The other portion of his estate he gave to the defendant, charged with a specific debt. The executor sold the estate devised to himself and paid debts; but other debts remaining due, the rest of the real estate was ordered to be sold under the statute 3 & 4 Will. 4. c. 104. The executor claimed, as against the proceeds of this estate, a debt due to himself, which was barred by the Statute of Limitations:—Held, that the devisee might set up the statute, and the plaintiff's claim could not be sustained. *Dring v. Greetham*, 23 Law J. Rep. (N.S.) Chanc. 156.

Where a defendant is out of the jurisdiction, and the bill prays process against him when he shall come within it, the operation of the Statute of Limitations is suspended, though he has neither been served nor appeared in the suit. *Hill v. Lord Bexley*, 20 Beav. 127.

LOTTERY.

A company, consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot. In connexion with this company there was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the company; and as part of the same concern, a bank in which the subscribers of the company might place their savings for purchasing their land from the company. The Judge, in an action of libel, having directed the jury that the whole of this scheme was illegal, on the grounds of its being contrary to the Lottery Acts and also to the Bank Act,—Held, that the scheme being illegal, as being contrary to the Bank Act, there was no misdirection. *O'Connor v. Bradshawe*, 20 Law J. Rep. (N.S.) Exch. 26; 5 Exch. Rep. 882.

Quære—whether it was contrary to the Lottery Acts. *Ibid*.

To a declaration in covenant the defendant pleaded that, before the making of the covenant, it was unlawfully agreed between the plaintiff and the defendant that the defendant should sell and the plaintiff purchase certain lands for a certain sum of money, to the intent and in order and for the purpose, as the plaintiff at the time of making the agreement well knew, that the lands should be sold by lottery contrary to the statute; that afterwards, in pursuance of the said illegal agreement, the said lands were conveyed to the defendant, and a part of the purchase-money for the same being unpaid, the defendant to secure the payment thereof made the covenant declared on. A verdict being found for the defendant on the issue on this plea, the plaintiff obtained judgment *non obstante veredicto*.—Held, in error, reversing the judgment below, that the plea was good, that after verdict it ought to be taken to mean that the covenant was given in pursuance of the illegal agreement, and, even if not so understood, that the covenant could not be enforced, since it was given as a security for the payment of money due under an illegal contract. *Bridges v. Fisher* (in error), 23 Law J. Rep. (N.S.) Q.B. 276; 3 E. & B. 642: in the court below, *Fisher v. Bridges*, 22 Law J. Rep. (N.S.) Q.B. 270; 2 E. & B. 118.

LUNATIC.

[See BARON AND FEME—MORTGAGE—PARTNERS—PRACTICE—WITNESS.]

- (A) CONTRACTS AND CONVEYANCES.
- (B) PROPERTY OF.
- (C) ALLOWANCE OUT OF ESTATE OF.
- (D) MAINTENANCE.
 - (a) *Application of Property for.*
 - (b) *Justices' Orders for Maintenance and Settlement.*
 - (1) *Under 8 & 9 Vict. c. 126.*
 - (2) *Costs and Expenses.*
 - (3) *Prior Order unappealed against.*
 - (4) *Appeal against.*

(E) COMMITTEE.

(F) CUSTODY AND CONTROUL.

(G) COMMISSION.

(a) *Leave to attend Execution of.*

(b) *Superseding.*

(c) *Costs of.*

(H) PRACTICE.

(I) COUNTY ASYLUM.

(A) CONTRACTS AND CONVEYANCES.

A contract having been made between the plaintiff, who was insane, and the defendant, which it was sought to set aside,—Held, upon an issue as to whether the defendant had notice of such insanity, that evidence was admissible of the plaintiff's conduct both before and after the signing of the contract, in order to shew that the character of his disease was such that it must have developed itself to one having the opportunity of observation afforded to the defendant, though a stranger. *Beavan v. M'Donnell*, 23 Law J. Rep. (N.S.) Exch. 326; 10 Exch. Rep. 184.

The plaintiff contracted for the purchase of an estate from the defendant, and paid a deposit on the terms that unless he objected to the title within a certain time the same should be considered as accepted. No objection was made by him to the title. The plaintiff at the time of the contract and of the payment of the deposit was a lunatic, incapable of understanding the meaning of a contract or of managing his affairs, and derived no benefit from the contract; but these facts were unknown to the defendant, who made the contract with him fairly and *bonâ fide*, believing him capable of understanding the meaning of the same:—Held, that the plaintiff was not entitled to recover the deposit notwithstanding he was a lunatic incapable of contracting or of understanding the meaning of contracts. *Beavan v. M'Donnell*, 23 Law J. Rep. (N.S.) Exch. 94; 9 Exch. Rep. 309.

A bill was filed to set aside a deed of conveyance twenty-seven years after its execution, on the ground of the lunacy of the grantor and other collateral circumstances of fraud. At the hearing of the cause these collateral circumstances were not established:—Held, dismissing the bill, that the plaintiff was not entitled to an issue to try the question of the lunacy of the grantor. *Price v. Berrington*, 3 Mac. & G. 486.

Whether a conveyance executed by a lunatic is absolutely void in the absence of notice of the lunacy to the party claiming under the conveyance, and of all circumstances of fraud—*quære*. *Ibid*.

Whether such a conveyance is voidable; and, if so, under what circumstances—*quære*. *Ibid*.

Such a conveyance executed under circumstances of fraud, the lunacy being one of these circumstances, might be set aside. *Ibid*.

(B) PROPERTY OF.

[See *post*, (D) (a).]

A lunatic, who, previously to his lunacy, professed the Roman Catholic religion, was tenant in tail of an advowson. The Court refused to make an order for the sale of the next presentation to the living, money not being wanted for the purposes specified in the 28th section of the 1 Will. 4. c. 65.

In re Vavasour, a lunatic, 20 Law J. Rep. (n.s.) Chanc. 619; 3 Mac. & G. 275.

A fee simple freehold estate was the property of a lunatic, and was ordered by the Court to be sold under the 2nd section of the statute 9 Geo. 4. c. 78, and the proceeds being more than enough to answer the purposes of the sale, the surplus was paid into court, and invested. The lunatic never recovered, and died, and his heir-at-law was unable to elect whether to take the surplus as real or personal estate, and died; and upon the petition by his heir-at-law,—Held, that the surplus had the character of realty impressed upon it by the 2nd section of the act, and so remained through all successive descents until some person, capable of electing, should elect to take the same as personally, and the money was ordered to be paid to the last-named heir-at-law. *In re Wharton*, 23 Law J. Rep. (n.s.) Chanc. 522; 5 De Gex, M. & G. 33.

Investment of a fund belonging to a lunatic in an annuity for his life. *In re Dodsworth's Trust*, 10 Hare, 16.

Order made on the application of the curator of a lunatic resident in Holland for the transfer to him of the corpus of funds in England to which the lunatic was entitled. *In re Elias*, 3 Mac. & G. 234.

In a case where the dissolution of a partnership had been decreed in consequence of the lunacy of one of the partners, and large sums had been paid into court to the separate account of the lunatic in respect of his share of the capital and profits of the business, the Lord Chancellor, on being subsequently satisfied of the complete recovery of the lunatic, ordered the fund to be paid out to him. *Leaf v. Coles, in re Coles*, 1 De Gex, M. & G. 417.

Mode of proceeding in such cases. *Ibid*.

The wife of a lunatic entitled to a share of residue of an intestate's personal estate, filed a bill against her husband praying a settlement of the fund on herself and children. After inquiries in the lunacy, the committee was authorized to assent to a settlement of one-half of the fund, and by an order made in the cause it was referred to the Master to approve of a settlement. The Master accordingly approved of a settlement, by writing at the foot of the draft, and no further proceedings were had when the lunatic died. The wife subsequently died, having by will disposed of the entire fund:—Held, that the proposals in the Master's office had not been proceeded with to such a stage at the time of the lunatic's death as to preclude his wife from retiring from the proposed settlement, and the Court ordered the whole amount of the fund to be paid to the representatives of the wife. *Baldwin v. Baldwin*, 5 De Gex & Sm. 319.

(C) ALLOWANCE OUT OF ESTATE OF.

Where a lady who had separate property married, and an agreement was made that out of her income certain domestic expenses should be defrayed, and the agreement was acted upon until her lunacy, and the husband continued the same expenses out of her property till his death; and where the lady was under a moral obligation to give her nephew 500*l.*, part of which she gave, and a further part her husband, after her lunacy, paid out of her property; the Court allowed the executors of the husband to deduct all

the money paid for keeping up the establishment, after the lunacy, till his death, and also the money paid by him to the nephew, before paying over the separate income of the wife to her committees. *In re Hewson*, 21 Law J. Rep. (n.s.) Chanc. 825.

(D) MAINTENANCE.

(a) Application of Property for.

A fund belonging to a pauper lunatic was paid by the trustees into court under the 10 & 11 Vict. c. 96. On the petition of the guardians of the poor, an order was made for the payment to them out of the fund of the expenses incurred by the parish in the support of the lunatic. *In re Upfull's Trust*, 21 Law J. Rep. (n.s.) Chanc. 119; 3 Mac. & G. 281.

A person of unsound mind, not found lunatic by inquisition, was entitled to sums of stock in court, the income of which was not sufficient for her maintenance. The Court directed that a part of one of the funds should be invested in the purchase of a Government annuity, in the name of the lunatic and for her life, to be paid to her brother until the further order of the Court, he undertaking to apply the same towards her maintenance. *Davies v. Davies, In re Davies*, 21 Law J. Rep. (n.s.) Chanc. 419; 2 De Gex, M. & G. 51.

Order made by the Master of the Rolls, directing the dividends of a sum in court belonging to a person of unsound mind, though not so found by inquisition, to be paid to her father for her maintenance. *In re Berry*, 13 Beav. 455.

A fund producing upwards of 200*l.* a year belonging to A B, a person of unsound mind, but not so found by inquisition, was paid into court under the Trustee Relief Act. A petition to the Master of the Rolls for the application of the income towards his maintenance was refused. *In re Irby*, 17 Beav. 334.

On the petition of the committee of the person and estate of a lunatic, reference directed to inquire as to the expediency of raising a fund for his maintenance by sale of his reversionary interest in realty. *In re Burbidge*, 3 Mac. & G. 1.

On the petition of the lunatic's further tenant for life of large landed estates, the Lord Chancellor declined to make an order under the act 16 & 17 Vict. c. 70, charging the estate of the lunatic tenant in tail in remainder with a sum found by the Master to be proper for the lunatic's maintenance, there being no special circumstances nor any evidence that the state of the petitioner's family was such as to make the charge just or reasonable. *In re Pugh*, 3 De Gex, M. & G. 416.

(b) Justices' Orders for Maintenance and Settlement.

(1) Under 8 & 9 Vict. c. 126.

The Court will take judicial notice that a city is a county of a city. Where, therefore, an order for the payment of the expenses and maintenance of a lunatic pauper was expressed throughout to be made by two Justices of the Peace "in and for the city of York,"—Held, that such order was valid under the 8 & 9 Vict. c. 126. s. 62, the word "county" in that section being by the 84th section interpreted to mean "county of a city." *Regina v. St. Maurice*, 20 Law J. Rep. (n.s.) M.C. 221; 16 Q.B. Rep. 908.

S, being about to be tried on a charge of murder, con-

veyed an estate in the township of H. to trustees upon certain trusts, subject to a previous mortgage to L, and was afterwards acquitted on the ground of insanity. L then sold the estate, and after satisfying his mortgage debt and costs, there remained a balance of 100*l.* in his hands. An order of settlement, and for the maintenance of S in the lunatic asylum to which he had been removed, was made on the township of H under the 3 & 4 Vict. c. 54. s. 2; and thereupon the overseers of H obtained an order, under the same section, for the recovery of the costs of maintenance out of the lunatic's estate, and demanded the balance in L's hands, which he refused to pay over:—Held, that the above section did not apply to the recovery of money so held, and that the order could not be enforced by mandamus. *In re Simpson's Trust Estate, ex parte the Overseers of Old Hutton*, 20 Law J. Rep. (n.s.) M.C. 231.

Where an order for the payment of expenses and maintenance of a pauper lunatic is made, under the 8 & 9 Vict. c. 126. s. 62. upon the parish in which he is adjudged to be settled, no notice of chargeability is required to be sent by the parish obtaining the order; the requirement of a notice of chargeability being a regulation relating to removals, and not to appeals against removals, and therefore not incorporated into the 8 & 9 Vict. c. 126. s. 62. *Regina v. the Inhabitants of Minster*, 20 Law J. Rep. (n.s.) M.C. 48; 14 Q.B. Rep. 349.

The order of maintenance recited a prior order for the removal of the lunatic to the asylum, and an order adjudging his settlement to be in the appellant parish, and stated that the pauper from the time of being sent to the asylum to the time of making the order of maintenance had been maintained at the expense of the appellant parish:—Held, that it sufficiently shewed that the pauper was chargeable. *Ibid.*

The certificate upon which a pauper lunatic was removed to an asylum under the 8 & 9 Vict. c. 126. s. 48. purported to be, and was in fact, given by a surgeon, but it did not follow the form in Schedule E, No. 1. to that act, in stating that he was a member of the College of Surgeons, &c., or in giving his place of abode:—Held, that although the keeper of the asylum might be guilty of a misdemeanour under section 51. for receiving the lunatic without a certificate in the prescribed form, yet the confinement did not thereby become unlawful, and the lunatic being *de facto* confined in the asylum, the jurisdiction of Justices to adjudge the settlement under section 58, and to make an order for costs under section 62. attached. *Ibid.*

The 12 & 13 Vict. c. 103. s. 5. extends to the maintenance of a pauper lunatic born in Ireland, who has acquired no settlement in England, but has become irremovable by reason of five years' residence in a parish within a union in England; and in such a case the burthen of maintaining the pauper in an asylum is cast upon the common fund of the union. *Regina v. Arnold*, 21 Law J. Rep. (n.s.) M.C. 180.

(2) Costs and Expenses.

The 12 & 13 Vict. c. 103. s. 5. provides, that all the costs, &c. incurred or thereafter to be incurred, in and about the obtaining any order of Justices for the removal and maintenance of a lunatic pauper who shall have been or shall be removed under any order to any asylum, &c., and who if not a lunatic

would have been exempt from removal by reason of the 9 & 10 Vict. c. 66, shall be borne by the common fund of the union comprising the parish where such lunatic was resident when he was so removed to such asylum:—Held, that these words must be read to include the expenses of maintenance as well as those of obtaining the order of removal to the asylum, both of which were, under the circumstances specified, to be borne by the union comprising the removing parish. *Regina v. the Overseers of Wigton*, 20 Law J. Rep. (n.s.) M.C. 110; 16 Q.B. Rep. 496.

The 12 & 13 Vict. c. 103. s. 5, providing that the costs and expenses of the removal and maintenance of a lunatic pauper removed to any asylum, and who if not a lunatic would have been exempt from removal under the 9 & 10 Vict. c. 66, shall be borne by the common fund of the union comprising the parish where such lunatic was resident when removed to the asylum, applies to a union formed under Gilbert's Act, 22 Geo. 3. c. 83. *Regina v. the Inhabitants of Priest Hutton*, 20 Law J. Rep. (n.s.) M.C. 226.

By 1 & 2 Vict. c. 14. s. 2, where any person is apprehended under circumstances denoting a derangement of mind and a purpose of committing a crime for which, if committed, he would be liable to be indicted, two Justices of the county in which such person is apprehended, on proof that he is insane or a dangerous idiot, may by an order cause such person to be conveyed to the county lunatic asylum, "and it shall be lawful for the said Justices to inquire into and ascertain, by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person or dangerous idiot, the place of the last legal settlement of such person," and to make an order on the overseers of the parish where they adjudge him to be settled, for the costs of examining and conveying him to the asylum, and of his maintenance in the asylum; "and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, &c. where such person shall have been apprehended:—Held, that the jurisdiction of the two Justices to inquire into the settlement of the lunatic was not limited to the time of making the order by which he was conveyed to the asylum, but might be exercised at any subsequent time, and that no order could be made on the county for the expenses, until they had inquired into and failed to ascertain the place of settlement. *Regina v. the West Riding of Yorkshire*, 20 Law J. Rep. (n.s.) M.C. 18; s.c. nom. *Regina v. Elsley*, 15 Q.B. Rep. 1025.

By section 3. of the same act an appeal is given to the overseers, &c. of the parish in which the Justices shall adjudge any such insane person to be settled, "in like manner and under like restrictions and regulations as against any order of removal," giving reasonable notice to the clerk of the peace of the county, &c., who is to be respondent in such appeal:—Held, that these provisions come into operation only when an appeal has been commenced, and that, therefore, the keeper of the asylum was a proper person to serve the notice of chargeability and other documents required by the Poor Law Acts to be sent to the overseers of the parish to be affected by the order of adjudication of settlement. *Ibid.*

The 12 & 13 Vict. c. 103. s. 5, which enacts that the cost of maintenance of a lunatic pauper, who if

not a lunatic would have been irremovable under the 8 & 9 Vict. c. 66, shall be borne by the common fund of the union, and not by the parish of settlement, is confined to cases where the lunatic is removed to an asylum under an order of Justices, and does not apply where the removal to the asylum was under the order of an officiating clergyman and a relieving officer, according to the 8 & 9 Vict. c. 126. s. 48; in which case the order for maintenance must be made on the parish where the lunatic is adjudged to be settled. *Regina v. the Inhabitants of St. Leonard, Shoreditch*, 22 Law J. Rep. (N.S.) M.C. 51; 14 Q.B. Rep. 340.

(3) Prior Order unappealed against.

A prior order of removal quashed on appeal upon the question of settlement is conclusive evidence between the same parties that the pauper was not then settled in the parish to which he was ordered to be removed, whether the subsequent inquiry be for the adjudication of the settlement and maintenance of a lunatic under the 8 & 9 Vict. c. 126. s. 58, or an ordinary case of removal of the pauper. *The Churchwardens, &c. of Heston v. the Churchwardens, &c. of St. Bride*, 22 Law J. Rep. (N.S.) M.C. 65; 1 E. & B. 583.

An order, removing J S from A to B, founded on a birth settlement in 1804, was made on the 7th of February 1852. This order was quashed on appeal upon the merits. In October 1852, J S being then confined in a lunatic asylum, an order adjudicating his settlement to be in B, and ordering B to pay the costs of his maintenance, was obtained by A, founded on a settlement acquired by J S in B in 1831:—Held, that the prior decision estopped A from obtaining the latter order. *Ibid.*

(4) Appeal against.

The 80th section of the Pauper Lunatic Act, the 8 & 9 Vict. c. 126, gives no right of appeal against the order of two Justices, under the 59th and 63rd sections, adjudicating a pauper lunatic to be chargeable to a county, and directing payment by the treasurer of the county of the expenses of his maintenance. *Regina v. Wilson*, 20 Law J. Rep. (N.S.) M.C. 233; s.c. nom. *Wilson v. the Overseers of Liverpool*, 17 Q.B. Rep. 303.

It cannot be made a valid ground of appeal against an order for the maintenance of a lunatic pauper under the 8 & 9 Vict. c. 126. that the order adjudicating the place of the pauper's settlement was made on hearsay evidence only, the 3rd section of the 11 & 12 Vict. c. 31, which does away with all objections to the depositions taken when an order is made, applying equally to orders of removal and orders of maintenance. *Regina v. St. Peter in Barton-on-Humber*, 21 Law J. Rep. (N.S.) M.C. 23; 17 Q.B. Rep. 630.

An appeal against an order for the maintenance of a lunatic pauper must be to the Quarter Sessions having jurisdiction in the place from which the lunatic was removed to an asylum. Where, therefore, a lunatic pauper was removed to an asylum from a parish wholly within the borough of Liverpool, and afterwards an order was made in the borough by two Justices of the county adjudicating the pauper's settlement, and for his maintenance:—Held, that the appeal against the latter order

under the 8 & 9 Vict. c. 126. s. 62. was exclusively to the Quarter Sessions of the borough. *Regina v. the Justices of Lancashire*, 21 Law J. Rep. (N.S.) M.C. 164.

In the case of an appeal against an order for the maintenance of a lunatic, notice of appeal must be given within twenty-one days after service of the notice of chargeability or of the particulars of settlement, and if no such notice or particulars have been served, then within twenty-one days after service of the order of maintenance. *Regina v. the Justices of Derbyshire*, 22 Law J. Rep. (N.S.) M.C. 147; 1 Bail C.C. 198.

A notice of appeal against an order adjudicating the settlement of a pauper lunatic, stated an intention of appealing to the next Sessions to be held for the borough of S. The appellants and respondents appeared at the borough sessions in pursuance of this notice, when the latter objected that the appeal lay to the county sessions, and not to those of the borough, upon which objection the Recorder dismissed the appeal. The appellants then entered and resited the appeal at the county sessions, which were held the next day, and at the following county sessions the Court refused to hear the appeal, on the ground that no valid notice of appeal had been given:—Held, that they had decided rightly, as the appellants, having acted upon the notice as a notice of appeal to the borough sessions, could not afterwards treat it as a notice of appeal to the county sessions. But where a notice of appeal erroneously states an intention to appeal to a borough sessions, and no steps are taken upon it by either party as a notice for those sessions, the words relating to the place may be rejected as surplusage, and the notice treated as a notice of appeal to the county sessions. *Regina v. the Justices of Salop*, 24 Law J. Rep. (N.S.) M.C. 14; 4 E. & B. 257; s.p. *Regina v. the Justices of Buckingham*, in a note to the above case.

On the trial of an appeal against an order of maintenance of a lunatic pauper, the appellants, to prove an application for copies of the depositions so as to bring themselves within the 11 & 12 Vict. c. 31, s. 9, shewed that their overseer wrote a letter to the clerk of the Justices who made the order, and that three days afterwards he received by post copies of the depositions, which he produced. The letter was not produced, and secondary evidence of its contents was rejected. The Sessions having dismissed the appeal on the ground that there was no sufficient evidence of an application for the depositions, this Court refused to grant a mandamus to them to hear the appeal. *Regina v. the Justices of the West Riding*, 2 L. M. & P. P.C. 651.

(E) COMMITTEE.

The heir-at-law of a lunatic, who with one other person was the next-of-kin of the lunatic, was appointed committee of his person. Another party being proposed, was approved of by the Master in Lunacy as committee of the estate. The committee of the person proposed himself as one surety for the committee of the estate. The Attorney General was willing to accept this security, but declined to do so without the sanction of the Court. An order was made that, upon the allowance to the lunatic being paid direct to the committee of the person, instead of passing intermediately through the hands of the com-

mittee of the estate, the committee of the person be accepted as one of the sureties for the committee of the estate, the general rule, however, to remain unaltered. *Ex parte Mount, in re Burton*, 21 Law J. Rep. (N.S.) Chanc. 221.

A lunatic was made a defendant as one of the next-of-kin of an intestate. He and his committee presented a petition entitled in the suit, and also in the lunacy, praying that the lunatic might defend by his guardian, and that the committee might be appointed such guardian. The committee prayed that, as such, he might be at liberty to prosecute the claim of the lunatic as next-of-kin, and that all such costs as should be properly incurred, and as should not be paid out of the estate to be administered in the suit might be raised and paid out of the lunatic's estate. The Court gave liberty to the committee to defend the suit, but refused to appoint a guardian as being unnecessary, or to make any prospective order as to costs, and directed the title in the cause to be struck out. *In re Manson*, 21 Law J. Rep. (N.S.) Chanc. 249.

A sum of money having been lost to the estate of the lunatic under circumstances which the Court considered to be the fault of the committee in not taking steps to enforce payment, the estate of the committee, who had died, was charged with the same. *In re Swindell*, 21 Law J. Rep. (N.S.) Chanc. 748; 2 De Gex, M. & G. 91.

Two committees of the estate of a lunatic were appointed, one of whom died, and no new committee was appointed in his place. The estate being small, the Court permitted the income to be paid to the survivor on the production of an affidavit of his solvent circumstances. *In re Noble*, 21 Law J. Rep. (N.S.) Chanc. 748; 2 De Gex, M. & G. 280.

Where the income of a lunatic consisted of rents payable weekly, the committee was allowed to receive them before perfecting his securities, he undertaking to perfect them within a given time. *In re Rutter*, 22 Law J. Rep. (N.S.) Chanc. 178.

A solicitor to committees received and misapplied part of the estate of the lunatic and then died insolvent. The Court, although it held the committees answerable, yet, considering that, under the circumstances, the lunatic, if he recovered, would not enforce the liability, made a declaration that they were not to be charged with the loss, but the costs were not to be allowed out of the estate. *In re Moore*, 23 Law J. Rep. (N.S.) Chanc. 153.

(F) CUSTODY AND CONTOUL.

A medical certificate, in the case of a private patient, under the stat. 16 & 17 Vict. c. 96, sched. A, No. 2, for the detention of a lunatic in a house licensed for the reception of lunatics, is bad if it merely state that the medical man examined the alleged lunatic at B (a considerable town), and omit to specify the street and number of the house, or other like particulars respecting the place where such examination was made. *Regina v. Pinder and In re Greenwood*, 24 Law J. Rep. (N.S.) Q.B. 148.

If the alleged lunatic is detained under such a certificate, he will be discharged on a writ of *habeas corpus*, on the ground that the detention is illegal, unless it be shewn that it would be injurious to himself or others to set him at liberty. *Ibid.*

Where, in the opinion of the Court, it will be for

the benefit of the lunatic that the care of the person should remain undisturbed, it will so direct, and will direct the whole of the income of the property to be paid to the lunatic, pending a petition to traverse; although the Court will confirm the report of the Master in Lunacy, appointing a committee of the person and a committee of the estate. *In re Cumming*, 21 Law J. Rep. (N.S.) Chanc. 753; 1 De Gex, M. & G. 537.

(G) COMMISSION.

[See 16 & 17 Vict. c. 70.]

(a) Leave to attend Execution of.

A party interested under a deed executed ten years back was allowed to attend the execution of a commission *de lunatico inquirendo* when the lunacy was alleged to have existed for a period antecedent to the date of the deed, but upon an undertaking to abide by such order as the Court might make as to the party's own costs and the increased costs occasioned by the attendance at the inquisition. *In re Richards*, 21 Law J. Rep. (N.S.) Chanc. 739; 1 De Gex, M. & G. 719.

(b) Superseding.

J W L was found a lunatic as from a certain day. He presented a petition to traverse, and an order was made allowing the same. On the same day an order was made, granting the care and custody of J W L and his estate to C B, who never perfected his securities, and no grant was ever made to him. On the traverse the jury found that the traverser was then of sound mind. The costs of the inquisition had been ordered to be taxed. J W L presented a petition for a *supersedeas* of the commission and for the delivering up of his deeds and papers in the hands of C B, or of those who had issued the commission. These parties applied for an order for the payment of the costs out of the traverser's estate; but the Court refused to make the order, first, on the ground that, independently of the statute 6 Geo. 4. c. 53, there was no jurisdiction, either original or as delegate of the Crown; and secondly, because the 4th section of that statute only authorized the Court to deal with the property pending and notwithstanding a traverse. The Court also decided that it had no authority to make the delivery up of the property dependent and conditional upon the payment of the costs. *In re Loveday*, 21 Law J. Rep. (N.S.) Chanc. 231; 1 De Gex, M. & G. 275.

A person found lunatic by inquisition is entitled as of right to traverse the finding; but before granting the writ the Court will be satisfied by personal examination that the alleged lunatic is competent to exercise volition upon the subject, and desires to have a traverse of the finding. *In re Cumming*, 21 Law J. Rep. (N.S.) Chanc. 753; 1 De Gex, M. & G. 537.

Where a personal examination of the alleged lunatic by the Court is impracticable, the Court will adopt some other mode of inquiry—*semble*. *Ibid.*

Whether a party may file a traverse in the Petty Bag Office without the intervention of the Court—*quære*. *Ibid.*

(c) Costs of.

Solicitors, who claimed costs for taking out the

commission, and for other business in the lunacy, obtained an order for taxation, but did not tax. Five years after the order the lunatic died, leaving real estate, but no personal property. The solicitors sued the committees at law, but they set up the Statute of Limitations, and the action failed. The solicitors now presented a petition, praying an order for taxation, with a view to proceedings to make the real estate liable, and the Court made the order, but without prejudice to any question whether the petitioners had any claim on the lunatic's estate. *In re Hart*, 21 Law J. Rep. (n.s.) Chanc. 810.

The wife of a lunatic sued out a commission *de lunatico inquirendo*, and for that purpose employed a solicitor. The husband was found lunatic, and in proceedings in the lunacy an order was made for the taxation of costs, but before the taxation the lunatic died, and his executors proved his will made before the lunacy. The solicitor proceeded by a summons to call upon the executors to pay his demand for the costs, or to enter into the usual administration accounts:—Held, that the proceedings being properly taken and conducted, the solicitor of the lunatic's wife was entitled to stand as a creditor against the lunatic's estate in respect to his costs, and to institute a creditor's suit to enforce his right. *Chester v. Rolfe* and *In re Rutter*, 23 Law J. Rep. (n.s.) Chanc. 233; 4 De Gex, M. & G. 798.

Upon an inquisition issued at the instance of the daughters of a lady, she was found lunatic, but upon her application was declared entitled to traverse; pending this she died, and a creditors' suit was instituted against the administratrix of her estate. The Court declared that the costs and expenses properly incurred in the proceedings in lunacy (they having been instituted for the benefit of the alleged lunatic) ought to be paid out of her estate. *In re Cumming*, 23 Law J. Rep. (n.s.) Chanc. 261; 5 De Gex, M. & G. 30.

Costs of a commission of lunacy which had been taxed during the lifetime of the lunatic, ordered to be paid after his death out of funds to which he was entitled, and which at his death were standing to the credit of a cause to which he was a party. *Taylor v. Taylor*, 3 Mac. & G. 426.

(H) PRACTICE.

A party, wishing to object to the confirmation of the Master's report in lunacy, must present a counter-petition in the nature of exceptions to the report. *In re Saunders*, 20 Law J. Rep. (n.s.) Chanc. 618; 3 Mac. & G. 219.

Whether the Lords Justices acting in lunacy under the royal sign manual have jurisdiction to make an order vesting a trust estate, of which a person of unsound mind, who was heir-at-law of a deceased trustee, was seised,—the words of the Trustee Act, 1850, 13 & 14 Vict. c. 60, being "the Lord Chancellor intrusted by virtue of the Queen's sign manual"—*quære*. *In re Pattinson*, 21 Law J. Rep. (n.s.) Chanc. 280.

Guardian *ad litem* to lunatic defendant (not found so by inquisition) appointed without a commission. *Piddocke v. Smith*, 21 Law J. Rep. (n.s.) Chanc. 359; 9 Hare, 395.

A lunatic died without leaving ready money to pay the expenses of his funeral, and of whose person or of whose estate there was no committee.

The heir-at-law, who was one of the next-of-kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of court for such purpose; but the Court directed the persons with whom the lunatic had resided to proceed with the funeral, and ordered the petition to stand over. *In re Townsend*, 21 Law J. Rep. (n.s.) Chanc. 747.

A petition for this purpose is necessary; a warrant from the Lunatic Office is not sufficient. *Ibid*.

Upon the petition of the committee of a lunatic mortgagee, an order was made vesting the estate in the mortgagor; the costs of the order to be paid out of the lunatic's estate, with the exception of the stamp, which was to be paid by the mortgagor. *In re Thomas, a lunatic*, 22 Law J. Rep. (n.s.) Chanc. 858.

After the death of a lunatic the committee of his estate passed his accounts and paid the balance in his hands into court, and his security was discharged, pursuant to the 44th of the Orders in Lunacy of the 7th of November 1853. The executors of the lunatic petitioned the Court for payment of the fund out to them without service on the committee, but the Court considered such service necessary. *In re Wylde*, 23 Law J. Rep. (n.s.) Chanc. 464; 5 De Gex, M. & G. 25.

A *curator bonis* of a lunatic's estate appointed by a Scotch Court may sue in England for debts due to the lunatic. *Scott v. Bentley*, 24 Law J. Rep. (n.s.) Chanc. 244; 1 Kay & J. 281.

Order in the nature of a stop-order granted on the application of the assignees of the interest of the sole next-of-kin of a lunatic, but dispensing with notice to the assignees of any applications in the matter except those respecting payments to the next-of-kin. *In re Pigott*, 3 Mac. & G. 268.

(I) COUNTY ASYLUM.

[See Stats. 16 & 17 Vict. c. 96; 18 & 19 Vict. c. 105. s. 16.]

A declaration against the clerk to a committee of visitors of a county lunatic asylum, under the 8 & 9 Vict. c. 126. ss. 16, 17, stated, that the committee under the statute agreed with the plaintiff, in consideration that he would render his services as an architect in examining the site of a proposed lunatic asylum, and preparing the requisite probationary drawings for the committee, and all other drawings required to be submitted to the Commissioners in Lunacy and the Secretary of State, that a certain sum should be paid to him, and averred that he did prepare requisite probationary drawings for the approval of the said committee, and was ready to prepare all other drawings to be submitted to the Commissioners and Secretary of State, but that the committee wrongfully discharged him and prevented him from completing the agreement. Second plea, that the plaintiff did not prepare the requisite probationary drawings. Fifth plea, that a reasonable time had elapsed for the plaintiff to prepare the requisite probationary drawings for the approval of the said committee, and that the plaintiff prepared divers drawings which were not approved of by the committee, but rejected by them, and that, save as aforesaid, the plaintiff did not prepare any probationary drawings for the approval of the committee, wherefore, &c.:—Held, that "probationary" drawings meant drawings to be approved of by the com-

mittee, the Commissioners, and the Secretary of State; that even if the visitors could contract for the payment for plans not approved of, yet there was a contract which would make them liable for dismissing the plaintiff; and that the plaintiff could not recover on the *indebitatus* counts. *Moffatt v. Dickson*, 22 Law J. Rep. (N.S.) M.C. 265; 13 Com. B. Rep. 543.

Quere.—First, whether the visitors had power to contract for the payment for plans not ultimately approved of; secondly, whether mandamus to the treasurer of the county would be the proper remedy in such a case; thirdly, whether the clerk could be sued; and whether the county would be liable on such a contract. *Ibid*.

MALICE.

[See ACTION—TRESPASS.]

(A) MALICIOUS PROSECUTION.

(B) MALICIOUS LEGAL PROCEEDINGS.

(A) MALICIOUS PROSECUTION.

[See *Guest v. Warren*, title ACTION, (A) (f).]

In an action for maliciously, and without reasonable or probable cause, prosecuting the plaintiff for perjury, it appeared that the statements alleged to be perjury had been made by the plaintiff as a witness in an action against the defendant, respecting facts known to the defendant only by the relation of others. There was evidence that the defendant had been told that the plaintiff's evidence was wilfully false; but there was also evidence that the defendant had said that he had indicted the plaintiff merely to stop his mouth as a witness in another proceeding. The Judge directed the jury "that if the plaintiff had, in fact, sworn falsely; or if the defendant at the time he preferred and prosecuted the indictment, acting upon the information he had received, believed and had reasonable grounds for believing that the plaintiff had sworn falsely, then there was reasonable and probable cause for preferring and prosecuting the indictment; but if the defendant at the time he preferred and prosecuted the indictment did not believe the information he had received to be true, but in his own mind believed and had reasonable grounds to believe that the plaintiff had not sworn falsely, or still more, if he believed that the plaintiff had spoken the truth, then there was no reasonable or probable cause for preferring and prosecuting the indictment":—Held, that this direction was correct. *Heslop v. Chapman* (in error), 23 Law J. Rep. (N.S.) Q.B. 49.

A railway company, a corporation, is not liable in an action for malicious prosecution in respect of a criminal proceeding instituted by their servant without their knowledge or direction. *Stevens v. the Midland Rail. Co.*, 23 Law J. Rep. (N.S.) Exch. 328; 10 Exch. Rep. 352.

Semble.—that an action for a malicious prosecution cannot be maintained against a corporation. *Ibid*.

(B) MALICIOUS LEGAL PROCEEDINGS.

A trader who was indebted to several creditors in a sufficient sum to form a petitioning creditor's debt,

caused his goods to be taken in execution by the plaintiff, another creditor, with intent to defeat or delay his creditors, and the plaintiff obtained the goods by bill of sale from the sheriff, by way of fraudulent preference; after which the defendant took them as a distress for rent. The trader subsequently filed a declaration of insolvency, and on this a fiat was obtained before the Bankruptcy Consolidation Act, 1849, came into operation, and he was adjudged a bankrupt on his own petition. The plaintiff then sued the defendant, alleging, in the first count, that the latter had maliciously distrained for more rent than was due, and in the second, that he had taken an excessive distress. A third count was in trover. After the commencement of the action the assignees gave notice to the plaintiff that they intended to treat the execution as void, and they also gave notice to the defendant claiming the goods and damages from him for the illegal distress:—Held, that the first count was bad, affirming *Tancred v. Leyland*, and that the insertion of the word "maliciously" could not make that actionable which was no legal injury without it. *Stevenson v. Newnham* (in error), 22 Law J. Rep. (N.S.) C.P. 110; 13 Com. B. Rep. 285.

An action lies at the suit of a debtor taken in execution under a writ of *capias ad satisfaciendum*, upon a judgment against an execution creditor, who "maliciously and without any reasonable or probable cause" causes and procures a warrant to be issued upon the said writ indorsed to levy a larger sum than remained due upon the judgment, and the debtor to be taken to satisfy such sum; there being no difference between an arrest on mesne process and an arrest in execution of a judgment. *Churchill v. Siggers*, 23 Law J. Rep. (N.S.) Q.B. 308; 3 E. & B. 929.

In a declaration in such an action, it is a sufficient allegation of damage that the plaintiff was imprisoned on such warrant until he could procure his discharge, and that by means of the premises he was prevented from attending to his business and injured in his credit and character, and was put to and incurred great costs and expenses in and about procuring his liberation from imprisonment. *Ibid*.

A declaration stated that the plaintiff had obtained a licence as a conductor of metropolitan stage carriages under the 13 & 14 Vict. c. 7 (which incorporated the provisions of the 6 & 7 Vict. c. 86), and that the defendant employed the plaintiff as a conductor, and the plaintiff thereupon delivered his licence to the defendant (under the 8th section of the 6 & 7 Vict. c. 86), and that the defendant, whilst the licence was in his possession, maliciously and wrongfully wrote in ink upon it, before he re-delivered it to the plaintiff on quitting his service, the words, "Discharged for being 1s. 4d. short," and re-delivered the licence with those words so written; and by reason of the premises the licence became defaced and damaged, whereby the plaintiff lost employment. Plea—that the plaintiff as such conductor received 12s. 3d. on behalf of the defendant; that it was his duty to account for that sum to the defendant; that he accounted for 10s. 11d., but did not account for or pay over the 1s. 4d. residue, and was short of the said sum of 1s. 4d.; that the plaintiff was dishonest and was discharged for being 1s. 4d. short: wherefore the defendant wrote the

said words, &c. :—Held, that the declaration was good and the plea bad. *Rogers v. Macnamara*, 23 Law J. Rep. (N.S.) C.P. 1; 14 Com. B. Rep. 27.

The declaration stated that the defendant had falsely and maliciously procured the plaintiff to be adjudged a bankrupt. The adjudication of bankruptcy had been made on an affidavit by the defendant, containing statements which were not true in fact. The adjudication was subsequently annulled, on the ground that the affidavit did not shew that an act of bankruptcy had been committed :—Held, that the action was maintainable, although the affidavit did not shew an act of bankruptcy committed, and the Commissioners had committed an error in adjudicating the plaintiff to be a bankrupt. *Farley v. Banks*, 24 Law J. Rep. (N.S.) Q.B. 244; 4 E. & B. 493.

Special damage, which is necessary in order to make words actionable, must be such as naturally or reasonably arises from the use of the words. *Had-don v. Lott*, 24 Law J. Rep. (N.S.) C.P. 49; 15 Com. B. Rep. 411.

The declaration alleged that the plaintiff, being the first inventor of a new manufacture, had duly applied for letters patent, and had left at the office of the Patent Commissioners a petition and declaration, and a provisional specification, under the Patent Amendment Act, 1852, and that the application and specification had been referred to the Solicitor General, who had permitted the title of the invention to be amended, and the plaintiff had given notice of his intention to proceed with the application. That the defendant, knowing the premises, maliciously and without reasonable or probable cause, pretended and represented to the Solicitor General that he had an interest in opposing the grant of the patent to the plaintiff, and maliciously, &c. published certain words, being a notice (set out) to the Solicitor General that the amended title might embrace an invention of the defendant for which he had applied for a patent; whereas the defendant was not, but the plaintiff was, the first inventor of the invention in question, and the defendant had never any interest in opposing the grant of a patent to the plaintiff; whereby the Solicitor General refused to allow the plaintiff's application for letters patent, &c. :—Held, that the declaration was bad; that the allegation of the refusal in the statement of special damage could not be called in aid to supply a substantial traversable allegation of the refusal; and that the special damage alleged did not appear to be the necessary or natural result of the facts stated in the declaration. *Ibid.*

MANDAMUS.

(A) WHEN IT LIES.

- (a) *In general.*
- (b) *To Quarter Sessions.*
- (c) *To Inferior Courts.*
- (d) *To the Lords of the Treasury.*
- (e) *To Public Companies and Commissioners.*

(B) WRIT OF.

- (a) *Service.*
- (b) *Pleadings.*

(C) COSTS.

(A) WHEN IT LIES.

(a) *In general.*

The office of clerk to the board of guardians of an union appointed under the provisions of the 4 & 5 Will. 4. c. 76. s. 46. is an office created by statute and of a public nature, in respect of which a *quo warranto* will lie. Where, therefore, such an office is full, a mandamus is not a proper mode of trying the validity of the election. *Regina v. the Guardians of St. Martin-in-the-Fields*, 20 Law J. Rep. (N.S.) Q.B. 423; 17 Q.B. Rep. 149.

There is no legal obligation upon the East India Company to pay to the commander-in-chief of the Queen's or of the native forces in India the arrears of pay due to him, as such commander-in-chief, and a mandamus to pay such arrears cannot be granted. *Ex parte Napier*, 21 Law J. Rep. (N.S.) Q.B. 332; 17 Q.B. Rep. 692.

Where a mortgage deed, in the form prescribed by the General Turnpike Act, 3 Geo. 4. c. 126. s. 81, assigned the tolls and toll-houses of a turnpike road, to hold for the residue of the term for which the tolls were granted, unless the mortgage money, with interest, were sooner repaid, the mortgagee has only an equitable right to enforce payment of the principal and interest, and, consequently, no mandamus will be granted to compel the trustees of the road to pay the interest. *Regina v. the Balby and Worksop Turnpike Road Trustees*, 22 Law J. Rep. (N.S.) Q.B. 164; 1 Bail C.C. 134.

In the parish of B the owners and not the occupiers of tenements, the value of which did not exceed 6l., were assessed to and paid the rates for the relief of the poor, under the 13 & 14 Vict. c. 99. At the election of a churchwarden for the parish, the votes of certain occupiers of tenements not exceeding the value of 6l. were rejected on the ground that they were not entitled to vote, and one of the candidates was declared elected :—Held, that as the election could not, on this ground, be considered as null and void, and it was not shewn that the result of the election would have been different, an application for a mandamus could not be entertained. *Ex parte Joyce, or Mawley*, 23 Law J. Rep. (N.S.) M.C. 153; 3 E. & B. 718.

The office of surgeon of the district prison of St. Catherine, in the island of Jamaica (created by the Acts, 5 Will. 4. c. 8. and 4 Vict. c. 26, of the Local Legislation of Jamaica), is an office held during pleasure only, and not during good behaviour. *Hill v. Regina*, 8 Moore P.C. 138.

Where Justices of the Peace having power to appoint a surgeon, appointed another in the place of one holding the office, held (reversing the proceeding in the Supreme Court upon a mandamus), first, that the office of surgeon of the district prison being a public office, held at pleasure, and not an ancient office, the choice of another to fill such office, by the Justices, in exercise of the powers vested in them by the local act, 5 Will. 4. c. 8, confirmed by the 4 Vict. c. 26, was a determination of the first appointment. Secondly, that the office being full, a mandamus would not lie. *Ibid.*

Semble—the remedy was by *quo warranto* against the occupant of the office. *Ibid.*

Special leave to appeal, granted *ex parte*, from an order of the Supreme Court at Jamaica issuing a

peremptory mandamus, directing Justices of the Peace to restore a party to the office of surgeon: subject to the right of the respondent to move upon a counter-petition to quash the leave given. *Ibid.*

(b) *To Quarter Sessions.*

A party rated under the Sanitary Act of Liverpool in respect of his property within the borough, appealed to the Court of Quarter Sessions of the borough, on the ground that he was rated at too large a sum. The act which authorized the rate, gave the appeal, and empowered the Court of Quarter Sessions on appeal to amend and quash the rate, provided, in section 156, that the net annual value of the property, in respect of which the person was liable to be rated, was to be ascertained according to the meaning of the words "net annual value" in the 6 & 7 Will. 4. c. 96, the act to regulate parochial assessments; and that it should, in all cases, for the purposes of the Sanitary Act, "be taken and estimated according to such value as the same was or should be rated or assessed in the rate or assessment for the relief of the poor in the year preceding." The assessment, in the rate appealed against, was made according to the poor-rate of the preceding year. On the appeal, the appellant proposed to shew that the assessment, although according to the poor-rate, was too high; but the Recorder decided that, under section 156, he could not go into evidence as to the value, and dismissed the appeal. The Court refused to grant a mandamus to compel the Recorder to hear the appeal, on the ground that the dismissal was not a declining of jurisdiction by him, but a decision on the appeal, and that, therefore, the Court had no power to issue the mandamus, whether the construction which the Recorder had put upon the act were right or wrong. *Regina v. the Recorder of Liverpool*, 20 Law J. Rep. (N.S.) M.C. 35.

(c) *To Inferior Courts.*

Certain parties claimed, as their own, goods which had been seized in execution, as the defendant's goods, under a judgment of the county court. On an interpleader summons being taken out in the county court, the claimants stated, as the particulars of their claim, that "the goods were assigned to us by an indenture, dated, &c., and made between the defendant and ourselves." The county court Judge held the particulars insufficient, refused to allow the parties to go into their claim, and made an order adjudicating the goods to be the property of the execution debtor.—Held, that the particulars of claim were sufficient; that the county court Judge was wrong in refusing to consider the claim, and a mandamus to him to hear and adjudicate upon it was granted. *Regina v. Richards*, 20 Law J. Rep. (N.S.) Q.B. 351; 2 L. M. & P. P.C. 263.

(d) *To the Lords of Treasury.*

[See *Regina v. the Lords of the Treasury*, title APPORTIONMENT, (A) (b).]

(e) *To Public Companies and Commissioners.*

Under the 8 & 9 Vict. c. 20. s. 46, a railway company has the option, when its line of railway crosses a turnpike road or a public highway (except when otherwise provided by the special Act), either to

carry the road over the railway or the railway over the road. A mandamus to command the company to do one of these two things is therefore defective unless it shews, on the face of it, circumstances which establish the impossibility of the company exercising this option. *Regina v. the South-Eastern Rail. Co.*, 4 H.L. Cas. 471.

Where such a mandamus had been issued, and the return had merely traversed that the road was a public road, and the issue thus raised had been found against the company, and a peremptory mandamus had been awarded,—Held, that on a writ of error, the Court of Error being satisfied that the mandamus itself ought not to have issued, had properly reversed the whole judgment. *Ibid.*

A bill being introduced into parliament for the purpose of more effectually draining a particular district of level, through a certain other district entirely within the jurisdiction of the Commissioners of Sewers for the county of Norfolk, acting under the 3 & 4 Will. 4. c. 42, the Commissioners apprehending that the provisions of the said bill would, if passed, occasion an injury to the land within their jurisdiction, *bonâ fide* and with discretion and prudence caused their clerk to take all reasonable and necessary steps for opposing the bill in parliament, and to prevent its passing, or to obtain the adoption of certain clauses; and thereby a considerable amount for costs and expenses had been incurred, and remained due to the clerk, who had since died.—Held, that his legal representatives were entitled to a mandamus, directing the Commissioners to levy a rate on the land within their jurisdiction, under the 4 & 5 Vict. c. 45, and to pay off the amount due for such costs and expenses. *Regina v. the Commissioners of Sewers for the County of Norfolk*, 20 Law J. Rep. (N.S.) Q.B. 121; 15 Q.B. Rep. 549.

Where Commissioners under a local act have power to appoint officers at a salary to be paid out of the rates raised, the appointment does not create a contract on the part of the Commissioners to pay the salary. Therefore an *indebitatus* action will not lie against them for salary; but a mandamus or an action on the case is the proper remedy. *Bogg v. Pearse*, 20 Law J. Rep. (N.S.) C.P. 99; 10 Com. B. Rep. 534; 2 L. M. & P. P.C. 21.

(B) WRIT OF.

[See 17 & 18 Vict. c. 125. ss. 68—72.]

(a) *Service.*

The Court refused to set aside the service of a copy of a writ of mandamus issued against a corporation, the original not having been shewn to the defendants at the time of the service. *Regina v. the Birmingham and Oxford Junction Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 195; 1 E. & B. 293.

(b) *Pleadings.*

The prosecutor of any writ of mandamus may since stat. 1 Will. 4. c. 21. plead several matters to the return, by leave of the Court. *Regina v. Ambergate Rail. Co.*, 22 Law J. Rep. (N.S.) Q.B. 191; 17 Q.B. Rep. 957.

A mandamus the object of which is to enforce a civil right is a proceeding in aid of which, under stat. 14 & 15 Vict. c. 99. s. 6, a Judge may grant an order for the inspection of documents by either

of the litigant parties, when the return to such writ is traversed. *Ibid*.

Mandamus to the lord and steward of the manor of C, to admit E H P, upon payment of the usual fines and fees, to certain copyhold estates which were alleged in the writ to have descended to the said E H P, as the heiress-at-law of S T, deceased, who was her maternal uncle and the person last seized. The return alleged that the said copyhold estates did not descend to the said E H P, as the heiress of S T, and that the said E H P was a stranger in blood to the said S T, and not entitled to the said estates, whereof the said S T died so seised. Pleas, first, that the said estates did descend to the said E H P, as the heiress-at-law of the said S T; secondly, that the said E H P was not a stranger in blood to the said S T as alleged; thirdly, that E H P was, on the death of S T, entitled to the said estates whereof S T died so seised:—Held, upon demurrer to the second plea, that it was to be considered as a distinct and single plea, and that it traversed an immaterial allegation in the return, and was, therefore, bad. And, *per Erle, J.*, that one plea, traversing the whole of the allegation in the return would have been good. *Per Crompton, J.*, that the rule of pleading, which admitted of the whole of an allegation being put in issue, though too much had been alleged, did not apply. *Regina v. Dendy*, 22 Law J. Rep. (N.S.) Q.B. 247; 1 E. & B. 829.

A mandamus, after reciting letters patent incorporating a company, and alleging that D was duly qualified to be elected an assistant of the company, that he was elected, that he had not misconducted himself, that there was no good cause for removing him, and that the wardens wrongfully removed him from his office, prayed that he might be restored. The return of the wardens alleged, that the letters patent were not fully set out, that D was not duly qualified, that he had misconducted himself, that there was good cause for removing him, and that the wardens did not wrongfully remove him. The return then proceeded to state a bye-law that bankrupts and insolvents should be ineligible, that D obtained his election by fraudulently representing himself solvent when insolvent, that he afterwards became bankrupt, whereupon they duly and according to law removed him. On an application under section 52. of the statute 15 & 16 Vict. c. 76 (the Common Law Procedure Act), calling on the defendants to amend the general allegations in their return, it was held (assuming the statute to apply to proceedings by mandamus) that the rule should be refused, as the latter part of the return plainly shewed on what the defendants relied, and therefore that D could not be embarrassed, prejudiced, or delayed in trying the question; but that the case might have been different had the general traverse in the return not been followed by the special statement. *Regina v. the Saddlers Co.*, 22 Law J. Rep. (N.S.) Q.B. 451; 1 Bail C.C. 183.

Where a party under section 56. of the same act sets out any omitted part of a document pleaded by his opponent, the latter is not called upon to make any answer to it. *Ibid*.

(C) Costs.

Upon a judgment awarding a peremptory mandamus, the costs are not those awarded at the discretion

of the Court, under sect. 6. of the 1 Will. 4. c. 21st but are the general costs under section 4. of that statute. *Regina v. the South-Eastern Rail. Co.*, 4 H.L. Cas. 471.

The guardians of the poor sued H in a county court, to recover from him the expense of abating a nuisance in a ditch of which they alleged he was the owner. He denied that the ditch was his, and applied to a Judge at chambers for a prohibition, on the ground that title to land came in question, and that the county court had no jurisdiction. The Judge referred him to the full Court, but no application being made the cause was heard and decided against him; the county court Judge, though of opinion that he had no jurisdiction, acting upon the supposed opinion to the contrary of the Judge at chambers. The county court Judge, however, afterwards refused to order H to pay the sum adjudged due, on the ground that he thought he had no jurisdiction; and a mandamus having been moved for to compel him to make the order, H shewed cause, but the Court ultimately, putting for the first time a judicial construction upon the statute 11 & 12 Vict. c. 123, held that the action lay in the county court, and directed the mandamus to issue. H did not offer any further opposition. On an application against H to compel him to pay the costs of obtaining the rule for the mandamus, the Court, holding the rule of practice to be that the party opposing the issuing of the mandamus unsuccessfully must pay costs unless there are strong grounds to the contrary, refused to make H pay costs, considering that the circumstances above stated afforded sufficient grounds for exempting him from the liability. *Regina v. Harden*, 23 Law J. Rep. (N.S.) Q.B. 127; 1 Bail C.C. 214.

In November, a person applied to the defendants, who were overseers of a parish, to certify, under the Beer Licensing Act, that he was resident occupier of certain premises in their parish. They inquired and found that the premises were not wholly in his occupation, and consequently refused their certificate. In the May following, the same party made another similar application to the overseers, but they again refused it, believing the applicant not entitled to the certificate, as no notice had been given to them that any alteration had been made in the occupation, though it was probable that the applicant had in fact become the occupier during the interval. The applicant thereupon obtained a mandamus (after argument), directing the overseers to inquire whether he was the occupier in May, and to certify accordingly. They returned that they had inquired, and were unable to ascertain whether he was occupier in May, but stated that he was then the occupier of the premises. The Court, under the above circumstances, in its discretion, refused to grant the applicant the costs of the mandamus, as the refusal of the overseers, in May, to certify was not wrongful, and it was even doubtful whether he was at that time entitled to a certificate. *Regina v. Langridge*, 24 Law J. Rep. (N.S.) Q.B. 73.

The Court will not grant costs on making a rule for a mandamus absolute, upon a mere affidavit of service; but on affidavits shewing ground for believing that the litigation is at an end, and that the defendants have had notice that the application will be made for costs, at the time the rule is made absolute,

the Court will make it absolute with costs. *Regina v. the East Anglian Rail. Co.*, 2 E. & B. 475.

MANSLAUGHTER.

[Form of the indictment, see 14 & 15 Vict. c. 100. s. 4.]

Trustees appointed, under a local act, for the purpose of repairing the roads in a district, with power to contract for executing such repair, are not chargeable with manslaughter if a person, using one of such roads, is accidentally killed in consequence of the road being out of repair through neglect of the trustees to contract for repairing it. *Regina v. Pocock*, 17 Q.B. Rep. 34.

If an engineer, employed to manage a steam-engine engaged to draw up miners from a coal pit, leave the engine in the charge of an ignorant boy, who tells him that he is unable to manage it, and in the absence of the engineer a man is drawn up, who is killed from the want of skill in the boy to manage the engine, this is manslaughter in the engineer. *Regina v. Lowe*, 3 Car. & K. 123.

A person may by a neglect of duty render himself liable to be convicted of manslaughter or even of murder. *Ibid.*

On an indictment for manslaughter by reason of gross negligence and ignorance in surgical treatment, neither on the one side nor the other can evidence be gone into of former cases treated by the prisoner; but witnesses may be asked, *causâ scientiæ*, their opinion as to his skill. *Regina v. Whitehead*, 3 Car. & K. 202.

MARKET.

[See *Roberts v. the Churchwardens, &c. of Aylesbury*, title RATE; Poor-rate.]

MARRIAGE.

[See titles BARON AND FEME—DIVORCE.]

- (A) VALIDITY OF.
- (B) CONTRACT.
- (C) SETTLEMENT.
- (D) PROOF OF.
- (E) BREACH OF PROMISE OF.

(A) VALIDITY OF.

The contract of marriage is in its essence a consent on the part of a man and woman to cohabit with each other, and with each other only. The religious element does not require anything more of the parties, and therefore it is not essential that all the words of the marriage service, to be repeated by the man and woman, should be actually said; but the ceremonies required by law, such as the publication of the banns and the like, being complied with, when the hands of the parties are joined together, and the clergyman pronounces them to be man and wife, if they understand that by that act they have agreed to cohabit together, and with no other person, they are married. *Harrod v. Harrod*, 1 Kay & J. 4.

Therefore deaf and dumb persons may marry, and the presumption is in favour of the validity of such a marriage, and of the capacity of the parties to contract it, and the onus of proof is upon those who would impeach such a marriage. *Ibid.*

Every thing is presumed in favour of marriage. *Ibid.*

If there be no question of mental capacity, the objection that a deaf and dumb person did not understand the nature of the contract of marriage, which she had been induced to enter into, is an objection on the ground of fraud. *Ibid.*

Distinction between unsoundness of mind and mere dullness of intellect. *Ibid.*

An issue as to sanity is not directed merely upon a suggestion in an answer; but such suggestion may be supported by evidence occasioning a reasonable doubt as to the sanity. *Ibid.*

Evidence of witnesses discredited by the inconsistency therewith of their own previous conduct and acts. *Ibid.*

(B) CONTRACT.

If a party upon the marriage of two persons makes a representation upon the faith of which the marriage takes place, he shall be bound to make good his representation. *Bold v. Hutchinson*, 24 Law J. Rep. (n.s.) Chanc. 285; 20 Beav. 250.

Upon a contract for marriage a representation by a father that the fortune of his daughter will, at the decease of himself and wife, amount to 10,000*l.* at the least, was decreed to be specifically carried into effect in favour of the husband, who was entitled to a life interest in his wife's fortune, although the wife had died in the lifetime of her father without issue. *Ibid.*

A statement was made by a father previous to the marriage of his daughter, that he had settled the *W* estate upon her, which was of the value of about 40,000*l.*, and that he could do nothing more; the fact being that he had settled the estate, subject to a charge for securing 5,000*l.*, which he had paid off previous to the marriage and kept alive for his own benefit. After the decease of the settlor, upon a claim by the husband and wife to have the estate discharged from the 5,000*l.*,—Held, that they were bound to prove that the marriage took place upon a definite statement by the father of what he had done, or intended to do; and in the absence of such evidence, that the father was justified in keeping alive the charge of 5,000*l.* for his own use; and that after his decease it formed a part of his residuary estate. *Jameson v. Stein*, 25 Law J. Rep. (n.s.) Chanc. 41; 21 Beav. 5.

(C) SETTLEMENT.

[See BARON AND FEME, (A) (f), and (B) (a).]

By a settlement, in the Scotch form, made upon the marriage of a Scotchman, domiciled in Scotland, with an Englishwoman, the husband covenanted to pay after his death an annuity to his widow and portions to his children, for which causes the wife assigned her real and personal estate "to and in favour of her husband, in conjunct fee and liferent, and the children of the marriage, whom failing, the wife, her heirs and assigns." For some years after the solemnization of the marriage the husband and wife continued domiciled in Scotland, the wife in the

mean time becoming entitled under her father's will to a share in the corpus of his personal estate. They then changed their domicile to England, after which the trustee of the will of the wife's father paid part of the wife's portion of the testator's estate to the husband upon the joint receipt of the husband and wife:—Held, affirming a decree of the Master of the Rolls, upon a bill filed by the wife against the trustee, impeaching the validity of such payment, that the trustee was justified by the terms of the settlement in making it. *Duncan v. Cannon*, 24 Law J. Rep. (N.S.) Chanc. 460.

Held, also, the husband having become bankrupt before the filing of the bill, and the effect of the settlement, interpreted according to the Scotch law, being to give him a life interest in the fund, with remainder to his wife absolutely, that his life interest could not be impounded to secure the performance of his covenant to pay the annuity and portions. *Ibid.*

A husband and wife who have made a marriage settlement of personal estate in a foreign form must be taken to have contracted not only for such powers of disposition over the property as are expressly reserved, but also for all such as by the law according to which the settlement is to be construed, are incidents to the estates created by it, and such powers are not lost by the parties afterwards becoming domiciled in a country by the law of which those powers are not incident to the estates. *Ibid.*

(D) PROOF OF.

In order to prove that a marriage in Scotland is valid according to the law of Scotland, a witness conversant with Scotch law as to marriage ought to be called. *Regina v. Povey*, 22 Law J. Rep. (N.S.) M.C. 19; 1 Dears. C.C. 32.

(E) BREACH OF PROMISE.

A declaration alleged, that in consideration that the plaintiff had promised to marry the defendant, the defendant promised to marry her; that the plaintiff continued and still is unmarried, and until the discovery of the defendant's marriage was ready and willing to marry him; that after the defendant's promise the plaintiff discovered that the defendant was and still is married, and that the plaintiff had not at the time of the defendant's promise any notice of the defendant's then marriage:—Held, on motion in arrest of judgment, that the declaration was good, and that the plaintiff's remaining unmarried was a sufficient consideration for the defendant's promise to marry her. *Milward v. Littlewood*, 20 Law J. Rep. (N.S.) Exch. 2; 5 Exch. Rep. 775.

Dictum, per Pollock, C.B., that a promise by a married man to a woman to marry her after his wife's death is illegal. *Ibid.*

MASTER AND SERVANT.

(A) CONTRACT OF HIRING.

- (a) *Construction of, in general.*
- (b) *Validity of.*
- (c) *Yearly Hiring.*
- (d) *Determination of.*
- (e) *Wages contrary to the Truck Act.*

(B) RIGHTS OF MASTER AND SERVANT.

(C) LIABILITY OF THE MASTER.

- (a) *For Acts of Servants.*
- (b) *For Acts of Contractors.*
- (c) *For Injuries to Servants.*

(D) JURISDICTION OF JUSTICES.

- (a) *Over Servants absenting themselves or neglecting their Work.*
- (b) *To enforce Payment of Wages.*

(A) CONTRACT OF HIRING.

(a) *Construction of, in general.*

[See *Metzner v. Bolton*, title AMENDMENT, (H) (b).]

A count in a declaration in assumpsit set forth an agreement between an attorney and solicitor and a company, that "from January then next, the plaintiff, as the attorney and solicitor of the company, should receive a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business transacted by him for the company as such attorney and solicitor; and should for such salary advise and act for the company on all occasions in all matters connected with the company" (the prosecuting and defending of suits, preparing bonds, and some other matters, for which he was to be allowed the regular charges, being excepted), "and that he should attend the secretary and the board of directors when required." The count then alleged, "That in consideration that the plaintiff had, at the request of the company, promised the company to perform his part of the agreement, the company promised the plaintiff to perform their part, and to retain and employ him as such attorney and solicitor of the said company, on the terms aforesaid." The count then alleged for breach, that "though for a small space of time the company did retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the salary, and though he was always ready and willing to advise and act for the company, and to accept the salary on the terms aforesaid, and in all other respects to fulfil the agreement on his part, yet the company, disregarding, &c., did not, nor would, continue to retain or employ the plaintiff as such attorney or solicitor on the terms aforesaid, but, on the contrary," in May, "wrongfully dismissed and discharged the plaintiff from such employment and retainer, and then and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor of the said company, and to pay him the salary as aforesaid, by reason of which last-mentioned premises the plaintiff has wholly lost and been deprived of the salary, and also of divers great gains and profits which he might and otherwise would have derived from such employment in and about the prosecuting and defending of suits and preparing of bonds, &c." After a verdict for the plaintiff, with 200*l.* damages:—Held, that the count did sufficiently allege a consideration for the promise to retain and employ the plaintiff as attorney and solicitor, and that the consideration was not exhausted by the promise on the part of the company to perform the agreement. *Cumens v. Elderton*, 4 H.L. Cas. 624; 13 Com. B. Rep. 495.

In 1846, the defendant entered into the service of the plaintiff, a solicitor at Amersham, as his clerk, and, in December 1849, the plaintiff put an end to the service, by a notice, to expire on the 25th of

March 1850. On the 7th of January 1850, the defendant wrote to the plaintiff, asking to be paid his salary to Lady-day, and to be at once discharged, "in order that he might go to London and remain there until he could meet with another engagement." To this letter the plaintiff replied, assenting to the defendant's proposal, saying,—"Of course, I should have expected your services, if you were in Amersham; but, as you request me at once to pay your salary to Lady-day, in order that you may go to town until you meet with another engagement, I consent to accord your request;" and, on the following day, the plaintiff asked the defendant whether, "if he paid him up to the 25th of March, he intended going to town and remaining there till he got another engagement," to which the defendant answered that he did; whereupon the plaintiff said,—"on these conditions, I am prepared to pay your salary at once up to Lady-day; but, if you remain in Amersham, I shall expect your services,"—and accordingly paid him the full quarter's salary. The defendant went to London, but shortly afterwards, and before Lady-day, returned to Amersham at the request of a client of the plaintiff's, in whose employ he remained, giving professional advice.—Held, that there was no evidence of a contract on the part of the defendant to go to London and remain there, or to forbear to give his services in Amersham to any person other than the plaintiff, or to render service to the plaintiff if he should return to Amersham. *Daniels v. Charley*, 11 Com. B. Rep. 739.

(b) *Validity of.*

W agreed in writing with G, in consideration of 3*l.* lent by G and of wages agreed to be paid him, to serve G as a tinplate worker, and not to serve any one else without leave in writing, for the term of twelve months and until the expiration of three calendar months after notice by W to G of his intention to determine the service, and to fulfil his service in a good, skilful and workmanlike manner. And in consideration of his good and faithful services, G agreed to pay him on Saturday night in every week during the said term, such wages as the articles made by W should amount to, at G's usual workmen's prices. The agreement then contained a proviso enabling either party to determine the service after the said term of twelve months by a three months' notice, and a stipulation authorizing G to deduct 10*s.* per week until the above sum of 3*l.* was paid.—Held, that the agreement by reasonable implication contained an obligation on the part of G to find employment, and was a valid contract upon which Justices were bound to adjudicate under the Masters and Servants Act, 4 Geo. 4. c. 31. *Regina v. Welch*, 22 Law J. Rep. (n.s.) M.C. 145; 2 E. & B. 357.

(c) *Yearly Hiring.*

The plaintiff was engaged by the defendants to superintend their smelting works in Spain by the following letter:—"We shall require you to enter into an engagement for at least three years, at our option, at a salary of 250*l.*" "We should further require you to visit some of the principal smelting establishments in England, and go out by way of Gibraltar, which is the shortest." The plaintiff commenced visiting the smelting establishments on the 1st of February 1850, and shortly after sailed

for Spain, where he served the defendants up to the middle of February 1851, and was then dismissed by them:—Held, that this was a contract binding the plaintiff to stay three years, and giving the defendants the option of determining the service at the end of each year; and, therefore, that the defendants, having dismissed the plaintiff after the commencement of a current year, were bound to pay his salary for that year. *Down v. Pinto*, 23 Law J. Rep. (n.s.) Exch. 103; 9 Exch. Rep. 327.

Held, also (*Parke, B. dubitante*) that the service commenced on the 1st of February. *Ibid.*

(d) *Determination of.*

A governess is not within the rule applicable to menial or domestic servants, that upon a general hiring the service may be determined by a month's notice or payment of a month's wages. *Todd v. Kellage*, or *Kerrich*, 22 Law J. Rep. (n.s.) Exch. 1; 8 Exch. Rep. 151.

(e) *Wages contrary to the Truck Act.*

The plaintiff contracted to load ironstone at so much per ton, but did not stipulate for his own personal labour. He employed men to do the work under him, and from time to time he worked personally:—Held, that he was not an "artificer" under the Truck Act, 1 & 2 Will. 4. c. 37. ss. 3, 5, 25—supporting *Riley v. Warden*. *Sharman v. Sanders*, 20 Law J. Rep. (n.s.) C.P. 99; 13 Com. B. Rep. 166.

If a collier be employed to get coal from a mine, and is to be paid at a certain rate per ton on the coals got by him, and has liberty to employ other men to assist him, he is an artificer within the meaning of the Truck Act, 1 & 2 Will. 4. c. 37, and his wages must be paid in money, not in goods, if by the contract he is bound to give his personal labour in the performance of the work. *Weaver v. Floyd*, 21 Law J. Rep. (n.s.) Q.B. 151.

(B) RIGHTS OF MASTER AND SERVANT.

[See titles ACTION—CONTRACT.]

The defendant by deed appointed the plaintiff auditor of his estates at a yearly salary, and in consideration thereof the plaintiff covenanted to give up his practice as a barrister, if required so to do, and not to accept any other office or employment whatever, so long as he should hold the said office. The defendant also covenanted to pay the plaintiff the said salary during so long as he should hold the office; and in case the defendant should revoke the appointment without adequate and just cause (to be determined as thereafter mentioned), that the defendant should pay him a retiring pension of 1,000*l.* a year; and it was provided that the adequacy and justice of the cause of any revocation by the defendant of the said appointment should be determined by J W:—Held, that the defendant had no power of dismissing the plaintiff without giving him a right to the pension of 1,000*l.* a year, until he, the defendant, had previously ascertained by a reference to J W that he had adequate and just cause to revoke the appointment. *Lowndes v. Stamford and Warrington (Earl)*, 21 Law J. Rep. (n.s.) Q.B. 371; 18 Q.B. Rep. 425.

Held, also, that the jurisdiction of the Court to

enforce payment of the retiring pension was not ousted; and that the plaintiff might declare for it without shewing that there had been any determination by J W or any excuse for his not having obtained such determination, or that a reasonable time for obtaining such determination had elapsed. *Ibid.*

The declaration stated, that the plaintiff entered into the service of the defendant for a term of three years, under an agreement that he, the plaintiff, would during that time use his best endeavours to promote the interests of the defendant, and would attend to and carry out all reasonable requests:—Held, in an action for wrongful dismissal before the end of the term that a plea that the plaintiff did not whilst in the defendant's employ use his best endeavours to promote the interests of the defendant according to the agreement, wherefore he was dismissed, disclosed a good defence. *Arding v. Lomax*, 24 Law J. Rep. (N.S.) Exch. 80; 10 Exch. Rep. 734.

If an employer discharge his servant, and at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant, although at the time of the discharge the employer did not know of that cause. *Willets v. Green*, 3 Car. & K. 59.

If a traveller receive part of a bill due to his employer in cash, and set off the residue against a debt due from himself to the debtor, and afterwards render to his employer an account of the cash, but omit to mention the set-off, *semble*, that this would not be a good ground of discharge unless it were done "fraudulently and wilfully." *Ibid.*

One servant has no right to beat another; and if an under-servant misconducts himself an upper servant is not justified in striking him, but should inform their master. *Regina v. Huntley*, 3 Car. & K. 143.

A, an under-servant, who had lost his right arm, was beaten by B, an upper servant, for misconduct; A took out a knife and wounded B:—Held, on a trial for feloniously wounding, that if A did this in self-defence only, he ought to be acquitted; but if A used more violence than was necessary for that purpose, he ought to be convicted of the misdemeanour of wounding only, under the statute 14 & 15 Vict. c. 19. s. 5. *Ibid.*

(C) LIABILITY OF THE MASTER.

[See titles COMPANY—PRINCIPAL AND AGENT.]

(a) For Acts of Servants.

Trespass for false imprisonment. The plaintiff having seen an advertisement of an excursion train from Monk's Ferry to Bangor and back, inquired of the clerk at the Monk's Ferry station, which belonged to the defendants, as to the return of the train, and was informed that he could return that day by the half-past 7 train. The plaintiff then took a ticket, proceeded to Bangor, and returning thence by train at the time appointed arrived at Chester, where the train stopped. The Chester station was used by the defendants and by other railway companies. A railway servant, who had charge of the train, took the plaintiff's ticket, and informing him that he ought not to have gone by that train, demanded 2s. 6d. more. Payment being refused, the railway servant and the superintendent

took the plaintiff into custody. The plaintiff's attorney having written to the secretary of the defendants' company, asking for compensation, received an answer from the secretary, requesting that he might be furnished with the date of the transaction and promising to make inquiries. The secretary also stated verbally that it was an awkward business, that the blame would fall upon the station clerk at the Monk's Ferry station, who gave the plaintiff the false information, and he also offered to return the 2s. 6d. *Quere*—whether there was evidence for the jury of the railway servant, who made the arrest, being a servant of the defendants. *Roe v. the Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, 21 Law J. Rep. (N.S.) Exch. 9; 7 Exch. Rep. 36.

But held, that, at all events, there being no proof of the defendants having the power of arresting the plaintiff, there was no evidence of their having expressly or impliedly authorized or ratified the arrest made by the railway servant, and therefore that they were not liable for his tortious act. *Ibid.*

A railway train driven at the rate of forty miles an hour, according to the general directions of the railway company to the driver, ran over and killed some sheep which had strayed on the line in consequence of the defective fences of the company:—Held, that the train being under the direction and controul of a rational agent, the company were not liable in trespass for the injury; but that the proper form of action was by action on the case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway. *Sharrod v. the London and North-Western Rail. Co.*, 20 Law J. Rep. (N.S.) Exch. 185; 4 Exch. Rep. 580.

It was the duty of the defendants' carman after having delivered his masters' goods for the day to return to their house, get the key of the stable, and put up their horse and cart in a mews in an adjoining street. On his return one evening he got the key, but instead of going to the mews, and without the defendants' leave, he drove a fellow servant in an opposite direction, and on his way back injured the plaintiff by his negligent driving:—Held, that the defendants were not liable. *Mitchell v. Crasweller*, 22 Law J. Rep. (N.S.) C.P. 100; 13 Com. B. Rep. 237.

The declaration alleged by way of inducement "that the defendants were possessed of a cart and horse which was being driven by their servant," without stating "at the time of the grievance" complained of:—Held, an immaterial allegation, and not traversable. *Ibid.*

The declaration also stated, that whilst the plaintiff was crossing a certain street, the defendants, by their servant, negligently drove and injured the plaintiff:—Held, that the defendants, under not guilty, might shew that the driver was not at that time acting as their servant. *Ibid.*

Quere—whether, if this defence had not been open to them on the original record, the Judge had power under the 222nd section of the Common Law Procedure Act to allow a plea, which would raise it, to be added at the trial. *Ibid.*

The plaintiff employed the defendant to remove her goods in his cart, for hire. With the consent of

the defendant's carman the plaintiff got on the cart with the goods, and on the way the cart broke down and the plaintiff was seriously injured and her goods broken:—Held, that the plaintiff was not entitled to recover damages for the personal injury. *Lygo v. Newbold*, 23 Law J. Rep. (N.S.) Exch. 109; 9 Exch. Rep. 302.

The plaintiff, a person of full age, contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart. On the way the cart broke down, and the plaintiff was thrown out and severely injured:—Held, that as the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injuries she had sustained. *Lygo v. Newbold*, 9 Exch. Rep. 302.

The defendant, with the consent of the owner of the soil and the surveyor of the district, employed P, who was a labourer, but a person particularly skilled in the construction of drains, to cleanse a drain which ran from the defendant's garden under the public road, and paid P 5s. for the job. The defendant had never before employed P, and did not in any way interfere with or direct him in doing the job:—Held, that the relationship of master and servant was established between the defendant and P, so as to render the defendant liable for an injury occasioned to the plaintiff, whilst riding on the public road, by reason of the negligent manner in which P had left the soil of the road over the drain. *Sadler v. Henlock*, 24 Law J. Rep. (N.S.) Q.B. 138; 4 E. & B. 570.

(b) For Acts of Contractors.

A having contracted with a railway company to construct a branch line, made a sub-contract with F and H to erect a bridge for part of the line. C, who was foreman to F and H, at a salary of 250l. a-year for attention to their general business, contracted with F and H for a specific additional sum to erect the necessary scaffolding for the bridge, F and H furnishing the materials, the gas-lights included. One of the poles of the scaffolding rested upon a sleeper which was in the highway and above the level of the pavement. In consequence of the want of sufficient light to shew the obstruction, the plaintiff fell against the sleeper and was injured. Subsequent to the accident additional lights were put at the expense of F and H:—Held, that F and H were not liable, but that the plaintiff's remedy lay against C. *Knight v. Fox*, 20 Law J. Rep. (N.S.) Exch. 9; 5 Exch. Rep. 721.

The defendants were employed to pave a district by A. They contracted with B to pave one of the streets. B's workmen in the course of paving the street left some stones at night in such a position as to constitute a public nuisance, and the plaintiff was injured by falling over these stones. No personal interference of the defendants with, or sanction of the work of laying down the stones was proved:—Held, that the defendants were not liable. *Overton v. Freeman*, 21 Law J. Rep. (N.S.) C.P. 52; 11 Com. B. Rep. 867.

Mattheus v. West London Waterworks Co., 3 Campb. 403, overruled. *Ibid.*

The plaintiff's vessel received damage through the negligence and unskilfulness of the master of a steam-tug, which was employed in towing it in the harbour of N. By an act of parliament, which appointed Commissioners of the harbour, it had been provided that it should be lawful for the Commissioners to build or provide steam-tugs for towing vessels into or out of the harbour, and that any person requiring the assistance of a towing vessel should pay to the Commissioners such reasonable compensation as the Commissioners should fix. An arrangement had been entered into between the Commissioners and the proprietors of the steam-tugs which had previously plied in the harbour without being subject to any controul of the Commissioners, that the proprietors should employ their boats at a reduced scale of charges, and that the Commissioners should pay them a sum annually, by way of compensation for their making the reduction. The steam-tugs had been by consent of the proprietors placed under the controul of the harbour master, who was authorized by the act to give directions respecting the management of vessels in the harbour. The plaintiff recovered judgment for the injury to his vessel against the Commissioners in a county court, on the ground that they were responsible for the negligence and misconduct of the master of the tug:—Held, on appeal, that the judgment ought to be reversed, as on no inferences of fact that could legitimately be drawn from the case, could the judgment of the county court have been arrived at without an error in law. *Cuthbertson v. Parsons*, 21 Law J. Rep. (N.S.) C.P. 165; 12 Com. B. Rep. 304.

If A employs another to do a lawful act, and he in doing it commits a public nuisance, A is not responsible. *Aliter*—If the act to be done necessarily involves the committing a public nuisance. *Peachey v. Rowland*, 22 Law J. Rep. (N.S.) C.P. 81; 13 Com. B. Rep. 182.

The defendants contracted with A to fill in the earth over a drain, which was being made for them across a portion of the highway from their house to the common sewer. A after having filled it in, left the earth so heaped above the level of the highway as to constitute a public nuisance, whereby the plaintiff in driving along the road sustained personal injury. A few days previous to the accident, and before the work was completed, one of the defendants had seen the earth so heaped over a portion of the drain, but beyond this there was no evidence that either defendant had interfered with or exercised any controul over the work:—Held, that there was no evidence to go to the jury of the defendants' liability. *Ibid.*

Where a person is employed to do an unlawful act by which an injury is occasioned to a third person, the employer is liable to an action for such injury, though the party employed be a contractor, and the act that of his servants. *Ellis v. the Sheffield Gas Consumers' Co.*, 23 Law J. Rep. (N.S.) Q.B. 42; 2 E. & B. 767.

The defendants, a registered joint-stock company, contracted with W for the laying of their main gas-pipes in the streets of Sheffield, having no special powers for that purpose. The servants of W left a heap of earth and stones which had been thrown out of the trenches dug for receiving the pipes in one of the streets, and the plaintiff in passing along the

street tumbled over it and was injured:—Held, that the defendants were liable to an action for the injury occasioned to the plaintiff. *Ibid*.

The defendant engaged a contractor to build a warehouse for him on his, the defendant's, premises. The contractor's workmen made a deep excavation for the foundation of the warehouse on the defendant's land, close to the boundary line, between the defendant's and the plaintiff's premises. In consequence of the excavation, the plaintiff's yard wall adjoining gave way and fell in; and the workmen, without any directions from the defendant, carried off the materials of the fallen wall. The plaintiff's house was also injured by the excavation. Neither the house nor the wall had been built ten years, and the plaintiff's premises were not entitled to any support from the defendant's land. In an action in a county court by the plaintiff against the defendant, for wrongfully and negligently excavating to the injury of the plaintiff's premises, and for wrongfully carrying away the materials of the wall, the Judge told the jury that as the defendant was in possession of the land adjoining the plaintiff's, he was answerable for the wrongful acts of any person allowed by the defendant to go upon his premises for the purpose of erecting the warehouse there; and that, therefore, the existence of any contract between the contractor and the defendant was immaterial; and that if the jury should be of opinion that the workmen, whilst they were on the defendant's land by his permission, for the purpose of erecting the warehouse, had, from want of due care, injured the plaintiff's wall and buildings, and had carried away from the defendant's land materials belonging to the plaintiff, the defendant was liable for the injuries arising from their acts:—Held, that the direction was wrong; that the action was not maintainable without proof that the plaintiff's premises were entitled to support from the defendant's land; and that the defendant could not be liable, though the acts were done on his premises, the workmen committing them not being his servants, and the acts not being done by his direction. *Gayford v. Nicholls*, 23 Law J. Rep. (N.S.) Exch. 205; 9 Exch. Rep. 70.

(c) *For Injuries to Servants.*

A master is bound to take all reasonable precautions to secure the safety of his workmen; more especially if the work be of a dangerous character and the persons engaged proverbially reckless. *Paterson v. Wallace*, 1 Macq. H.L. Cas. 748.

By the law of England, when the accidental death of a servant is occasioned by the negligence of a fellow servant, the master is not generally held responsible. This does not appear to be the law of Scotland—*sed quære*. *Ibid*.

How far the rashness of the deceased is an answer to a claim of reparation on the part of his relatives where negligence is established against the master. Whether the English and Scotch laws do not differ on this head—*quære*. *Ibid*.

The plaintiff was a guard in the service of the defendants, a railway company, and his duty was to attach certain carriages to the engine of a goods train and to despatch the same within a certain time so as to avoid collision with a passenger train. In consequence of the plaintiff not having had another person to assist him, the engine started, threw him

upon the rails and a truck passed over his arm. The plaintiff for three months previously had done the same work without any assistance and without making any objection:—Held, in an action by the plaintiff against the defendants for compensation for the injury, that the plaintiff having voluntarily undertaken the duty was not entitled to recover. *Skip v. the Eastern Counties Rail. Co.*, 23 Law J. Rep. (N.S.) Exch. 23; 9 Exch. Rep. 223.

(D) JURISDICTION OF JUSTICES.

(a) *Over Servants absenting themselves or neglecting their Work.*

A warrant of commitment issued by a Justice, under the statute 4 Geo. 4. c. 34. s. 3, recited that complaint had been made to the Justice that A had contracted to serve with B & C, in their business, for a term of one year, to commence from the 11th of November last, and that the term of his contract being unexpired, the said A did, on the 2nd of June instant, unlawfully misconduct himself in his said service by neglecting and absenting himself from his said master's service without notice or assigning a sufficient reason. The warrant adjudged the complaint to be true, and convicted A of the offence, and sentenced him to be imprisoned for a month:—Held, that A was entitled to be discharged from custody, as the warrant was bad for not stating either that the contract was in writing, or that A had entered into the service. *In re Askeu*, 20 Law J. Rep. (N.S.) M.C. 241; 2 L. M. & P. P.C. 429.

A warrant of commitment, under the 4 Geo. 4. c. 34. s. 3, adjudged that J G having contracted to serve J S as a collier for a certain time, and the term of his contract being unexpired, "did unlawfully misdeemean and misconduct himself in his said service by neglecting and absenting himself from his said service without the leave of his master, without having given to his said master any notice thereof, and without assigning any sufficient reason for so doing":—Held, that the warrant was bad, as it did not shew that J G had absented himself without lawful excuse. *In re Geswood*, 23 Law J. Rep. (N.S.) M.C. 35; 2 E. & B. 952.

Semble—that such an instrument, although for some purposes equivalent to a conviction, need not set out the evidence; at all events since the 11 & 12 Vict. c. 43. s. 17. *Ibid*.

A B was committed to prison by a Justice under the Master and Servants Act by a warrant which, after reciting that complaint had been made on oath that A B did contract with Messrs. M in the capacity and employment of a collier for the term of one month, and so on from month to month, determinable on a month's notice, and for the wages of 1s. 10d. per ton for cutting coal; and that the said A B entered into the said service according to the said contract, and afterwards and before the term was completed was, in the execution of his contract, guilty of misconduct and misdemeanour in unlawfully absenting himself without the consent of his masters, and without lawful excuse, proceeded, "and whereas the said A B was, this 10th day of December 1853, duly convicted before me, &c. of the said offence so charged upon him in and by the said information, and I, the Justice, adjudged that the said A B for his said offence should be committed to the said house of correction, &c., these are there-

fore to command," &c. The warrant then directed the gaoler to detain the prisoner for the time specified therein. Upon a return to a *habeas corpus* consisting of the above warrant,—Held, first, that affidavits might be used for the purpose of shewing that there was no evidence before the Justice from which he could legally infer a contract creating the relation of master and servant between the parties; and so negating jurisdiction. *Ex parte Bailey*, and *Ex parte Collier*, 23 Law J. Rep. (n.s.) M.C. 161; 3 E. & B. 607.

But, it being assumed that the evidence before the Justice was that A B was employed by Messrs. M under a contract to serve until a month's notice should be given by either party; that the price to be paid should be 1s. 10d. per ton of coal cut, and should rise and fall with the price in other collieries in the district, but that the price was not to affect the month's notice; that A B should serve Messrs. M exclusively, and should not work for any other person during the said service and until the expiration of the month's notice; that if trade was slack or the works stopped by accident, Messrs. M were to be compelled to provide him with work or to pay him reasonable wages; and that the evidence on the part of A B was that he was not bound to any hours of working, nor to cut any quantity of coal; that the employment in the colliery depended on the demand for coal, and that there was not always full employment, and that no allowance was made for loss of time when trade was slack or the works stopped by accident:—Held, that there was evidence from which the Justice might infer an obligation on the part of Messrs. M to employ and of A B to serve personally, and that he therefore had jurisdiction, and that the Court would not interfere with his decision. *Ibid.*

Held, also, that this being a warrant of commitment purporting to be founded on a preceding conviction, it was good on its face, notwithstanding that it did not state that the evidence was given on oath or in the presence of the prisoner. *Ibid.*

(b) To enforce Payment of Wages.

H was hired as a dairy-maid at a farm, to serve for a year, and the duties to be performed by her were those of a dairy-maid, and to assist in the harvesting of the hay and corn, if required. She had also to keep house and to cook for the men-servants and labourers, and to make their beds, and when her master and sometimes his family visited the farm, which he did weekly, she cooked for and attended upon them. An order was made by two Justices under 20 Geo. 2. c. 19. upon the master for payment of a year's wages to H as a servant in husbandry:—Held, that upon the above facts, the Justices might find that H was a servant in husbandry within the 20 Geo. 2. c. 19, and that the order, appearing to be valid, ought to be enforced. *Ex parte Hughes*, 23 Law J. Rep. (n.s.) M.C. 138.

No right of appeal to the Quarter Sessions exists against an order of Justices, made under 4 Geo. 4. c. 34. s. 5, for the payment of an amount of weekly wages adjudged to be due from a master to his servant, upon a complaint under 20 Geo. 2. c. 19, although the Justices in making such order may have acted without jurisdiction. *Regina v. Bedwell*, 24 Law J. Rep. (n.s.) M.C. 17; 4 E. & B. 213.

MERGER.

A testator, by his will, after charging his real estates with the payment of his debts, legacies and funeral expenses, gave to trustees the sum of 6,000*l.*, upon trust to pay the same to E W upon the day of her marriage, the sum to carry interest in the mean time, with a direction that if E W should die without leaving issue, the sum should sink into the residue of his personal estate, and go to his son G W; and he gave all his real and personal estate to G W absolutely. G W, on his marriage, conveyed the real estates to uses, subject to the charge of the 6,000*l.* E W died, without leaving issue, and G W died subsequently, the charge never having been raised. On a bill by the personal representatives of G W to have the charge raised,—Held, reversing the decision below, that the charge had merged for the benefit of the persons entitled to the real estates; and that the result was not altered by the fact of G W having settled the real estates subject to the charge. *Johnston v. Webster*, 24 Law J. Rep. (n.s.) Chanc. 300; 4 De Gex, M. & G. 474: reversing 23 Law J. Rep. (n.s.) Chanc. 480; 2 Sm. & G. 136.

Two terms were created in the same manor: one for 500 years, in 1712; and the other for 600 years, in 1768. In 1791, the latter was assigned to A to secure a mortgage debt, and by a deed of even date the former was assigned to B as a trustee for A. A died, having appointed B, C and D his executors. In 1801, by a deed indorsed on the first assignment of 1791 and made between B, C and D, executors of A, of the one part, and E of the other part, B, C and D assigned the premises "and all the estate," &c. to E for the residue of the term of 600 years, subject to the equity of redemption:—Held, that the term of 1712 being held by B in what must be deemed his own right, did not pass by force of the words "and all the estate," &c., and was not merged. *Rooper v. Harrison*, 2 Kay & J. 86.

Where the tenant in fee, or in tail of an estate, becomes entitled to a charge upon the same estate, the general rule is that the charge merges, unless it be kept alive by the party entitled to it; and where the merger of the charge would have let in other charges in priority, thereby rendering it the interest of the owner of the estate to keep alive his charge, the Court presumed that such was his intention, notwithstanding the absence of any other indication of such intention. *Grice v. Shaw*, 10 Hare, 76.

Merger of a charge in the inheritance is not to be presumed, if it would be contrary to the interest of the owner of the estate and charge. *Davis v. Barrett*, 14 Beav. 542.

A devised an estate to his heir, who in his own right had a charge on it. The heir bought up an incumbrance on the estate amounting to 11,555*l.* for 2,000*l.*:—Held, that he was entitled to the full amount as against the other incumbrancers on the estate. *Ibid.*

A, the owner of a freehold estate subject to a mortgage in fee to secure 1,300*l.*, devised and bequeathed his real and personal estate to B, the mortgagee. B, in his residuary account, stated that he had retained 467*l.* out of the personal estate towards payment of his mortgage debt. Afterwards, B devised the property to three relatives of A, "provided

they undertake to receive the same with all the liabilities attaching thereunto":—Held, first, under the circumstances, that the mortgage had not merged in the fee; and, secondly, that the three took the estate, subject to the payment of the balance of the mortgage debt. *Hatch v. Skelton*, 20 Beav. 453.

METROPOLITAN BUILDING ACT.

[See Stat. 18 & 19 Vict. c. 122.]

The Metropolitan Building Act (7 & 8 Vict. c. 84.) by section 5. provides that "notwithstanding anything to the contrary in any act now in force," every building within specified limits shall be built in reference (*inter alia*) to the walls, height, and to the projections and other parts or appendages of such building, in the manner and of the materials and in every other respect in conformity with the particulars contained in the schedules to that act, and subject in every case of doubt, difference, or dissatisfaction in respect thereof, either between the parties concerned, or between any party concerned and the surveyor of the district, to the determination of the official referees appointed under that act. There are also provisions requiring buildings to be erected under the supervision of the surveyor, and enabling him, in case of irregularities, to require any buildings to be cut into for the purpose of inspection. By the Metropolitan Paving Act (57 Geo. 3. c. xxix.) a power is given to Justices of the Peace to hear complaints by the Paving Commissioners against owners or occupiers of houses who refuse to remove any projections from their buildings over any public ways, vested in the Commissioners:—Held, that the provisions of the Building Act vested in the official referees the sole jurisdiction of determining questions connected with building operations, but did not extend it to the decision of other matters in which the public is interested, and that, consequently, the right of a Justice to give redress under the Metropolitan Paving Act in case of encroachment on a public way was not taken away by the Building Act. *Regina v. Ingham*, 21 Law J. Rep. (N.S.) M.C. 125; 17 Q.B. 884.

A house occupied by a tenant under a lease for twenty-one years was during the term accidentally burnt, and, being ruinous, was pulled down under the provisions of the Metropolitan Building Act. By the lease the tenant was exempted from paying rent for the time that the house was untenable by reason of an accidental fire:—Held, that the expenses incurred could not be recovered from the landlord, a tenant for life of the reversion, under section 42. of the act, which throws the burden upon "the owner of every such building, being the person entitled to the immediate possession thereof." *Ex parte the Overseers of Saffron Hill*, 24 Law J. Rep. (N.S.) M.C. 56.

METROPOLITAN PAVING ACT.

[See *Regina v. Ingham*, title METROPOLITAN BUILDING ACT.]

To a declaration in trespass for entering the plaintiff's close and pulling down a wall there, the defendant pleaded that the close in question was a paved

public place, within the meaning of the Metropolitan Paving Act (57 Geo. 3. c. 29), and that the plaintiff had unlawfully, and contrary to the provisions of the said act, erected thereon the said wall; and because the said wall, at the said time when, &c. remained incumbering the said public pavement, and because the plaintiff, upon the request of the defendant, refused to remove the same, the defendant entered upon the said close and pulled down the said wall:—Held (after verdict for the defendant), that the plea was bad, as it did not shew any necessity for the defendant's using the portion of the pavement obstructed by the wall, or that it interfered with the exercise of his right of passage. *Bateman v. Bluck*, 21 Law J. Rep. (N.S.) Q.B. 406.

METROPOLITAN POLICE MAGISTRATES.

[See JUSTICE OF THE PEACE.]

MINE.

[Right to Minerals, see title INCLOSURE, (B) (α).]

- (A) GRANT.
- (B) LEASE.
- (C) COMPANY.
 - (a) Powers, Duties and Liabilities, in general.
 - (b) Liability for Injuries in Working Mines.
- (D) COST-BOOK SYSTEM.
- (E) SHARES, SALE AND TRANSFER OF.
- (F) INSPECTION OF.

(A) GRANT.

[See title LIMITATIONS, STATUTE OF.]

Trespass for breaking and entering the plaintiff's closes and digging minerals therein. Pleas, first, not possessed; and, secondly, a plea justifying the trespasses by the defendant as assignee of a lease of the minerals, and of the right to work them for ninety-nine years granted by the owner of the fee in 1821. Replication, that the right to make an entry did not first accrue to the defendant or those through whom he claimed within twenty years next before the entry by the defendant, and that the defendant's right was, therefore, barred by the 3 & 4 Will. 4. c. 27. Issue was taken on this replication. It appeared that in 1821, while B was in possession, as tenant from year to year, of a farm, including the close in question, the owner of the fee by indenture demised the coal lying beneath the farm to B and P for ninety-nine years, with liberty to work the same. The interest of B and P under this demise became vested by various mesne assignments in the defendant, who in 1847 (during the term) worked the coal. Up to 1847 no coal had ever been worked under the demise:—Held, first, that B must be presumed to have been in possession of the minerals, as well as of the surface, when the lease for ninety-nine years was granted, which thus became a lease in possession and not a mere *interesse termini*, and that this possession of the minerals continued and passed to the defendant without any actual entry under the lease of 1821. Secondly, that the possession of B enured for the benefit of himself and P.

Thirdly, that the second plea confessing that the plaintiff was *de facto* in possession when the trespasses were committed, would be satisfied by a dispossession of the lessees within twenty years before the defendant entered to commit the trespasses in question, and that the defendant might rely on the right of entry which accrued on such dispossession, and not upon a right of entry accruing as upon a grant of an *interesse termini* in 1821. *Keyse v. Powell*, 22 Law J. Rep. (N.S.) Q.B. 305; 2 E. & B. 132.

(B) LEASE.

In a lease of a coal mine the lessees covenanted to leave unworked a barrier of coal between the demised mine and the adjoining mines, except where the lease gave them liberty to break through it. The liberty was to make outstrokes, or other communications through the barrier for the purpose of conveying underground coals gotten in any of the adjoining collieries in the occupation of the lessees, from such colliery into the demised mine, and by such outstrokes and communications to convey underground the coals from such adjoining collieries into the demised mine, and from thence to convey and carry away all such coals, and also draw to bank at any of the pits or shafts, sunk or to be sunk by the lessees in any of the land and grounds demised, the coals from such adjoining colliery:—Held, that this liberty extended to authorize the lessees to break through the barrier for the winning coal of the demised mine and for winning coal of such adjoining mines, though the coal of such demised or adjoining mines when won was not to be nor was brought to the surface through a pit or shaft in the demised land, and although no such pit or shaft in fact existed. *James v. Cochran* (in error), 22 Law J. Rep. (N.S.) Exch. 201; 8 Exch. Rep. 556: affirming the judgment below, 21 Law J. Rep. (N.S.) Exch. 229; 7 Exch. Rep. 170.

There were various provisions in the lease which spoke of pits or shafts in the demised lands; but there was no express covenant to make any such pit or shaft. There was also a covenant that the lessees would draw to bank at some of the pits or shafts of the said colliery (provided that the same should be pits or shafts from which the coals of the demised colliery should not be worked by an outstroke), and lay in some convenient place on the lands of the lessors all the manure made by the horses employed underground in working the demised mine:—Held, that there was no express or implied engagement by the lessees that bound them to sink a pit in the demised land. *Ibid*.

There was a further covenant that the lessees would not do or suffer to be done anything whereby the demised mine or any part of it should be damaged, drowned, or overburthened with water, or which might occasion any creep or thrust on the workings, shafts, aircourses or watercourses of the colliery, and that they would keep the levels, drifts and necessary staples for air clear and in good repair, order and condition from the surface of the earth down to the levels or drifts; and should and would draw all the water to come forth out of the colliery by means of fire or other engines to the surface of the earth or to some off-take or drift, and there discharge the same. *Semble*—That suffering the workings and aircourses of an old seam of the mine which had been partially worked, but which was being worked no longer, to

remain full of water, was not a breach of that part of the covenant which required the lessees to keep the levels, drifts, and necessary staples for air in good repair, order and condition. *Ibid*.

Coal mines were demised at a certain royalty per ton upon the coal which might be got, and also at the rent of 300*l.* a year, or so much thereof as with the royalty should amount to that sum, such rent of 300*l.* to be a minimum rent for the coal demised. And the lessee covenanted to pay the rents and to work the mine:—Held, that a court of equity would not restrain an action by the lessor for the minimum rent, although the coal proved to be not worth the expense of working; but that if the lessor were to sue upon the lessee's covenant to work the mine, the Court would interfere. *Ridgway v. Sneyd*, Kay, 627.

In applying the rule of *caveat emptor* to the case of leases of coal mines, it must be remembered that every one acquainted with that kind of property is aware that coal mines are liable to be interrupted by faults. *Ibid*.

If all the coal had been gotten by ancient workings, that might be a case for equitable relief. *Ibid*.

(C) COMPANY.

(a) Powers, Duties and Liabilities in general.

[See Stat. 18 & 19 Vict. c. 32.]

In an action of assumpsit, the declaration stated, that in consideration that the plaintiffs would sell to the defendants iron rails, the defendants agreed to furnish to the plaintiffs sections of the said railways, averring mutual promises, and alleging as a breach the non-delivery of the sections by the defendants. It appeared that the plaintiffs were incorporated by a charter, for the purpose of carrying on the business of copper miners, and that the contract in question, which was not under seal, had been made by an agent on behalf of the plaintiffs with the defendants:—Held, that the action could not be maintained by the corporation, as the contract was not under seal, and did not fall within any of the exceptions to the general rule, that a corporation can only bind itself by deed. That the contract was not incidental or ancillary to carrying on the business of copper miners, and was therefore not binding on the corporation. That no other charter authorizing the company to deal in iron could be presumed to exist, the charter which was given in evidence not supporting such an authority. That, as the corporation could not be sued upon this contract, and as the alleged promise by them formed the consideration for the defendants' promise, the corporation could not sue upon the contract. *The Governor and Company of Copper Miners v. Fox*, 20 Law J. Rep. (N.S.) Q.B. 174; 16 Q.B. Rep. 229.

Semble—that the doctrine cannot be supported, that a corporation may sue as plaintiffs upon a simple contract, upon the ground that by so doing they are estopped from objecting that the contract was not binding upon them. At all events, such an estoppel could only support an action of covenant, as upon a contract under seal. *Ibid*.

Where a bill was addressed to a mining company, and accepted by the defendant as manager, and it was shewn that he and three others had agreed to

form the company, and that the mine had been worked on the footing of that agreement.—Held, that the defendant was individually liable on the bill as a member of the company. *Owen v. Van Uster*, 20 Law J. Rep. (N.S.) C.P. 61; 10 Com. B. Rep. 318.

The case of *Vice v. Lady Anson*, 7 B. & C. 409; s. c. 6 Law J. Rep. K.B. 24, commented upon. *Ibid.*

The directors of a mining company have no implied authority to borrow money on the credit of the company, for the purposes of carrying on the mines or for any other purpose, however useful or necessary to the objects for which the company is formed. *Burmester v. Norris*, 21 Law J. Rep. (N.S.) Exch. 43; 6 Exch. Rep. 796.

By the deed of settlement under which a company was carried on, a capital of 50,000*l.* was provided, and there were powers to create new shares, and to alter the provisions of the deed by the vote of a special general meeting. There was also a clause "that the affairs and business of the company shall be under the sole and entire controul of the directors, of whom there shall be not less than five or more than nine, and three of them shall, at all meetings of directors, and for all purposes, be competent to act":—Held, that under this deed the directors had no express authority to borrow money for the necessary purposes of the mines. *Ibid.*

The defendant and other adventurers purchased a mine of B for 1,000*l.* down, and 15,000*l.* to be paid in cash or shares at the end of six months, should they continue to work it, such payment of the 15,000*l.* or the surrender of the mine to B being optional to them. At a meeting, at which the defendant was present, on the 21st of October, for the purpose of forming a company, on the cost-book principle, to work the mine, it was divided into 60,000 shares, 1,125 of which were allotted to the defendant, and for which he paid 100*l.*, and 33,750 shares to A, B and C, who agreed to find the capital requisite for working the mine during six months from that date, and they, with others, including the defendant, were appointed a managing committee. During the six months the plaintiffs supplied machinery necessary for the mining operations to the order of the pursuer:—Held, that the defendant was a partner in the mine during that time, and that the resolution of the 21st of October, that A, B and C should find the requisite capital for six months, did not exempt him from liability to the plaintiffs for the goods supplied. *Peel v. Thomas*, 24 Law J. Rep. (N.S.) C.P. 86; 15 Com. B. Rep. 714.

A manager of a mine is authorized to incur debts for wages and goods necessary for carrying on the mine. *In re the German Mining Company*, 22 Law J. Rep. (N.S.) Chanc. 926; 4 De Gex, M. & G. 19.

(b) *Liability for Injuries in working Mines.*

When the surface of land belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. The owner of the surface-close, while unencumbered by buildings and in its natural state, is entitled to have it supported

by the subjacent mineral strata, and if the surface subsides and is injured by the removal of these strata, although the operation of removal may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Humphries v. Brogden*, 20 Law J. Rep. (N.S.) Q.B. 10; 12 Q.B. Rep. 739.

A declaration alleging that the defendant wrongfully and improperly and without leaving any proper or sufficient pillars or supports in that behalf, worked certain coal mines under and contiguous to the close of the plaintiff, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, and that by reason thereof the soil and surface of the said close sank in, cracked, swagged, and gave way, is sufficient, without an express allegation that the plaintiff was entitled to have his close supported by the subjacent strata. *Ibid.*

A declaration in case by reversioners stated that certain buildings and closes of land were in the occupation of A and B as tenants to the plaintiffs, the reversion belonging to them. That the defendant so negligently, and without leaving proper support, worked certain mines near and contiguous to the said premises, and dug minerals out of the mines near and contiguous to the said buildings and closes, whereby large portions of the buildings became injured, and the ground on which the buildings stood and the said closes swagged and gave way:—Held, on motion in arrest of judgment, that the declaration was good; that, as it did not appear that the soil in which the mines were belonged to the defendant, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the defendant was *prima facie* a wrong-doer, and that it was unnecessary to aver in the declaration that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked. If any circumstance existed which justified the defendant in getting the minerals without leaving sufficient support, that should have been pleaded by way of confession and avoidance. *Jeffries v. Williams*, 20 Law J. Rep. (N.S.) Exch. 14; 5 Exch. Rep. 792.

The withdrawal of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action, as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. Therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, and an accord and satisfaction agreed to and performed between the parties. *Nicklin v. Williams*, 23 Law J. Rep. (N.S.) Exch. 335; 10 Exch. Rep. 259.

Declaration for wrongfully, negligently, and improperly, and without leaving any proper or sufficient support, working certain coal mines under the land and buildings of the plaintiffs, whereby the said land swagged and sank, and the said buildings were cracked and injured. Plea, setting out an indenture of 1671, by which the land in question upon which the buildings were erected was conveyed by Sir R. Cole to R. C, from whom the plaintiffs claimed title, reserving to the said Sir R. Cole the coal mines within and under the said land, with free and full

power to work, sink, dig for or mine, and to drive drifts and make watercourses, or to do any other act necessary or convenient for the working, winning, or getting the said coal, with free liberty of way-leave for leading and carrying to places convenient for laying or vending the same; and containing a covenant by the said Sir R. Cole, his heirs or assigns, for payment to the said R. C, his heirs or assigns, of treble the damages, loss, or prejudice which the said R. C, his heirs or assigns, should sustain by reason of the digging, working, sinking, breaking of ground, and way-leave, or other matter or thing used or exercised in working or leading of the said coal. The plea then alleged that the plaintiffs were not entitled to have the said land and buildings supported by the said mines, otherwise than subject to the said rights, privileges, reservations, and matters excepted and reserved out of the said grant by the said deed. The title of the defendant to the said mines, with all the said rights, privileges, &c., was shewn; and it was further alleged, that the defendant worked, sunk, dug for and won the said mines in divers parts of the said lands and premises, and drove drifts and made watergates and used divers ways, and did other acts necessary and convenient for working, winning, and getting the same in the said lands, and in so doing caused the damage complained of; the defendant doing the said acts carefully, diligently, skilfully and properly, and according to the course and practice of mining used and approved of in the county, and being ready and willing to satisfy and pay damages according to the said covenant in the said deed contained. Replication, taking issue, first, upon the allegation that the acts complained of were necessary for the working, &c. the said mines; and, secondly, that the said acts were done carefully, &c., according to the course and practice of mining used, &c. Demurrer also to the plea. It was admitted at the trial of the issues that the defendant had skilfully and properly worked the said mines, except that he had removed all the coal and left no support for the surface land. It also appeared, that in 1671 and until 1810 the approved course and practice of mining in the county was to leave ribs of coal to support the surface, but since 1810 the practice had been different:—Held, that the *prima facie* right of the plaintiffs, as owners of the surface, to sufficient support from the subjacent strata, was not interfered with by the powers of working and winning the coals, reserved by the deed of 1671, which were perfectly consistent with the exercise of them being subject to the plaintiffs' right to support; and therefore that the plaintiffs were entitled to judgment upon the demurrer. *Smart v. Morton*, 24 Law J. Rep. (N.S.) Q.B. 260.

Held, also, that the plaintiffs were entitled to retain the verdict on the issues raised by the replication. *Ibid.*

(D) COST-BOOK SYSTEM.

A lease of a mine was made to A B and two other persons, co-adventurers, who agreed to work it upon the cost-book system. Calls were made which A B did not pay, and his co-adventurers declared his shares forfeited. A B had not abandoned his right, but after three years he filed a bill, praying a dissolution of the partnership and for an account:—Held, (affirming a decree of the Master of the Rolls) that

there is no custom in mines worked on the cost-book system to forfeit shares for non-payment of calls without a special stipulation. *Hart v. Clarke*, 24 Law J. Rep. (N.S.) Chanc. 137; 6 De Gex, M. & G. 232; 19 Beav. 349.

Held, also, (reversing the decree of the Court below) that the partnership was not determined at the time of the declaration of forfeiture, and that the plaintiff was entitled to an account, and to the appointment of a manager and receiver, and that, the plaintiff having a legal interest in the mine, it could not be affected by the acts of his partners. *Ibid.*

(E) SHARES, SALE AND TRANSFER OF.

[See titles, FRAUDS, STATUTE OF—INSOLVENT.]

(F) INSPECTION OF.

[See Stat. 18 & 19 Vict. c. 108.]

MISDEMEANOUR.

[See the various titles of CRIMINAL LAW, and especially BURIAL—CONSPIRACY—FORGERY.]

In some counts of an indictment, the defendant was charged with unlawfully and knowingly obtaining and procuring indecent and obscene prints and libels, in order and for the purpose of afterwards publishing and disseminating them. In other counts with unlawfully and knowingly preserving and keeping in his possession indecent and obscene prints and libels, with the intent and for the purpose of afterwards publishing and disseminating them:—Held, on writ of error, that the former counts were good, as the obtaining and procuring the indecent prints and libels, for the purpose alleged, was an act done in commencing a misdemeanour, and, therefore, an indictable offence. But that the latter counts were bad, as they alleged no act done, and the possession of the prints and libels may have been come by innocently. *Dugdale v. Regina* (in error), 22 Law J. Rep. (N.S.) M.C. 50; 1 E. & B. 425.

MONEY COUNTS.

[See title ACCOUNT STATED.]

(A) MONEY PAID.

(B) MONEY LENT.

(C) MONEY HAD AND RECEIVED.

(A) MONEY PAID.

When a wife dies, her husband is bound to provide her with a funeral at a reasonable expense; and if he does not do so, any person who voluntarily employs an undertaker and pays him for performing such a funeral, is entitled to recover the sum so expended, from the husband, in an action for money paid. *Ambrose v. Kerrison*, 20 Law J. Rep. (N.S.) C.P. 135; 10 Com. B. Rep. 776.

A being in want of money applied to D and S, who were in partnership, for an advance. They sent him an acceptance by D alone, and A agreed that if he discounted that acceptance he would give to D and S his own acceptance. He discounted D's acceptance, but failed to give his cross-acceptance.

D was afterwards sued on his acceptance by the holder of it, and paid it out of the money of D and S. D then sued A for money paid:—Held, that the action could be maintained by D alone upon the implied contract to indemnify him, which arose when he paid the acceptance upon which he alone was liable to be sued. *Driver v. Burton*, 21 Law J. Rep. (n.s.) Q.B. 157; 17 Q.B. Rep. 989.

A and B, being partners, kept an account with C as their banker. On the banker's claiming a balance against the firm, A demanded an explanation from B, and B wrote to him that the balance was his own private debt, and that the firm had nothing to do with it. Subsequently B gave the banker a promissory note for this balance signed in the partnership name. A having been compelled to pay this note, —Held, that he might recover the whole from B in an action for money paid to his use. *Cross v. Cheshire*, 21 Law J. Rep. (n.s.) Exch. 3; 7 Exch. Rep. 43.

(B) MONEY LENT.

[See *Enthover v. Hayler*, title DEBENTURES.]

M W deposited certain country bank notes, payable in London, representing 80*l.* in value, with a banking company, and received the following memorandum, signed by the manager:—"Received of M W 80*l.*, for which we are accountable. 80*l.*, at 3*l.* per cent. interest, with fourteen days' notice." The notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and refused payment. They were re-transmitted by that night's post to the banking company, who on the following day gave notice of dishonour to M W, and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M W made the deposit with the banking company, but that neither M W nor the banking company were then aware of this:—Held, that, under the above circumstances, M W could not maintain an action, either for money lent or for money had and received, against the banking company. *Timmis v. Gibbins*, 21 Law J. Rep. (n.s.) Q.B. 403.

(C) MONEY HAD AND RECEIVED.

[See *Edwards v. the Great Western Rail. Co.*, title CARRIER, (C), and titles ASSUMPSIT—INSOLVENT.]

A and B, the defendants, went together to the house of the plaintiff's mother, and A seized there a sum of money belonging to the plaintiff. There was some evidence of A and B having gone with the intent to get the money, but there was no evidence that B went into the house. They subsequently paid the money into a bank to their joint account:—Held, that the plaintiff might waive the trespass, and maintain an action for money had and received against the two defendants. *Neat v. Harding*, 20 Law J. Rep. (n.s.) Exch. 250; 6 Exch. Rep. 849.

Deeds of the plaintiff were placed by A in the hands of the defendant, her attorney, and, upon application, A declined to give any information about them, unless upon payment of a sum of money which she claimed to be due to her from the person who had devised to the plaintiff's wife the property to which the deeds related, and ultimately referred the plaintiff to the defendant. He also refused to

give them up, and the plaintiff, in order to obtain them, paid the amount claimed, saying, at the same time, to the defendant, "You shall hear of this again:—Held, that this was not a voluntary payment, and that the amount so paid was recoverable in an action for money had and received. *Oates v. Hudson*, 20 Law J. Rep. (n.s.) Exch. 284; 6 Exch. Rep. 346.

A landlord, who has sold his tenant's goods under a distress for rent, is not liable in an action for money had and received at the suit of the mortgagee of the goods to recover the overplus money in the landlord's hands; the proper remedy being by an action on the case against him for not paying over the overplus to the sheriff, pursuant to 2 W. & M. sess. 1. c. 5. s. 2. *Yates v. Eastwood*, 20 Law J. Rep. (n.s.) Exch. 303; 6 Exch. Rep. 805.

The Bristol and Exeter Railway is a continuation of the Great Western Railway, but worked by a distinct company, and the act of incorporation requires that the charges for carriage of goods, &c. shall be the same to all persons under similar circumstances. By the scale-bill issued at the stations on both lines, and purporting to specify the rates of carriage along both lines, the sum of 2*l.* 6*s.* 3*d.* was stated as the price for the carriage of goods per ton from Paddington, being the London terminus of the Great Western Railway, to Taunton, a station on the Bristol and Exeter line. This charge included the cost of collection and of the delivery of the goods at the respective places. To the bill was appended a notice that persons collecting and delivering their own goods in London and Taunton would be allowed 2*s.* 6*d.* and 1*s.* respectively. The plaintiff, who so collected and delivered goods which he sent by the railway from Paddington to Taunton, demanded a larger allowance, alleging that the sum of 3*s.* 6*d.* was not a reasonable compensation for the performance of these duties, and upon several occasions he paid to the Bristol and Exeter Railway Company at Taunton the full amount of 2*l.* 6*s.* 3*d.* per ton, less the allowance above specified, for the carriage of goods from Paddington to Taunton, but always under protest, although without ever tendering a smaller amount. He then brought an action for money had and received to recover the excess which he had paid above what would have been payable at an increased allowance. The jury found that the allowance of 2*s.* 6*d.* and 1*s.* was too little, and returned a verdict for the amount so paid in excess:—Held, first, that the action for money had and received was maintainable. Secondly, that the whole sum so paid in excess was recoverable from the Bristol and Exeter Railway Company, although they received a portion of it as agents only for the Great Western Railway Company. *Parker v. the Bristol and Exeter Rail. Co.*, 20 Law J. Rep. (n.s.) Exch. 442; 6 Exch. Rep. 702.

L placed in plaintiff's hand a fund, out of which plaintiff was directed to satisfy certain acceptances; defendant falsely represented to plaintiff that he held one such acceptance, and thereby induced plaintiff to pay him the amount of the alleged acceptance out of the fund:—Held, that plaintiff might maintain money had and received against defendant. *Holt v. Ely*, 1 E. & B. 795.

Semble—that L might also have maintained the action. *Ibid.*

The will of a testator, who at the time of his death, was in possession of some household property, which had been mortgaged to him in fee to secure 1,500*l.* and interest, contained the following clauses:—"I give all my interest and claim on household property in N belonging to the successors of the late [mortgagee], on which I have a mortgage of 1,500*l.*" &c. "to the plaintiff, his heirs and assigns for ever," &c. "My widow shall pay my funeral expenses and other just debts, without interfering with the legacies to my family." During the testator's lifetime, certain repairs which had been ordered by him had been done to the mortgaged premises, but had not been paid for by him, but were paid for by his executrix after his death. There were also at the time of his death arrears of interest due on the mortgage:—Held, that, by the will, not only the principal sum of 1,500*l.* but also the unpaid arrears of interest passed to the plaintiff as legatee. That the plaintiff was not liable to repay to the executrix the sum he had so paid for the repairs of the mortgaged premises. That the executrix was not justified in refusing to give up to the plaintiff the mortgage deed until he had paid to her the amount of the arrears of interest and of the bill for the repairs; and that, assuming that she had assented to the legacy, and that the sums were paid under duress, he was entitled to recover them back. *Gibbon v. Gibbon*, 22 Law J. Rep. (n.s.) C.P. 131; 13 Com. B. Rep. 205.

E H L, who resided in New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to trustees, to dispose of it for his benefit. The plaintiff entered into a written correspondence with the trustees upon the matter of the purchase, and from the various letters which passed between the parties it appeared that the terms of the purchase were not finally determined and settled upon until the 28th of February 1849. Upon the 6th of February the annuitant died. The purchase-money was paid by the plaintiff in ignorance of the death, and came into the hands of the executrix of the deceased:—Held, that, as the annuity had ceased to exist at the time of its purchase, the plaintiff was entitled to recover from the executrix the whole of the purchase-money, on the ground of its having been paid without consideration. *Strickland v. Turner*, 22 Law J. Rep. (n.s.) Exch. 115; 7 Exch. Rep. 208.

The plaintiff applied to the defendant, a parish clerk, who kept the parish registers under the direction of the rector, for permission to search them. He told the defendant he did not want certificates, but only to make extracts, and was informed that the charge would be the same whether he made extracts or had certificates. He accordingly searched the registers and made extracts. The evidence was, that no mention of the charge was made before the search, but that the plaintiff was told by the defendant that the charge was 3*s.* 6*d.* for each extract, the amount of which he paid:—Held, first, that the payment was not voluntary, and that the plaintiff was entitled to recover the excess paid in an action for money had and received; secondly, that the defendant, and not the rector, was the party to be sued. *Steele v. Williams*, 22 Law J. Rep. (n.s.) Exch. 225; 8 Exch. Rep. 625.

Semble—that the fees if taken by the clerk after the examination of the book, would have been taken *colore officii*, and might have been recovered back. *Ibid.*

Semble, also—that the plaintiff was entitled to take minutes in the course of his search, but not to occupy an unreasonable time for that purpose, nor to have the registers in his hands, it being the duty of the clerk to superintend the search, and to keep a controul over the registers. *Ibid.*

Where a party, to secure advances made to him, assigned to his creditor his present and also his after-acquired property, and the former being insufficient to pay the debt, the creditor sold the present and also the after-acquired property, with the assent of the debtor, who probably thought that the after-acquired property passed by the assignment,—Held, that the proceeds of the after-acquired property which had been sold under a mistake as to the law, but without fraud, could not be recovered back. *Platt v. Bromage*, 24 Law J. Rep. (n.s.) Exch. 63.

MORTGAGE.

[See titles LANDLORD AND TENANT—MERGER—TROVER.]

- (A) CONSTITUTION AND EXTENT OF.
- (B) EQUITABLE MORTGAGE.
- (C) STATUTORY MORTGAGE.
- (D) MORTGAGOR AND MORTGAGEE—RELATIVE POSITION OF.
- (E) RIGHTS OF THE MORTGAGOR.
- (F) RIGHTS OF THE MORTGAGEE AND OTHERS CLAIMING UNDER HIM.
- (G) POSSESSION OF MORTGAGEE.
- (H) LOST TITLE DEEDS.
- (I) PRIORITY.
- (J) TACKING.
- (K) LIABILITY TO DEBTS.
- (L) POWER OF SALE.
- (M) ASSIGNMENT.
- (N) RIGHT TO REDEEM.
- (O) REDEMPTION AND RECONVEYANCE.
- (P) FORECLOSURE.
- (Q) RECEIVER.
- (R) ACCOUNTS.
- (S) INTEREST.
- (T) COSTS.
- (U) PRACTICE.

(A) CONSTITUTION AND EXTENT OF.

A mortgage of a chattel may be made without deed. *Flory v. Denny*, 21 Law J. Rep. (n.s.) Exch. 223; 7 Exch. Rep. 581.

Trustees were empowered under a local act to purchase land, &c. for the purpose of making public docks, and to raise funds by borrowing money on the security of the rates and tolls to be levied under the act, and of any property vested in the trustees by virtue of the act, and the mortgages executed for this object were to be pursuant to a certain form, and to be registered. In the course of the execution of the works a large quantity of tools, machinery, and materials were purchased by the trustees for the purposes of the works, which they subsequently mortgaged to the contractor by two deeds which were not in the form given by the statute or registered. Subsequently these materials, tools, and machinery were seized under an execution against the company:—Held, that the

mortgage was valid, and the materials, &c. were not liable to be seized. *McCormick v. Parry*, 21 Law J. Rep. (N.S.) Exch. 143; 7 Exch. Rep. 355.

The purchase of a piece of land at an exorbitant price will not be allowed to stand when made the condition of a loan of money to a party whose necessities compelled him to borrow. *Cockell v. Taylor, Preston v. Collett, and Collett v. Preston*, 21 Law J. Rep. (N.S.) Chanc. 545; 15 Beav. 103.

A mortgage of a fund in court in a suit of *Collett v. Maule*, by W G C, the purchaser of the land, to secure 6,000*l.*, the purchase-money, to G W F, the vendor, set aside, on the ground that the transaction was fraudulent. *Ibid.*

An assignment of a chose in action must be taken, subject to all prior claims. Sub-mortgages of the fund in court, made without noticing G W F, were therefore set aside, as his title was either void or subject to the prior equity of W G C, notwithstanding he had been induced to create or countenance such sub-mortgages. *Ibid.*

The acts of W G C in joining to create the sub-mortgages were not a recognition of or an acquiescence in the sub-mortgages, as they were done in entire ignorance of his rights, and under the idea that the original transaction with G W F was unimpeachable. *Ibid.*

In 1815, real estate stood settled on the husband for life, remainder to his wife for life; remainder to the heirs of the body of his wife; remainder to the right heirs of the husband. The husband and wife barred the estate tail; and by a deed of the 30th of June 1817, it was settled to such uses as the husband alone should appoint. He, by a deed of the 1st of July 1817, appointed to such uses as he and his wife should jointly appoint; and in default, to himself for life; remainder to his wife for life; remainder to his son in fee: and on the 2nd of July 1817, they appointed the estate by way of mortgage for a term, with a proviso for cesser of the term upon repayment. Between 1817 and 1826, various other mortgages were made under the power, the equity of redemption being reserved in terms consistent with the uses of the deed of the 1st of July 1817. In 1832, the husband and wife, under the power, mortgaged the estate in fee; the equity of redemption being limited to the husband and wife, their heirs or assigns, or to such other persons as they should direct:—Held, upon appeal, reversing the decision below, that the proviso for redemption in the deed of 1832 was not intended to alter the limitations in the deed of the 1st of July 1817. *Whitbread v. Smith*, 23 Law J. Rep. (N.S.) Chanc. 611; 3 De Gex, M. & G. 727; reversing 1 Drew. 531.

Held, also, that the deeds of the 30th of June and the 1st and 2nd of July 1817, constituted one transaction; and that, consequently, the deed of the 1st of July 1817 was not a voluntary deed, as between the son claiming under the limitations of that deed, and a purchaser from the husband. *Ibid.*

A B, a tenant in tail subject to an existing life estate, borrowed money on mortgage, and the tenant for life joined in order to bar the entail, and he covenanted to pay the interest during his life. By the same deed the equity of redemption was resettled on A B for life, with remainder to his issue in tail, with limitations over,—the Court, ten years afterwards,

set aside the resettlement of the equity of redemption, on the ground that there was no proof of any contract to vary the existing limitations. *Meadows v. Meadows*, 16 Beav. 401.

A widow who, under her marriage settlement and otherwise, was entitled to annual and other sums charged on her husband's estates, was one of the trustees of his will, whereby the estates were devised in trust to raise 2,000*l.* for her benefit, and subject thereto in trust, to convey the estates as the testator's daughter by a former marriage should direct. The daughter borrowed money upon the security of the mortgage of some of the estates, in which the widow and her co-trustee joined, and whereby after reciting the will and the agreement for the loan, and that the daughter had directed the widow and her co-trustee to make such conveyance as was therein-after contained, the widow and her co-trustee, as devisees in trust, by the direction of the daughter, conveyed the estates to the mortgagee upon trust for sale and for payment of the mortgage-debt and of the surplus as the daughter should appoint, and subject thereto according to the trusts of the will:—Held, 1. That the mortgage did not pass the beneficial interest of the widow. 2. That, nevertheless, her charges must be postponed to the mortgage, she having concurred in it without reserving her priority. *Strong v. Hawkes*, 4 De Gex, M. & G. 186.

A surrender by a husband and wife of the wife's copyhold estate was expressed to be to such uses in favour or for the benefit of the husband, his heirs and assigns, and with such powers of sale and other powers and provisos, and chargeable with such sums as a mortgagee (to whom a conditional surrender had some time previously been made to secure 50*l.*) should, at the request and by the direction of the husband appoint, and subject thereto to the use of the mortgagee and his heirs, with a proviso for making the surrender void on payment of the sum of 100*l.* then advanced by the mortgagee to the husband:—Held, that the destination of the equity of redemption was completely changed by the last-mentioned surrender, and was not merely affected to the extent required for the purpose of the security thereby created. Held, also, that the lord having accepted a surrender in the above form was bound by it. *Eddleston v. Collins*, 3 De Gex, M. & G. 1; 22 Law J. Rep. (N.S.) Chanc. 480.

Seem—that he could not have been compelled to accept it. *Ibid.*

Seem—that in a foreclosure suit it is not competent for the defendant to impeach the mortgage on the ground of fraud, without instituting a cross-suit. *Ibid.*

A B, being seised in fee of four estates, mortgaged two of them, and subsequently settled the mortgaged estates, and one of the others, on himself for life, with remainder to his son in tail, and covenanted against incumbrances; but the settlement did not recite that there were any incumbrances. He afterwards mortgaged the fourth estate, and took the benefit of the Insolvent Debtors Act. After this, a creditor on certain bills of exchange became a registered judgment creditor, and then filed a bill against the tenant in tail, and the assignee under the insolvency, and the other incumbrancers, praying a sale in satisfaction of the judgment debt and what might be paid by the plaintiff in discharge of prior

incumbrances, subject to the estate and interest of the tenant in tail under the settlement:—Held, reversing a decree of foreclosure against the tenant in tail, that the settled estates must be regarded as exonerated from incumbrances as between A B, the settlor, and the tenant in tail; and that the plaintiff was subject to the same equities as the settlor; and that as the judgment debt was itself subsequent to the settlement, the tenant in tail could not be affected by the judgment. *Hughes v. Williams*, 3 Mac. & G. 683.

Among other incumbrances on the estates in question, was a legacy of 800*l.*, subject to the payment of which the estates had been devised to A B; the testator's death took place in 1810, and the bill was filed in 1843, at which time the legacy and the arrears of interest thereon remained unpaid:—Held, that the arrears of interest on such legacy could only be recovered from within six years from the filing of the bill. *Ibid.*

(B) EQUITABLE MORTGAGE.

T, being possessed of a plot of land for a term of years, by indenture, dated the 24th of April 1845, mortgaged the term to S, as a security for 300*l.*, with an absolute power of sale on default of payment. On the same day he executed a memorandum of agreement, by which he undertook to deposit with S a lease of another plot of ground when it should be executed, the draft of which was already prepared, as a further and collateral security for the sum secured by the mortgage. A mill and certain buildings occupied therewith stood partly on one plot of land and partly on the other. On the 18th of December 1848 the lease was granted to T, and then deposited with S, in accordance with the memorandum of agreement. By indenture of the 27th of August 1845, T executed a second mortgage of the term mortgaged to S, as security to H M for 100*l.* On the 2nd of March 1847, T assigned an undivided moiety of the premises comprised in the lease first mentioned and of those comprised in the lease of the 18th of December 1845, and of the mill and buildings thereon, to A; and on the 20th of September 1847 assigned all his estate and effects to trustees for his creditors. By indenture of the 31st of August 1848 S and H M assigned to the defendant both plots of land, with the mill and buildings thereon, subject to such equity of redemption as was then existing. In April 1852 the defendant sold the premises by auction, the conditions stating that he sold the whole as mortgagee of T; but that as to the part comprised in the lease of the 18th of December 1845 he had only the equitable interest, and the legal estate was not vested in him, and that the purchaser should accept as to this part such title as the vendor was able to deduce and convey. The plaintiffs purchased both plots and paid the deposit thereon; but on the abstract of title being furnished, and T refusing to join in the conveyance, they declined to complete, on the ground that the legal estate in the premises comprised in the lease of the 18th of December 1845 was outstanding and might be set up adversely to them. They then brought an action for the deposit:—Held, that they were not entitled to recover as upon a failure of consideration, for that under the circumstances there was the same absolute power of sale as to the premises comprised

in both leases, the deposit having been upon the same terms as the mortgage; and that even if this were not so, the conditions of sale had been complied with, the defendant having expressly stipulated to sell an equitable interest only. *Ashworth v. Mounsey*, 23 Law J. Rep. (N.S.) Exch. 73; 9 Exch. Rep. 175.

A bond creditor having obtained possession of the title deeds of certain real estate, was held, in the absence of any evidence of an agreement for a deposit, not to be an equitable mortgagee, and the Court refused to direct any inquiry. *Chapman v. Chapman*, 20 Law J. Rep. (N.S.) Chanc. 465; 13 Beav. 308.

G S insisting that J F, the owner of an agreement for a building lease, had deposited it to secure to him 900*l.*, claimed payment of the money from the administrator of J F, who had expended money out of his own pocket in finishing the houses, and had obtained leases from the lessors, and questioned the deposit and the extent of the advance, if any had been made:—Held, that the affidavits affording evidence of deposit, the Court was bound to act upon them; that when the deposit was made, it gave G S a title to a mortgage, and that he had a right to payment; and the Court made a decree for an account and sale of the houses comprised in the agreement. *Sims v. Helling*, 21 Law J. Rep. (N.S.) Chanc. 76.

The Court will, on claim by equitable mortgagee by deposit of deeds, order a sale of the property in mortgage, but will not, in the absence or without the consent of the mortgagor, deprive him of the usual period of six months to redeem. *Lloyd v. Whittey*, 22 Law J. Rep. (N.S.) Chanc. 1038.

Certain leasehold property was assigned to a purchaser. The assignment, with the receipt for purchase-money, was executed, and the title-deeds were given up to the purchaser, but part of the purchase-money was left unpaid. The purchaser, on the following day, deposited the title-deeds by way of equitable mortgage, to secure a sum of money previously advanced to him:—Held, that the equitable interests of the two parties, the vendor in respect of his lien for unpaid purchase-money and the equitable mortgagee, being in all other respects equal, the equitable mortgagee, by the possession of the title-deeds, had the better equity, and that the rule *qui prior est tempore potior est jure* can only apply where the equitable interests are in every respect equal. *Rice v. Rice*, 23 Law J. Rep. (N.S.) Chanc. 289; 2 Drew. 73.

A and B were tenants in common in tail of a copyhold estate, with cross-remainders between them. A deposited the deeds with C, as a security for money advanced to him, and by a memorandum of deposit engaged to surrender his interest when required. At the foot of the memorandum B wrote, "I join in the deposit." A died without issue, and B thereupon became entitled, as remainder-man, to the entirety. On a bill by C for a foreclosure,—Held, upon appeal, affirming the decision of the Court below, that the charge affected the moiety of A only; and that B was bound to surrender such moiety to the plaintiff, and to bear the expenses of such surrender. *Pryce v. Bury*, 23 Law J. Rep. (N.S.) Chanc. 676; 2 Drew. 11, 41.

A deposit of title-deeds to indemnify a person

against loss, in consequence of his having joined as surety in a promissory note, entitles him to a memorandum stating the purpose of the deposit. It will not entitle him to claim a legal mortgage upon the estate. *Sporle v. Whayman*, 24 Law J. Rep. (n.s.) Chanc. 789; 20 Beav. 607.

A party taking an equitable mortgage, with notice of a prior equitable mortgage, cannot by assignment to another without notice give him a better title. *Ford v. White*, 16 Beav. 120.

Property in Middlesex was mortgaged to A and afterwards to B, and subsequently to C, with notice of B's incumbrance. C registered before B, and afterwards assigned to D, who had no notice of B's mortgage:—Held, that the interests being equitable, D had no priority over B. *Ibid*.

The assignees of a bankrupt mortgagor, who had no assets, disclaimed, and said that they would have disclaimed before suit if any application had been made to them:—Held, nevertheless, that they were not entitled to costs. *Ibid*.

An equitable mortgagee as of right is entitled to a foreclosure, and not to a sale. *Cox v. Toole*, 20 Beav. 145.

The secretary of a banking company had a credit account with the bank to the extent of 3,000*l.*, secured by a memorandum specifying certain securities deposited by way of equitable mortgage. On his dying a debtor to the bank in 4,000*l.*, there were found in his office in the banking-house the securities mentioned in the memorandum, with others tied in a bundle and indorsed and labelled as securities. There was evidence that he had stated that the bank was secured in 5,000*l.*:—Held, that the bank was equitable mortgagee of all the securities. *Ferris v. Mullins*, 2 Sm. & G. 378.

A solicitor took a deposit of a policy from his client under a parol agreement that it was to secure his then existing costs. Afterwards he made advances, and took an assignment of the policy to secure them, the deed saying nothing about the costs:—Held, that the deed expressing no agreement that it was to include the costs, the possession under it merged the possession under the deposit, and the policy was only a security for the advances. *Vaughan v. Vanderstegen*, 2 Drew. 289.

(C) STATUTORY MORTGAGE.

A corporation in order to complete a canal raised money by mortgage of the canal and of other property. They obtained an act, enabling them to borrow money, to complete the canal, by mortgage of the canal and tolls. They applied part of the money raised under the act in paying off the former mortgages:—Held, overruling a decision of one of the Vice Chancellors, that the corporation had no authority to pay off the former mortgages out of the money raised under the act; that the corporation were liable to repay to the statutory mortgagees the money so applied; that the statutory mortgagees had a lien on the corporation estates, other than the canal, included in the former mortgages to the amount of the money so applied; and that as between the statutory mortgagees and the corporation, the estates of the corporation, other than the canal, included in the prior mortgages, constituted the primary fund for the payment of the money so declared due to them. *Trevillian v. the Mayor of*

Exeter, 24 Law J. Rep. (n.s.) Chanc. 157; 5 De Gex, M. & G. 828.

Divers acts of parliament authorized the construction of docks, &c., which were vested in trustees, who, without being personally responsible, were to enter into contracts for works and materials; they were also to raise money by mortgage of the rates and tolls to carry on the undertaking, and if any action on contracts was brought against them, the damages and costs were to be paid out of the money to arise under the acts. A creditor of the trustees obtained a judgment against the trustees, to whom the rates and tolls were payable, and subsequently an order to issue execution against the persons by whom the rents and tolls were payable. The mortgagees then instituted this suit and obtained a receiver; and upon a petition by the judgment creditor for leave to issue execution, and on a motion for an injunction to restrain him from proceeding further,—Held, that the priority of the mortgagees was not affected, though the Common Law Procedure Act, 17 & 18 Vict. c. 155, had enabled parties to issue execution against property not previously liable. *Ames v. the Trustees of the Birkenhead Docks*, 24 Law J. Rep. (n.s.) Chanc. 540; 20 Beav. 332.

Held, also, that the mortgagees might at any time take possession of the rates and tolls, and deprive the judgment creditor of all advantage which might arise from the execution. *Ibid*.

(D) MORTGAGOR AND MORTGAGEE—RELATIVE POSITION OF.

A mortgage contained a power of sale, and then a proviso and covenant by the mortgagee, that no sale should take place, nor any means of obtaining possession of the premises be taken, until the expiration of twelve calendar months after notice in writing of such intention had been given to the mortgagor. It also contained a covenant by the mortgagee for quiet enjoyment by the mortgagor as tenant at will to the mortgagee, on payment of a yearly rent, in lieu of and as interest upon the mortgage money. The mortgagor remained in possession of the premises, but no livery of seisin was made to the mortgagor. Prior to the commencement of the action, there was a demand of possession, but no notice to quit was ever given to the mortgagor:—Held, that the effect of the deed was to create a tenancy at will only; and that a demand of possession without any notice to quit was sufficient to entitle the mortgagee or his assignee to maintain ejectment. *Doe d. Dixie v. Davies*, 21 Law J. Rep. (n.s.) Exch. 60; 7 Exch. Rep. 89.

By the law of Canada (before the passing of the Canada Chancery Act, 7 Will. 4. c. 2), the relative position of mortgagor and mortgagee was governed entirely by the Common Law, and there was no equitable jurisdiction for redemption or foreclosure. When a mortgage in fee was made, giving the legal title to the mortgagee, and the mortgagor remained in possession, if the mortgagee were desirous of obtaining possession, and making his title absolute, he could only do so by an action of ejectment, and the mortgagor could, during the pendency of such action, come in, and by payment of the money obtain a compulsory right of redemption; but if the mortgagor abandoned that right, and the mortgagee obtained possession, the title of the mortgagee be-

came absolute and indefeasible. *Smyth v. Simpson*, 7 Moore, P.C. 205.

(E) RIGHTS OF THE MORTGAGOR.

[See title PARLIAMENT.]

Trespass to goods. Plea, that by an indenture made in 1847, between Q and the defendant, it was agreed between Q and the defendant, who was, during all the time thereafter mentioned, possessed of certain premises for a certain term then to come and unexpired therein, that Q should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.*, for which rent it should be lawfully for the defendant to distrain as landlords may for rents reserved on leases for years; that Q held the premises under the said indenture and agreement; that three years' and a quarter's arrears of rent became due, during the time Q held the premises as such tenant, and the defendant was possessed of them as aforesaid; and that the defendant distrained the goods for rent. The plaintiff set out the indenture on oyer, from which it appeared that Q, having become, in 1847, the lessee of the premises under M for twenty-one years, wanting one day, and having borrowed money from the defendant, demised the premises to the defendant by way of mortgage, at a peppercorn rent, and that the defendant redemised the same to Q, at a yearly rent of 150*l.*, with power of distress:—Held, on demurrer, that the plea was bad in not shewing such an interest in the premises, on the part of the defendant, as entitled him to distrain. *Pinhorn v. Sonster*, or *Souster*, 22 Law J. Rep. (N.S.) Exch. 18; 8 Exch. Rep. 188.

A mortgagor in possession is, *præsumptione juris*, authorized to distrain as the bailiff of the mortgagor. *Trent v. Hunt*, 22 Law J. Rep. (N.S.) Exch. 318; 9 Exch. Rep. 14.

A mortgagor in possession distrained for rent accruing due after the mortgage, but the notice of distress described the rent as due to himself:—Held, in replevin, that he could make cognizance as the bailiff of the mortgagee. *Ibid.*

(F) RIGHTS OF THE MORTGAGEE AND OTHERS CLAIMING UNDER HIM.

C having mortgaged a piece of land to the plaintiff, the defendants, a railway company, afterwards occupied it by laying their rails upon it, and being subsequently called upon by the plaintiff for compensation, negotiated with him in respect thereof. The plaintiff had never been in possession of the land, but gave notice of the mortgage to the defendants, and then brought an action for use and occupation. The Judge directed the jury that the plaintiff was in a condition to waive the trespass, in respect of the occupation of the land by the railway company, and to bring an action for use and occupation:—Held, first, that there was evidence for the jury of the defendants having held the land on the terms of paying for it. Secondly, that the plaintiff being a mortgagee out of possession, and not having entered upon the land previously to the trespass, nor having a judgment by default, or a verdict in ejectment in his favour, was not entitled to maintain an action of trespass against the defendants. *Turner v. Cameron's Coalbrook Steam Coal, and Swansea and Loughor Rail. Co.*, 20 Law J. Rep. (N.S.) Exch. 71; 5 Exch. Rep. 932.

Quære—supposing the plaintiff to have been in possession of the land, and the defendants to have trespassed thereon and occupied it to his exclusion for some time, whether he would be entitled to recover for use and occupation on the principle that he might waive the trespass and recover in assumpsit. *Ibid.*

Debt for use and occupation. Plea—that the premises in question had been mortgaged to L S to secure the repayment of 200*l.* and interest in six months. That before the defendant began to use and occupy the said premises, the said six months had elapsed, without the repayment of the said sum of 200*l.*, which still remained due. That until the commencement of the suit, the mortgagor continued the controul and management of the premises. That before the commencement of the suit, the defendant was required by notice to pay to the assignee of the mortgage the amount sought to be recovered, and that from the time of the giving of such notice the defendant was liable to pay the same to such assignee:—Held, upon demurrer, that the plea was no answer to the action. *Wilton v. Dunn*, 21 Law J. Rep. (N.S.) Q.B. 60; 17 Q.B. Rep. 294.

Semble—that if payment had actually been made under a claim by the mortgagee, such payment might have been pleaded as a defence to the action. *Ibid.*

Where there were cross-covenants in a mortgage deed, and the mortgagees did not execute, it was held they might, nevertheless, bring their action against the mortgagor, who did execute—distinguishing the case of a demise by indenture, as in *Swatman v. Ambler*. *Morgan v. Pike*, 23 Law J. Rep. (N.S.) C.P. 64; 14 Com. B. Rep. 473.

A lessee who had covenanted to insure against fire in the joint names of himself and his lessor, with a proviso that the policy monies should be expended in reinstating the premises, assigned them by way of mortgage, with a power of sale under which the mortgagee sold. The mortgage deed did not notice the policy. The premises were subsequently damaged by fire, and were reinstated by the mortgagee. On a claim filed by the mortgagee and his vendee, the mortgagor was decreed to deliver up the policy and join with the lessor in signing the receipt to the insurance office to enable the mortgagee to receive the money payable under the policy. A lessee in possession is not entitled as against his mortgagee to a lien on the policy monies for repairs done by him after a fire. *Garden v. Ingram*, 23 Law J. Rep. (N.S.) Chanc. 478.

A creditors' suit was instituted for the administration of an estate, the plaintiff being a puisne mortgagee, the bill impeaching a first mortgage and asking for the realization of the second security. The first mortgagee, who was a party, by his answer insisted on his rights. A receiver was appointed by the Court, the first mortgagee not opposing, and he, the mortgagee, took no part in, although he had notice of, the proceedings in the suit. Claims were set up by strangers against the estate paramount the mortgages and the mortgagor's title, which were defeated in proceedings at law instituted by order of the Court; and the receiver was ordered to pay the costs of those proceedings, without prejudice to the question how they were ultimately to be borne. The Court ordered a sale of the estate, and directed that the first mort-

gagee, whose title to priority had been established, should join therein. The income of the estate became insufficient to pay the interest on the incumbrances, whereupon the first mortgagee presented a petition, praying the discharge of the receiver and that he might be let into possession, but the petition was dismissed by one of the Vice Chancellors:—Held, upon appeal, that the mortgaged estate was not, as against the first mortgagee, liable to the costs of the law proceedings of defending the estate, nor as against him to the general costs of the creditors' suit; that he was entitled to have the receiver discharged, and to be let into possession without paying any of such costs. *Langton v. Langton*, 24 Law J. Rep. (n.s.) Chanc. 625.

The Court has no jurisdiction in such a suit to order a first mortgagee to join in a sale; and the fact that the title of such first mortgagee is equitable does not affect any of his rights as to costs or as to being let into possession. *Ibid*.

This Court will marshal the proceeds arising from several mortgaged estates so as to prevent the first and second mortgagees of different estates from exhausting the proceeds of one estate upon which alone a third mortgagee had taken a security. *Gibson v. Seagrim*, 24 Law J. Rep. (n.s.) Chanc. 782; 20 Beav. 614.

A puisne incumbrancer offered to pay off the first mortgage, which being declined, he filed a bill to compel a transfer. The first mortgagee having afterwards proceeded to sell the property, was restrained from transferring the first mortgage and parting with the legal estate and title-deeds. *Rhodes v. Buckland*, 16 Beav. 212.

Right of eigne as against a puisne mortgagee to enforce all his remedies at the same time. By a deed the amount due to the first mortgagee was confirmed to him by the subsequent incumbrancers, and he thereby agreed not to execute his power of sale for a limited time:—Held, that a party who, by his bill, contested the amount so admitted to be due to the first mortgagee, could not take advantage of the stipulation in the deed not to sell within the time, and an injunction to restrain such sale was refused. *Cockell v. Bacon*, 16 Beav. 158.

A B was the first mortgagee of Blackacre, and C D was the first mortgagee of Whiteacre, and the second mortgagee of Blackacre. A B and C D demised both properties together, reserving the whole rent to A B. The parties did not seem to have observed the distinction between their rights in respect of the two properties. The Court relieved C D from the mistake by ordering A B to pay him an apportionment of the whole rent in respect of Whiteacre. *Harryman v. Collins*, 18 Beav. 11.

In 1841 A mortgaged a wharf to B, and covenanted to lay out the insurance money in rebuilding the premises. A fire occurred in 1844, and A having in 1845 purchased an adjoining slip of land laid out the money in building partly on both parcels. In 1846 A mortgaged the slip to C, who had notice of the first mortgage. The claim of B to have the benefit of the expenditure of the insurance money on the slip was rejected by the Court. *Ibid*.

A mortgagor contracted to sell the estate, and one of the conditions was that the purchaser should pay a deposit to the auctioneer. The mortgagee afterwards concurred in and adopted the contract. A loss hav-

ing occurred by the insolvency of the auctioneer,—held, that as between the purchaser and mortgagee, the latter stood in the shoes of the vendor and must bear the loss. *Rowe v. May*, 18 Beav. 613.

A mortgaged property to three trustees, B, C and D. Some time after B, who was a solicitor, having in his hands a sum belonging to a client, E, proposed to lay it out on a transfer of the mortgage. He prepared a transfer, which was executed by A, B and C, but not by D, and a receipt for the money was signed by B and C alone. No money was ever paid, and it was lost by B's insolvency:—Held, that the alleged transfer to E was ineffectual, the consideration not having actually been paid; and that in equity the deed was inoperative both as against the mortgagor and the three trustees. *Griffin v. Clowes*, 20 Beav. 61.

Mortgage deeds contained covenants on the part of the mortgagor to insure the mortgaged premises in the names of the mortgagor and mortgagees, not adding their heirs, executors, administrators or assigns. The mortgagees entered into possession, and after the mortgagor's death the persons entitled to the equity of redemption not having insured the premises, the mortgagees insured in their own names only as mortgagees:—Held, that the mortgagees were entitled to add the premiums to their mortgage debt. *Dobson v. Lard*, 4 De Gex & Sm. 575.

Seem—that if the rents and profits were insufficient to keep down the interest and pay the premiums, the mortgagees would have been entitled to be allowed interest on the premiums so paid. *Ibid*.

The mortgagor had before the mortgagees entered into possession indorsed to the mortgagees bills of exchange for the arrears of interest. The bills fell due after possession was taken, and were dishonoured:—Held, that the interest was in arrear when possession was taken, so as to preclude the mortgagor from claiming to have the account of the receipts of the mortgagees taken with rests. *Ibid*.

(G) POSSESSION OF MORTGAGEE.

A lease was made to A of property described as all that piece of land, &c., with the messuages and buildings thereon erected. The lease contained a covenant by A to keep the messuages, &c. in repair, and a clause of forfeiture on breach of the covenant. A mortgaged this property, by way of under-lease, together with other property, to B. The mortgage deed contained a power of sale and powers for B to expend all monies to be received by him under the deed in repairs, and a covenant by A to indemnify B against the covenants in the lease until possession taken by him. At the time of the mortgage the buildings on the demised land consisted of carcasses of houses only. B entered into possession of the property comprised in the lease, but neither sold it nor completed the houses, which were taken by the landlord under the clause of forfeiture:—Held, that B was liable to A in respect of the forfeiture of the lease. *Perry v. Walker*, 24 Law J. Rep. (n.s.) Chanc. 319.

A mortgagee in possession of part and allowing the mortgagor to retain possession of the rest, is not at the suit of a subsequent incumbrancer to be charged constructively as in possession of the whole. *Soar v. Dalby*, 15 Beav. 156.

(H) LOST TITLE-DEEDS.

A mortgagor who has paid off the mortgage debt,

and to whom the mortgaged property has been re-conveyed, is entitled to compensation from the mortgagee for the unaccountable loss of the title-deeds whilst in the possession of the mortgagee, unless the latter can shew something to discharge himself. *Brown v. Sewell*, 22 Law J. Rep. (n.s.) Chanc. 1063; 11 Hare, 49.

(I) PRIORITY.

By a mortgage deed in 1843, the defendant and his wife and two daughters joined in mortgaging to the plaintiff certain property, partly belonging to the defendant and partly to his wife and daughters, to secure 5,600*l.*, with a proviso that the defendant and his property should be primarily liable for the amount (part of his property being subject to a mortgage for 400*l.*, which was assigned in 1844 to the plaintiff). In 1849 the defendant created a further charge upon his own portion of the property to the plaintiff for 700*l.*:—Held, that the latter charge for 700*l.* must be postponed to such rights as the daughters of the defendant had under the deed of 1843, in which they were sureties for their father:—and that the daughters as such sureties had a right on payment to the plaintiff of 6,000*l.* and interest to call for a transfer of all the securities comprised in the mortgage of 1843. *Bowker v. Bull*, 20 Law J. Rep. (n.s.) Chanc. 47; 1 Sim. N.S. 29.

Where a mortgagor, a solicitor, prepares the mortgage deed, the mortgagee not employing another solicitor, the mortgagor will be considered to be the solicitor of the mortgagee in the transaction of the mortgage; but the latter will not therefore be deemed to have notice of a prior deposit of the title-deeds by the mortgagor, or of any uncommunicated fact which it was the interest of the mortgagor to conceal from the mortgagee. *Hewitt v. Loosemore*, 21 Law J. Rep. (n.s.) Chanc. 69; 9 Hare, 449.

Constructive notice is knowledge imputed by the Court on presumption, too strong to be rebutted, that the knowledge must have been communicated. *Ibid.*

A legal mortgagee will not be postponed to a prior equitable one, on the ground of not having got in the title-deeds, unless there has been fraud or gross or wilful negligence on the part of the legal mortgagee. *Ibid.*

Fraud or gross or wilful negligence will not be imputed to a mortgagee who has made *bona fide* an inquiry for the title-deeds, and a reasonable excuse has been given for the non-delivery of them to him. *Secus*, if he has not made any inquiry after the deeds. *Ibid.*

The assignee of a chose in action, or security of any kind, where there has been no fraud, stands in exactly the same situation as the assignor as to the equities arising upon it. He must be taken to be cognizant of them. It is his duty to make inquiries, and as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information. If a loss arises it falls upon him whose duty it is to make the inquiries, and who has not made them. But if the notice given by the assignee discloses, on the face of it, that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances, and if

he should not do so, he will be bound to perform the stipulations of the security, and cannot be allowed to take advantage of the equities existing as between the assignor and himself. *Mangles v. Dixon*, 3 H.L. Cas. 702: reversing s.c. 6 Law J. Dig. 438.

The performance by the creator of a security of any intermediate stipulations in it, after he has received notice of its assignment, being an act done under both a legal and an equitable liability, can never in itself be considered as a ground for fixing him with a liability to something beyond that by which he is equitably bound. *Ibid.*

A was the owner of a vessel. B was to charter it for a particular voyage to seek a particular cargo. Its tonnage was larger than B required. A was willing to undertake half the risk, and was to have half the profits. A charter-party was executed on the 24th of April 1845 by which the vessel was declared to be let to freight at 1*l.* 6*s.* a ton per month to B, and bills were to be given and payments from time to time made by B, which taken together would cover one-half of the amount stipulated for the freight. On the arrival of the ship at home B was to give a bill at ninety days' date for the remainder of the freight. Two other instruments were executed on the same day, by the first of which A was to join in the adventure, and "after payment or deduction of the freight and all incidental expenses, the profit or loss" was to be borne by the parties in equal moieties; and by the other, A gave to B a guarantee for the due performance by the clerk of the stipulations he had entered into. On the 1st of December 1845, while the ship was on the voyage, A assigned to C the charter-party, and wrote on the margin thereof a note addressed to B, requesting him to pay "what is due." C gave B notice of this assignment and note. The notice was in the ordinary form, and C made no inquiries of B. B continued the payments, which, by the stipulations in the charter-party, he was bound to make. The vessel returned in August 1846, and the adventure turned out a loss. B claimed as against C to balance the accounts of profit and loss, as he would have been entitled to do with A had the charter-party not been assigned:—Held, that, in equity he was entitled to do so. *Ibid.*

A executed a mortgage to B for 1,000*l.* This was not acted on, but A afterwards executed another mortgage for 2,000*l.* to B. The solicitor employed retained the first deed, and afterwards fraudulently induced B, without consideration, to sign a memorandum, undertaking to transfer the first mortgage to C, and he executed such transfer. C, on the faith of B's acts, advanced 1,000*l.*, which was received by the solicitor and misapplied:—Held, that B must be postponed to C. *Hiorns v. Holtom*, 16 Beav. 259.

To postpone a first mortgagee, on the ground of his leaving the title-deeds in the hands of the mortgagor, there must be a distinct voluntary and unjustifiable concurrence on the part of the mortgagee in the mortgagor's retaining them. *Finch v. Shaw*; *Colyer v. Finch*, 19 Beav. 500: affirmed by the House of Lords, 26 Law J. Rep. (n.s.) Chanc. 65.

To a bill by an eigne against a puisne mortgagee a defence by the latter that he is a purchaser for valuable consideration without notice of the first mortgage is unavailing. *Ibid.*

Parts of lands charged with debts and legacies were mortgaged by the devisee, who was also one of the two executors. He afterwards sold that part ostensibly to pay the legacies, and he and the co-executor conveyed it to the purchaser:—Held, that as between the devisee and mortgagee the latter had an equity to throw the legacies on the portion not mortgaged; and that as between the mortgagee and purchaser the latter not having obtained the legal estate was subject to the same equity as his vendor. *Ibid.*

Sloper in 1833 mortgaged certain real estates to Sievwright, with a power of sale, under which the property was sold in 1842 to a purchaser, who transferred his contract to Sievwright. There was a balance after paying off Sievwright, and there being accounts between Sloper and Matthews this balance was placed, under a deed of the 25th of June 1842, in the hands of trustees to be dealt with by arbitration between Sloper and Matthews. In 1834 Sloper had made an equitable mortgage of the property to Matthews. In January 1840 Matthews deposited these deeds with Waldron, the plaintiff, by way of equitable mortgage. In April 1842 Matthews applied to the plaintiff for the loan of the deeds, telling him that he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the plaintiff never applied to have the deeds back for more than four years. In May 1843 Matthews deposited the deeds by way of mortgage with Pinckney, who now held them. In 1846 Matthews became bankrupt. Waldron filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842 paid to him:—Held, that as between Waldron, the plaintiff, and Pinckney, the plaintiff had by his laches enabled Matthews to commit a fraud, and had no equity against the defendant Pinckney. The Court also expressed an opinion that the real estate being converted into personalty before the bankruptcy, the right of Matthews was merely a right to receive a certain sum of money, and that no notice having been given by the plaintiff or the holder of the deeds to the trustees, the right to receive the money remained in the order and disposition of Matthews and passed to his assignees. This point did not, however, arise for express decision. *Waldron v. Sloper*, 1 Drew. 193.

First mortgage to W with power of sale and declaration of trust of residue of monies arising from the sale for the persons entitled to the equity of redemption. Second mortgage to R. Third mortgage, without notice of the second, to H, who was W's solicitor, and as such had possession of the deeds. Afterwards other incumbrances. Then W died, having devised mortgage and trust estate to H, and appointed him and another executors. H sold under the power, and conveyed the mortgaged estate, paid off W's mortgage out of the purchase-money and retained the balance. Subsequently H for the first time had notice of R's mortgage:—Held, first, that R's omission to give notice did not give priority either to H or a subsequent incumbrancer who gave notice before R, the estate, though substantially converted, being real estate, when the securities were executed, and to real estate the

rule as to notice giving priority does not apply. Secondly, that since R was not bound, his motives for abstaining from giving notice were, in the absence of fraud, immaterial, the rule being that an equitable incumbrancer on real estate is not postponed by any absence of activity in asserting his rights, except such as amounts to participating in fraud or to constructive fraud. Thirdly, that if before the sale H had the legal estate in the premises (and as to part, *semble*, that he had), still, having since parted with it, his opportunity of using it as a *tabula in naufragio* to protect his own charge was gone, and that H having, as devisee of W, paid off W's mortgage, held the surplus trust for the persons entitled to the equity of redemption, and though he might before notice of R's mortgage have paid the surplus to other subsequent incumbrancers, he could not be heard to say he had appropriated it to himself. And the incumbrances were declared to have priority according to the dates of the instruments. *Rooper v. Harrison*, 2 Kay & J. 86.

Investigation of the doctrine as to the protection afforded to an incumbrancer by means of the legal estate. *Ibid.*

(J) TACKING.

Since the 3 & 4 Will. 4. c. 104, a mortgagee of copyholds may tack a simple contract debt to his mortgage debt, as against the customary heir or devisee, but not as against specialty creditors. It seems also that a mortgagee may tack a simple contract debt to his mortgage debt as against the heir, devisee or executor, wherever the equity of redemption is assets in their hands for payment of simple contract debts. *Rolfe v. Chester*, 20 Beav. 610.

(K) LIABILITY TO DEBTS.

Two persons being joint trustees of a sum of money lent it upon mortgage. The mortgage was executed, and the usual receipt for the money indorsed on the deed was signed by the mortgagor. The money, however, was only paid in part, although it had been handed over by one of the trustees to his co-trustee for the purpose of being paid to the mortgagor. The co-trustee who had received the money died insolvent:—Held, upon a bill filed by the surviving trustee against the mortgagor, that the mortgagor was liable to make good the whole mortgage money, he having signed a receipt for the amount, and thereby induced the surviving trustee to believe that the money had been paid. *West v. Jones*, 20 Law J. Rep. (N.S.) Chanc. 362; 1 Sim. N.S. 205.

A mortgaged real estate to B for 3,000*l.*, and died, having devised two-thirds of it to C, and one-third to D and E, in equal moieties. By a deed of transfer, after reciting that B had required payment of the debt from C, D and E, which they were unable to pay, and that they had applied to F to lend them the amount, which he had consented to do, on having the repayment secured as hereinafter expressed, B, at the request of C, D and E, conveyed the premises to F, subject to a proviso for redemption on payment by C, his heirs, executors and administrators, of 2,000*l.*, and by D and E, their heirs, executors and administrators, of 1,000*l.*; and C covenanted to pay 2,000*l.*, and D and E covenanted to pay 1,000*l.*:—Held, that as between the real and personal representatives of D, he had not taken on

himself the payment of his share of the mortgage debt. *Hedges v. Hedges*, 21 Law J. Rep. (N.S.) Chanc. 858; 5 De Gex & Sm. 330.

A B by a voluntary settlement conveyed real estate to such uses as he should by deed or will appoint, and in default of appointment, to the use of himself for life, with remainders over. By an appointment executed subsequently, A B mortgaged the real estate for 15,000*l.*, and thereby he covenanted for the payment of the amount and interest. By his will, A B, after reciting the settlement, but without mentioning the mortgage, made certain charges on the estate, and, subject thereto, confirmed the settlement; he also, by his will, charged his residuary personal estate with the payment of his debts:—Held, that the real estate included in the mortgage, and not the testator's personal estate, was the primary fund for discharge of the debt. *Jenkinson v. Harcourt*, 23 Law J. Rep. (N.S.) Chanc. 785; Kay, 688.

The purchaser of real estate mortgaged it and died intestate, leaving his father his heir-at-law and sole next-of-kin. Shortly afterwards the father died also intestate, without having taken out administration to his son:—Held, that the personal estate of the son was liable to be applied in discharge of the mortgage debt in exoneration of the real estate. *Bond v. England*, 24 Law J. Rep. (N.S.) Chanc. 671; 2 Kay & J. 44.

Devise in tail of real estate claiming to be exonerated out of the descended moiety from a mortgage, filed his bill against the heir more than thirty years after the testator's death, and more than twenty years after the heir's title accrued, but within two years after the deficiency of the personal estate had been ascertained under a decree of the Court:—Held, that the devisee was entitled to a decree for exoneration against the heir with costs. *Newhouse v. Smith*, 2 Sm. & G. 344.

(L) POWER OF SALE.

A mortgaged real estate to B, and gave B a power of sale, and the trusts of the surplus purchase-moneys were declared to be for A, his executors, administrators and assigns. A died. After A's death the estate was sold under the power of sale:—Held, that A's real, and not his personal, representatives were entitled to the surplus purchase-money. *In re Clarke's Trust*, 22 Law J. Rep. (N.S.) Chanc. 230.

Where a trust is created as a security for money an immediate sale of the estate will not be allowed, though the power to sell is without further concurrence; but the usual time to redeem will be allowed, though no express equity of redemption was reserved. *Bell v. Carter*, 22 Law J. Rep. (N.S.) Chanc. 923; 17 Beav. 11.

A mortgage contained a power of sale to be exercised, in case of default in payment of the mortgage money, by the mortgagee, his heirs, executors, administrators or assigns. The mortgagee assigned the debt, and conveyed the estate to an assignee, who died. The heir of the assignee then conveyed the estate to a trustee for his administrator:—Held, that the trustee and administrator together could make a good title to a purchaser. *Saloway v. Strawbridge*, 24 Law J. Rep. (N.S.) Chanc. 393; 1 Kay & J. 371.

A mortgagee had a power of sale, and of retaining

his costs, charges and expenses. He sold, but the purchaser resisted the completion on the ground of misdescription. Being advised by counsel that the objection was untenable, he filed a bill for specific performance, which was dismissed with costs:—Held, upon a redemption, that he could not charge the costs of the suit. *Peers v. Ceeley*, 15 Beav. 209.

A mortgage contained a power of sale. The mortgage was transferred with the benefit of all provisos, &c. contained therein. The mortgagor concurred, and covenanted to pay a different sum on a different day:—Held, that the power of sale still existed, and that a good title could be made upon a sale under the power. *Young v. Roberts*, 15 Beav. 558.

In a mortgage power of sale it was required that notice should be given to the mortgagor, his heirs or assigns. The mortgagor died, leaving an infant heir:—Held, that notice to the infant heir and her guardian was good notice. *Tracey v. Lawrence*, 2 Drew. 403.

A power of sale, and to give receipts in a mortgage given to the two mortgagees, their heirs and assigns, it being declared that the mortgage money was advanced by them out of monies in their possession on a joint account:—Held, to be exercisable by the survivor. *Hind v. Poole*, 1 Kay & J. 383.

A fortiori, when the proceeds of the sale were to be applied to reimburse "themselves and himself," all expenses which "he or they" should be put to in making the sale, &c., and then to reimburse "themselves and himself" the mortgage-money and interest, and it was declared that the receipts of the "survivor" of them should be good discharges for the mortgage debt and interest. *Ibid.*

(M) ASSIGNMENT.

An assignment of a mortgage not containing any words of transfer, beyond those incidental to the transfer of the mere mortgage, does not pass rent then in arrear. *Salmon v. Dean*, 3 Mac. & G. 344.

(N) RIGHT TO REDEEM.

After a mortgagee had been more than twenty years in possession of property mortgaged, the mortgagor's solicitor wrote a letter asking when the mortgagee would see him on the mortgagor's claims. The mortgagee wrote back to the solicitor, "I do not see the use of a meeting unless some party is ready to pay me off." The mortgagor filed a bill to redeem:—Held, affirming a decree at the Rolls, that this was a sufficient acknowledgment in writing of the title of the mortgagor to his solicitor acting as his agent, to bring the case within the 28th section of the Statute of Limitations, 3 & 4 Will. 4. c. 27. *Stansfield v. Hobson*, 22 Law J. Rep. (N.S.) Chanc. 457; 3 De Gex, M. & G. 620; 16 Beav. 236.

(O) REDEMPTION AND RECONVEYANCE.

In 1830, W conveyed certain real estates to Rhodes and Taylor and their heirs, by way of mortgage, for securing 400*l.*, with a power of sale in case of default. W died in 1839, having devised the same property, subject to certain charges created by his will, to his sons, A, B, and C, as tenants in common in fee. In 1839, after W's death, B conveyed all his one-third share, under his father's will, to Rhodes, Hirst and Naylor, by way of mortgage, with power of sale in

case of default. Rhodes, the surviving mortgagee of the deed of 1830, threatened to sell under the power in that deed unless A, the acting executor of W, would redeem both mortgages. Upon bill by A to redeem and for an injunction, the Court upon motion, on payment into court by A of the money due upon the first mortgage, restrained Rhodes from selling under the power contained in the deed of 1830, and from conveying the legal estate in the one-third share of B comprised in the mortgage of 1830, and from conveying the legal estate in the one-third share of B comprised in the mortgage of 1839. *Whitworth v. Rhodes*, 20 Law J. Rep. (N.S.) Chanc. 105.

§ The owner of a reversion in personality mortgaged it. He then mortgaged the equity of redemption to a second person, and then agreed to sell, subject to the mortgages, to a third party. The first mortgagee required to be paid off. The mortgagor in a memorandum, reciting that the purchaser had paid the first mortgagee in discharge of her debt out of the purchase-money, agreed to execute an assignment to the purchaser, and until it should be executed that the purchaser should stand in the place of the first mortgagee:—Held, reversing the decree below, that the debt of the first mortgagee was not extinguished, and that the purchaser was entitled to the benefit of that security. *Watts v. Symes*, 21 Law J. Rep. (N.S.) Chanc. 713; 1 De Gex, M. & G. 240: reversing 16 Sim. 640.

The second mortgagee was also mortgagee of other property of the mortgagor:—Held, also reversing the decree below, that one mortgage could not be redeemed without the other. *Ibid.*

A mortgaged an estate in fee to B, and covenanted to pay B the mortgage debt and interest. A died intestate, leaving C his heir-at-law. At the time of the death of A an arrear of more than six years' interest was due. Suit for redemption by C against B:—Held, that C was not entitled to redeem, except on the terms of paying the principal and the whole of the interest due. *Elvy v. Norwood*, 21 Law J. Rep. (N.S.) Chanc. 716; 5 De Gex & Sm. 240.

Upon the expiration of a notice to pay off mortgage-money, the mortgagees are bound to know and to state the amount due for principal, interest, and costs. And if the mortgagees refuse to receive the amount tendered by the mortgagor as due for principal, interest, and costs, they do so at their own risk; and a sum having been tendered and refused,—Held, upon a claim to redeem, that the mortgagors were entitled to a decree for an account of the principal, interest, and costs, and that the interest (if the principal did not appear to have been lying idle,) must be continued to the time of taking the account; and that, if the sum tendered did not amount to the sum due, the plaintiffs must pay the costs; but if it exceeded the amount found due, the defendants must pay the costs. *Harmer v. Priestley*, 22 Law J. Rep. (N.S.) Chanc. 1041; 16 Beav. 569.

When a mortgagee agrees to take a portion of his debt in lieu of the whole, upon payment on a given day, the Court will not relieve against the effect of its non-payment on that day. *Ford v. the Earl of Chesterfield*, 19 Beav. 428.

D was indebted to C in 69,000*l.* By deed made between D C and S (a surety) C covenanted that if D or S should pay him 38,000*l.* on a day named,

he would accept it in full satisfaction of the whole debt. D covenanted to pay it on the day, and D and S covenanted to pay interest on it to the day and afterwards. Default was made in payment, but interest was for four years afterwards received by C on the 38,000*l.*:—Held, that D was liable for the whole debt of 69,000*l.*, and was entitled to no equitable relief against the default in payment on the day fixed. *Ibid.*

The time appointed for redemption enlarged on terms, pending an appeal to the House of Lords. *Finch v. Shaw and Colyer v. Finch*, 20 Beav. 555.

Where mortgagees declared trusts of the mortgage-moneys, and transferred the mortgages by the same deeds,—Held that, on redemption, the trust deeds must be delivered up to the mortgagor, or in the case of one of them (being a marriage settlement), the mortgagees retaining it (by his consent) were bound to furnish him, at their own expense, with attested copies and a covenant for production. *Dobson v. Laud*, 4 De Gex & Sm. 581.

A mortgagee being decreed to reconvey one undivided moiety of an estate included in his security (a part of the debt being satisfied) to the mortgagor, and being entitled to retain the title-deeds of the whole estate, is bound to covenant to produce the deeds. *Yates v. Plumbe*, 2 Sm. & G. 174.

(P) FORECLOSURE.

In a foreclosure suit the bill was taken *pro confesso* against two of the defendants. The cause was brought to a hearing, and these defendants did not appear:—Held, that the plaintiff was entitled only to the ordinary decree, and not to a decree of foreclosure absolutely against them. *Brierly v. Ward*, 20 Law J. Rep. (N.S.) Chanc. 46.

An application for liberty to dispense with the service of a decree on defendants against whom the bill has been ordered to be taken *pro confesso*, and who do not appear at the hearing, cannot be made at the hearing. *Ibid.*

The mortgagee with power of sale of a reversionary interest in stock is entitled to the common decree of foreclosure, and there is no rule or practice of the Court compelling him to submit adversely to a decree for sale. *Wayne v. Hanham*, 20 Law J. Rep. (N.S.) Chanc. 530; 9 Hare, 62.

In a foreclosure suit, after decree for payment of the mortgage-money had been made absolute and the order had been signed and enrolled, the Court, upon motion by the defendant, enlarged the time for payment of the principal, interest and costs. *Thornhill v. Manning*, 20 Law J. Rep. (N.S.) Chanc. 604; 1 Sim. N.S. 451.

Upon a claim by an equitable mortgagee against a mortgagor, asking for a sale, and also that the several other mortgagees might be summoned before the Master, or that a decree might be made to ascertain what mortgages there were, and their priorities, the Court refused the order. *Burgess v. Sturgis*, 21 Law J. Rep. (N.S.) Chanc. 53; 14 Beav. 440.

A claim was filed for foreclosure before the statute 15 & 16 Vict. c. 86. came into operation. There were several incumbrances, and on an application under the 48th section of that act, the Court made an order for sale of the mortgaged property, and directed accounts of the sums due to the several incumbrancers. *Cator v. Reeves*, 22 Law J. Rep. (N.S.) Chanc. 19.

Upon a foreclosure claim against the mortgagor and three judgment creditors, a decree was made that all the three judgment creditors should be foreclosed together, and not successively. *Stead v. Banks*, 22 Law J. Rep. (n.s.) Chanc. 208; 5 De Gex & Sm. 560.

In a foreclosure claim, the defendants appeared to the claim, but, though duly summoned, did not appear at the hearing. The plaintiff asked for an immediate sale. The Court declined to direct an immediate sale, but ordered that an account should be taken, and that, in default of payment within a short period, the property should be sold. *Smith v. Robinson*, 22 Law J. Rep. (n.s.) Chanc. 482; 1 Sm. & G. 140.

In a foreclosure suit a creditor by judgment, subsequent to the plaintiff, put in his answer, disclaiming all interest, stating at the same time that no application had been made to him to release his interest previous to the filing of the bill. To this answer the plaintiff filed a replication:—Held, that the plaintiff was entitled to a decree of foreclosure, but that the defendant was not entitled to any costs from the plaintiff. *Ford v. the Earl of Chesterfield*, 22 Law J. Rep. (n.s.) Chanc. 630; 16 Beav. 516.

Where a decree for foreclosure has been made against the defendants, subsequently discovered to be infants, the Court will not rehear the cause, nor expedite the foreclosure of their equity of redemption, but a supplemental suit must be filed, or another suit instituted. *Scaven v. Nicholson*, 22 Law J. Rep. (n.s.) Chanc. 632.

The Court will not upon an interlocutory application, direct a sale of a mortgaged estate under the terms of the 48th section of the Chancery Procedure Amendment Act. *Wayn v. Lewis*, 22 Law J. Rep. (n.s.) Chanc. 1051; 1 Drew. 487.

The deposit to be made by a mortgagor, requesting a sale instead of a foreclosure, should be sufficient to cover the expenses of an abortive attempt to sell. *Bellamy v. Cockle*, 23 Law J. Rep. (n.s.) Chanc. 456.

An inquisition finding a party to have been a lunatic for a period long antecedent to the date of a mortgage deed executed by him, will not prevent the Court from making a decree of foreclosure upon the deed being proved in the usual manner by the attesting witness. *Jacobs v. Richards*, 23 Law J. Rep. (n.s.) Chanc. 557; 5 De Gex, M. & G. 55; 18 Beav. 300.

A deed must be avoided at law before this Court will give actual relief against it, although there is evidence before the Court leading to a supposition, not only that the mortgagor who executed the deed was in a helpless state of mental incapacity when he did so, but also that a fraud had been committed; had the defendants, however, cross-examined the attesting witness, evidence might have been obtained which would have prevented the Court from proceeding upon the deed. But held, upon appeal, that the defendants must try the validity of the mortgage in an ejectment, or by an issue as to the mortgagor's sanity. *Ibid.*

A advanced money to B on mortgage. At the date of the mortgage deed B was a lunatic; but A paid the money to B or his account, had no knowledge or notice of his lunacy, and did not take any advantage of B in the transaction. A filed a bill of

foreclosure against the persons entitled to the equity of redemption under B, who was dead:—Held, that, notwithstanding the lunacy of B, A was entitled to the usual foreclosure decree. *Campbell v. Hooper*, 24 Law J. Rep. (n.s.) Chanc. 644; 3 Sm. & G. 153.

A decree for foreclosure being made, the mortgagee, after the accounts had been taken, incurred further costs in another proceeding:—Held, that he could not by petition obtain an order to add them to his security. *Barron v. Lancefield*, 17 Beav. 208.

Decree for sale ordered at the request of the first and second mortgagees and the mortgagor, notwithstanding the third incumbrancer insisted on a decree for foreclosure and redemption, the value of the property not being proved. *Wickham v. Nicholson*, 15 Beav. 38.

A husband and wife assigned leasehold premises of which the husband was possessed in her right to a mortgagee for securing money then lent and interest by a deed containing a proviso for redemption by the husband and wife, or either of them, or the representatives of either. The husband subsequently became insolvent, and the mortgagee filed a claim seeking a foreclosure against the assignee in insolvency and the insolvent and his wife. The married woman proved that her husband had been without employment, and that she and her child were destitute, and claimed an equity to a settlement out of the mortgaged property:—Held, that the married woman had no equity to a settlement; but the proviso for redemption being on repayment of the sum advanced by the insolvent and his wife, the power to redeem must be given to the married woman, as well as to the insolvent's assignee. *Hill v. Edmonds*, 5 De Gex & S. 603.

Two separate portions charged on real estates were assigned by way of mortgage to a person who also became the mortgagee in fee of the entirety of the same estates, subject to the portions. The mortgagee in one foreclosure suit sought to foreclose the mortgagors of the two portions and the mortgagor of the entirety. On an objection taken by the mortgagor of the entirety at the hearing,—Held, that the suit was not multifarious. *Pearce v. Watkins*, 5 De Gex & S. 315.

A mortgagee in fee died intestate. His heiress-at-law was also his administratrix. She by will devised all estates vested in her as mortgagee to two trustees, whom she also appointed executors, and by a codicil appointed the husband of her heiress-at-law "to be a trustee and executor of her will jointly" with the two trustees named in the will, and died. The two trustees named in the will disclaimed the devise and renounced probate, but the husband proved. He and his wife filed their bill against the mortgagor, offering to reconvey and for a foreclosure. At the hearing the mortgagor objected that the heiress-at-law had no interest and was improperly made a co-plaintiff, and he asked the dismissal of the bill:—Held, that she had no interest, and that though the objection would have prevailed if it had been made by demurrer, yet she was not so improper a party as that the Court would entertain the objection at the hearing; but the Court allowed no additional costs occasioned by her being made plaintiff or of evidence in support of her pedigree. *Ibid.*

Upon a bill of foreclosure by first mortgagee, there was a contest between the defendants, the puisne

mortgagees, as to their respective priorities. The Court held, that it must in the first instance direct an inquiry. *Duberley v. Day*, 14 Beav. 9.

Under the 15 & 16 Vict. c. 86. s. 48, the Court has power, after decree for foreclosure, to direct a sale. *Laslett v. Oliffe*, 2 Sm. & G. 278.

On the petition of an insolvent mortgagor and two of his creditors, with the concurrence of the plaintiff (the first incumbrancer), the Court, after a decree in a foreclosure suit, and upon payment into court of a sum sufficient to indemnify a puisne incumbrancer, made an order for a sale. *Ibid*.

Under the common decree in a foreclosure suit, the chief clerk's certificate having fixed the time and place for the repayment, by the mortgagor, of what was due for principal and interest, the plaintiff's solicitor attended at the time and place appointed, but without any power of attorney from the plaintiff to receive the mortgage monies; the mortgagor made default. Upon a motion for the order absolute to foreclose.—Held, it is the mortgagor's right to have every formality strictly observed. *Gurney v. Jackson*, 1 Sm. & G. App. xxvi.

An equity of redemption was granted by deed to trustees, upon trust for certain parties, some of whom were infants. The mortgagee filed a bill for foreclosure against the trustees of the settlement and the adult *cestuis que trust* only, as defendants. One of the latter died after the filing of the bill. The Court, upon a motion for a decree for sale, made the decree in the absence of the infant *cestuis que trust*, and of the representative of the deceased defendant, upon an affidavit by the trustee of the settlement that it would be for the benefit of the infants; and ordered the proceeds to be paid into court. *Siffken v. Davis*, Kay, App. xxi.

The costs of the trustee, as he would be a necessary party to reconvey, were ordered to be paid out of the mortgage debt. *Ibid*.

In a suit for foreclosure, on motion by a subsequent mortgagee, the bill was ordered to be dismissed on the mover paying into court a fixed sum on or before a day specified, to answer the plaintiff's claim and the costs of the plaintiff and other defendants. *Challie v. Gwynne*, Kay, App. xlv.

In a suit for foreclosure and redemption by one of several successive mortgagees, upon motion by a subsequent incumbrancer, the bill was ordered to be dismissed with costs against all the other defendants, without prejudice to any other suit upon payment by the defendant moving of a certain sum of money into court on or before a certain day, such money to be invested and accumulated; the plaintiff to pay the taxed costs of all the other defendants, and to have them over from the defendant moving, who was ordered to pay to the plaintiff and other defendants their costs of this application; and the defendant moving, by his counsel, undertaking to indemnify the plaintiff against any proceedings which might be taken in the mean time by any party for redeeming the plaintiff's securities—a reference was directed to ascertain what was due to the plaintiff for principal and interest, and the taxing Master was ordered to tax his costs and those of the mortgagees, other than the defendant moving, who, as well as the plaintiff, were to have liberty to apply. *Jones v. Tinney*, Kay, App. xlv.

The defendant in a foreclosure suit may obtain an

enlargement of the time limited for absolute foreclosure, upon slight evidence of the probability of his being able to pay off the mortgage; but the order will only be made upon the terms of his paying a large part of the interest due to the plaintiff within a short specified time, and paying interest upon the aggregate sum found to be due to the plaintiff for principal, interest and costs, from the date of the certificate, and the costs of the application; and that if he fail to pay the specified sum to the plaintiff for interest at the time appointed, he shall be absolutely foreclosed. *Holford v. Yate*, 1 Kay & J. 677.

Decree for foreclosure upon an original claim on further directions, and on the hearing of a supplemental claim, where the existence of an incumbrance subsequent to that of the plaintiff was found by the Master, and the subsequent incumbrancer was brought before the Court by the supplemental claim. *Robinson v. Turner*, 9 Hare, 488.

The Court refused on the application of the mortgagee, after a decree of foreclosure had been made, to vary the decree by directing a sale under the 48th section of the 15 & 16 Vict. c. 86. *Girdlestone v. Lavender*, 9 Hare, App. liii.

Form of order for foreclosure taken by consent without account. *Boydell v. Manby*, 9 Hare, App. liii.

Direction for sale of an infant's estate in a foreclosure suit (under circumstances shewing it to be clearly for the benefit of the infant), without giving time to redeem. *Mears v. Best*, 10 Hare, App. li.

Decree for foreclosure of the estate of a married woman must be in the ordinary form, and ought not to be made absolute at once, even by consent. *Harrison v. Kennedy*, 10 Hare, App. li.

(Q.) RECEIVER.

A receiver was appointed by a mortgagor and divers incumbrancers, and the mortgagor covenanted not to revoke the appointment without their consent; the mortgagor afterwards mortgaged his equity of redemption to the plaintiff. In a suit for foreclosure,—Held, that the first incumbrancers being no parties to the suit, the receiver could not be called on to account, or restrained from dealing with the surplus income; but leave was given to amend the bill. *Ford v. Rackham*, 22 Law J. Rep. (N.S.) Chanc. 481; 17 Beav. 485.

Receiver against a mortgagee in possession granted after decree, on the application of another mortgagee, a co-defendant. *Hiles v. Moore*, 15 Beav. 175.

A B, the third mortgagee, took possession, and then bought up the first mortgage. Having retained possession many years, and received a considerable sum, a receiver was appointed against him on the application of the second mortgagee, the affidavit of A B not satisfactorily shewing that anything remained due on the first mortgage. *Ibid*.

A mortgagor and a mortgagee, with a power of sale, joined in demising the mortgaged hereditaments to a receiver upon trust, at the request of the mortgagee, during the continuance of the security, and at the request of the mortgagor, after satisfaction of the sums secured, to grant leases of the premises in such manner as the person making such request should appoint, but to permit the mortgagor to receive the rents until default was made in payment of the mortgage money or interest; and upon trust,

after default, to receive the rents, and apply the same in keeping down the interest upon the mortgage. These trusts were not declared to be subject to the power of sale in the mortgage:—Held, that they were so in effect; and that the receiver was bound, without the concurrence of the mortgagor, to join in conveying the hereditaments to a purchaser from the mortgagee under the power of sale. *King v. Heenan*, 3 De Gex, M. & G. 890.

(R) ACCOUNTS.

A mortgage deed, creating an additional security for 10,000*l.*, and intended also as a security for further advances to be made, contained a recital that the mortgagee was liable as surety for sums borrowed of third parties, which was not the fact. Though such sums had been borrowed through the instrumentality of the mortgagee, he was not allowed to extend the security to those sums against a party who had joined as surety for the 10,000*l.*, and to assist the raising the further advances; and upon a bill filed for an account of what was due, and for redemption and delivery up of the securities:—Held, that an account must be taken on the footing of the deed; that no sums beyond the 10,000*l.* and interest were to be allowed to the mortgagee, except such as he had paid, or was then liable for, or had since become legally liable to pay, according to the provisions of the deed. *Lake v. Brutton*, 23 Law J. Rep. (n.s.) Chanc. 294; 18 Beav. 54.

A tenant for life in possession, having power to charge the inheritance with 20,000*l.* and interest for his own benefit, executed the power and assigned the charge as part security for a greater mortgage. The rents received from the estates were insufficient to pay the interest, and the tenant for life paid the difference out of his own money:—Held, overruling a decision of the Master of the Rolls, that the estate of the tenant for life, who had died, was entitled to be reimbursed such payment out of the corpus of the estate. *Lord Kensington v. Bouverie*, 24 Law J. Rep. (n.s.) Chanc. 442; overruling 24 Law J. Rep. (n.s.) Chanc. 269; 19 Beav. 39.

Where a tenant for life has a mortgage upon the inheritance, and an account is directed to be taken between him and the remainderman of the rents received, and the interest on the mortgage, such tenant for life cannot, excepting upon special grounds, be charged with wilful default as in the case of a mortgagee in possession. *Ibid.*

Where a mortgagee receives rents after the account has been taken, he must account on affidavit for the amount. *Oxenham v. Ellis*, 18 Beav. 593.

After the amount due to a mortgagee had been ascertained and paid, the mortgagee was held entitled to some allowance for crops, manure, &c., for which he remained liable to pay to an outgoing tenant of the mortgaged property. *Ibid.*

No account of bygone rents will be directed against a mortgagor in possession, nor against his agent, nor against a person claiming under his voluntary revocable deed. *Hele v. Lord Bexley*, 20 Beav. 127.

(S) INTEREST.

A mortgage of a vessel having been executed to secure repayment at the end of six months of a sum of money, with interest thereon at the rate of 10*l.*

per cent., with a power of sale at the end of that time, and the interest and principal not having been paid at the expiration of the six months,—Held, that the defendant was liable to pay interest at the rate of 10*l.* per cent. in respect of the time that elapsed after the expiration of the six months. *Morgan v. Jones*, 22 Law J. Rep. (n.s.) Exch. 232; 8 Exch. Rep. 620.

A mortgagee, notwithstanding the interest mortgage is reversionary, can only recover six years of interest as against the land mortgaged, although he may receive twenty years' arrears on the covenant to pay. *Sinclair v. Jackson*, 17 Beav. 405.

The interest on money secured by mortgage of land and by covenant being sixteen years in arrear, the mortgagee filed his bill for foreclosure against the heir of the mortgagor, raising no question of liability on the covenant or of any right of tacking. A decree was made to take an account of what was due on the mortgage. Under the Statute of Limitations twenty years' arrears could be recovered on the covenant, but six only as against the land. The Master refused to allow the plaintiff to tack his two claims:—Held, on exceptions, that he was right. *Ibid.*

Whether the right to tack in such a case would be different in a suit for foreclosure from what it is in a suit for redemption—*querre*. *Ibid.*

A mortgage deed made no provision for interest, and the mortgagee thereby agreed upon payment of the principal sum to reconvey:—Held, that the mortgage carried no interest. *Thompson v. Drew*, 20 Beav. 49.

(T) COSTS.

A mortgagor devised the mortgaged estate to a person who did not accept the devise, and did not take or claim any benefit under the will. A bill of foreclosure was filed against him, without any allegation that he had been asked to accept the devise. He put in a disclaimer, and the cause was brought to a hearing:—Held, that he was entitled to his costs, to be paid by the plaintiff. *Higgins v. Francis*, 20 Law J. Rep. (n.s.) Chanc. 16.

The costs of obtaining a re-transfer of premises mortgaged to a lunatic are to be paid out of the lunatic's estate where the petition for that purpose is presented by the committee of the estate. If the petition be presented by the mortgagor, he will not be allowed the costs, except in a case where the committee has refused to proceed. *In re Wheeler*, 21 Law J. Rep. (n.s.) Chanc. 759; 1 De Gex, M. & G. 434.

A mortgagee instituted a foreclosure suit, in which he was ordered to pay the costs of an interlocutory motion, but died before payment and before the hearing of the cause. His representatives filed an original bill of foreclosure without noticing or reviving the abated suit of the mortgagee. The Court refused to allow the plaintiffs their costs in the second suit unless they submitted to pay the costs of the motion in the first suit ordered to be paid by their testator. *Long v. Stone*, 21 Law J. Rep. (n.s.) Chanc. 521; 9 Hare, 542.

In a foreclosure suit, the bill alleged that the plaintiff, the first mortgagee, had applied to the defendants, who were subsequent mortgagees, to pay his mortgage debt and interest, and that they had

refused so to do. The defendants, by their answer, stated that the plaintiff had not made any application to them, and that, if he had, they would have released and disclaimed all interest, and they then disclaimed. At the hearing of the cause,—Held, that the plaintiff was bound to pay the defendants their costs. *Gurney v. Jackson*, 22 Law J. Rep. (N.S.) Chanc. 417; 1 Sm. & G. 97.

Where, through the lunacy of a mortgagee, not found lunatic by inquisition, a petition under the Trustee Act, 13 & 14 Vict. c. 60, is rendered necessary in order to enable the mortgagor to pay off the mortgage debt, the costs must be paid out of the mortgage debt. There being no committee, but only a receiver of the mortgagee's estate under the 8 & 9 Vict. c. 100, the costs of the appearance of the heir-at-law and next-of-kin were allowed. *In re Biddle*, 23 Law J. Rep. (N.S.) Chanc. 23.

The assignee of a mortgagee, who was one of a firm of auctioneers, took possession of the mortgaged property on account of non-payment of the money, and sold the property by auction under a power of sale. The expenses of the sale were charged by the firm of auctioneers:—Held, that the vendor was in the position of a trustee from the time of taking possession, and was not at liberty to charge for personal trouble. *Mathison v. Clarke*, 24 Law J. Rep. (N.S.) Chanc. 202; 3 Drew. 3.

Where a mortgagee, instead of simply filing a bill to enforce his securities, institutes or adopts a suit for a general administration, and the estate proves deficient, the costs of the suit are to be paid, in the first instance, out of the estate. *Armstrong v. Storer*, 14 Beav. 535.

Bill by the owner against his mortgagees and the trustee of a fund to compel payment, held to be a suit for administration and not redemption, and the costs of all parties were ordered to be paid out of the fund in the first instance. *Bryant v. Blackwell*, 15 Beav. 44.

An over-statement on the part of mortgagees in possession of a colliery as to the balance represented by them as remaining due on the mortgage, and their refusal to furnish accounts to the mortgagors except on being paid the expenses of so doing,—Held, not such vexatious conduct as to deprive them of their costs of a redemption suit. *Norton v. Cooper*, 5 De Gex, M. & G. 728.

On their appeal from a decree disallowing such costs, they were held entitled to have their costs of the appeal. *Ibid*.

(U) PRACTICE.

In a mortgage suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed in order to give full effect to the plaintiff's charge. *Lewis v. Duncombe*, 20 Beav. 398.

In a suit by a mortgagor for redemption, a decree was made for an account with annual rests. The plaintiff died, and the suit was abandoned; after which the mortgagee instituted a suit for foreclosure:—Held, that the decree must be the same, and with annual rests. *Morris v. Islip*, 20 Beav. 654.

On making an order of foreclosure absolute the Court refused to add a declaration, under the Trustee Act, 1850, that the mortgagor being out of the jurisdiction is a trustee, in order to found a subsequent

application for a vesting order. Such a declaration can be obtained only on a separate application. *Smith v. Boucher*, 1 Sm. & G. 72.

An equitable mortgagee filed a claim for an account and for the appointment of new trustees, against the heir (who disclaimed) of a deceased trustee; and an inquiry being asked at the hearing to ascertain the parties entitled to the equity of redemption, the Court refused, at the instance of a party having only a redeemable interest, to direct inquiries which, on the satisfaction of the mortgage, might become useless. *Wetherill v. Garbutt*, 1 Sm. & G. 124.

In a suit to redeem, the mortgagee having by mistake omitted to attend at the time and place fixed by the Master for payment of the sum computed to be due to him for principal, interest and costs, the Court upon motion with notice appointed a new time and place for the payment of the money ten days after the date of the order. *Hughes v. Williams*, Kay, App. iv.

In such a case the defendant is not entitled to subsequent interest. *Ibid*.

Certain tenements were upon a loan of 200*l.* assigned by the owner to the lender for a long term of years, upon trust to sell and out of the proceeds first to pay the costs of sale; secondly, to pay the 200*l.* and interest; and, thirdly, to pay the surplus to the owner. The deed contained a covenant by the owner to pay to the lender the 200*l.* and interest at the end of six months, and also absolute covenants by the owner for title as upon a mortgage and for quiet enjoyment by the lender after default. Upon a bill to foreclose the equity of redemption in the form No. 6. of Schedule A. to the Orders of April 1850,—Held, that the case was one for a sale and not for a foreclosure. *Jenkin v. Row*, 5 De Gex & S. 107.

A B on his marriage settled certain estates, then in mortgage, on himself for life, with remainder to his first and other sons in tail, and covenanted against incumbrances; he afterwards mortgaged other estates and became insolvent. A bill was filed by his assignee under the insolvency against the incumbrancers on all the estates and against the tenant in tail, praying an account of what was due on the several incumbrances, that their priorities might be ascertained, and for sale or redemption. A decree was made in the suit, directing that on the plaintiff and the defendant, the tenant in tail, paying what was due on the respective incumbrances, the unsettled estates should be conveyed to the party redeeming, and that the settled estates should be conveyed on the trusts of the settlement, and in default of redemption that the bill should be dismissed:—Held, by the Lord Chancellor, that the decree for redemption being permissive only as against the tenant in tail was correct, and that a decree for sale would have been improper. *Chappell v. Rees*, 1 De Gex, M. & G. 393.

MORTMAIN.

[See title CHARITY.]

A bequest of the proceeds of shares in a joint-stock banking company, formed under a deed of settlement, and which possessed freehold and copyhold property, does not come within the Statute of Mortmain, 9 Geo 2. c. 36. *Myers v. Perigal*, 21 Law J. Rep. (N.S.) C.P. 217; 11 Com. B. Rep. 90.

A testator bequeathed shares in a joint-stock banking company to his wife for life, and directed that after her decease the shares should be sold, and the proceeds invested in government securities for the benefit of certain charities. By the deed of settlement of the company, the directors were empowered to invest their surplus capital on mortgage, or in the purchase of freehold, copyhold and leasehold lands, and from time to time to call in and dispose of the same, and re-invest the proceeds in like manner; and it was declared that all the property of the company, as between the shareholders thereof, and as between their respective real and personal representatives, should be deemed personal estate. At the testator's death, the property of the bank consisted (among other things) of freehold and copyhold hereditaments and monies secured upon mortgage of real estate:—Held, upon appeal, reversing the decision of the Court below, and in accordance with the certificate of the Court of Common Pleas in the above case, that the bequest of the shares to the charities was a valid legal bequest within the 9 Geo. 2. c. 36. *Myers v. Perigal*, 22 Law J. Rep. (N.S.) Chanc. 431; 2 De Gex, M. & G. 599; overruling 18 Law J. Rep. (N.S.) Chanc. 185; 16 Sim. 533.

A testator bequeathed the residue of his estate to trustees, to be purchased into the funds, for the following purpose, viz. for opening new schools, subscribing to those already opened in England, Scotland, Ireland, and elsewhere, and purchasing land to be let out to the poor at a low rent, such rent to be applied to any benevolent purposes his trustees might think proper:—Held, that the residue was divisible into two equal parts, and that one of such parts was applicable to the purposes of education, according to a scheme to be settled by the Court, and that the trusts of the other part were void under the Mortmain Act. *Crafton v. Frith*, 20 Law J. Rep. (N.S.) Chanc. 198; 4 De Gex & Sm. 237.

Shares in incorporated companies having interests in land, as canal companies, railway companies, &c. constituted by acts of parliament, under which the shares are declared to be personal estate, are not within the Mortmain Act, 9 Geo. 2. c. 36. *Ashton v. Lord Langdale*, 20 Law J. Rep. (N.S.) Chanc. 234; 4 De Gex & Sm. 402.

Debentures given by incorporated companies having interests in land, which merely contain a personal obligation, and do not convey the undertaking, tolls, &c. to the holder, are not within the Mortmain Act. *Ibid.*

Shares in an unincorporated banking company, which was authorized to hold lands by way of mortgage, and might have had interests in lands, and which had been constituted by deed of settlement, under which the shares were declared to be personal estate, held not to be within the Mortmain Act. *Ibid.*

Railway scrip is not within the Mortmain Act. *Ibid.*

Mortgages given by a railway company of the undertaking and tolls, rates and sums arising by virtue of the act of parliament under which it was constituted, held to be within the Mortmain Act. *Ibid.*

Where exceptions to a Master's report relate only to matters of law, and not to matters of fact, the Court will not make any order on the exceptions, but express its decision by way of declaration. *Ibid.*

It was conceded by the parties interested in opposing it, that a bequest to the Commissioners for the Reduction of the National Debt, to be applied in reduction of the National Debt, was a charitable use. *Ibid.*

J O, by his will, directed his trustees, after the decease of his wife, to transfer funds of the value of 8,000*l.* sterling to the corporation of G, and a like sum of 8,000*l.* to the corporate bodies of C, T and W, upon trust in each case thereof to raise 1,300*l.* and lay out the same in the foundation, building, and furnishing a hospital or almshouse for the city of G, and each of the other places, C, T and W, in the event of any land being given or granted to the corporation for the purpose of his charity within the period of ten years next after his decease, under the provisions of 9 Geo. 2. c. 36. And he declared that no part of the trust monies should be applied in the purchase of land; and in the event of no land being granted within the ten years, then the principal trust monies incapable of being applied were to fall into his residuary estate. Land as a site for the hospital was conveyed to the corporation of G and to each of the corporate bodies of C, T and W shortly before the expiration of the ten years, but the deed conveying the land to the corporation of G was not enrolled until five days after the ten years had expired:—Held, that the deeds conveying the land were good under the 9 Geo. 2. c. 36. That a bequest made on an inducement to third parties to convey land in mortmain, and not to take effect unless land should be conveyed accordingly, was void: and that a bequest which tended directly to bring fresh lands into mortmain was void: and that a bequest of money to be expended in the erection or repair of buildings was void, unless an intention was clearly expressed that the money was to be expended upon land already in mortmain. *Trye v. the Corporation of Gloucester*, 21 Law J. Rep. (N.S.) Chanc. 81; 14 Beav. 173.

A testator, a portion of whose property consisted of railway shares, bequeathed it to certain persons for their lives, and after the decease of the survivor to the British and Foreign Bible Society and the Home Missionary Society:—Held, that the railway shares must be sold and the produce invested in stock; and that the question whether the railway shares were within the provisions of the Mortmain Act was premature. *Thornton v. Ellis*, 21 Law J. Rep. (N.S.) 714; 15 Beav. 193.

A testator gave a legacy to "the Society for Building Churches." Upon a reference, the Master reported that the society meant was "The Incorporated Society for Promoting the Enlargement, Building and Repairing of Churches and Chapels":—Held, that the bequest was not void under the Statute of Mortmain. *The Church Building Society v. Barlow*, 22 Law J. Rep. (N.S.) Chanc. 339; 3 De Gex, M. & G. 120.

A testator by his will directed that a sum should be invested in the names of trustees, upon trust to pay the income for the maintenance of a school to be established in the parish of W; and declared that this sum should not be laid out in the purchase of lands, his expectation being that other persons would furnish lands and buildings for that purpose:—Held, that the bequest was valid, and not void under the Mortmain Act. *Cawood v. Thompson*,

22 Law J. Rep. (N.S.) Chanc. 835; 1 Sm. & G. 409.

A testatrix directed her executors, as opportunity might offer, to apply the residue of her personal estate, or such parts as by law might be legally applied to such purposes, in the endowment of district churches and chapels in populous places, so that the poor might have the Gospel preached to them; and the testatrix expressed her wish that a preference should be given to those parishes the churches of which were under the patronage of the trustees of her late friend the Rev. Charles Simeon, and other similar trusts:—Held, not to be a gift within the Statutes of Mortmain. *Edwards v. Hall*, 22 Law J. Rep. (N.S.) Chanc. 1078.

Bill filed to set aside a deed by which an annuity, charged on real estate, was granted to trustees for charitable purposes. The deed was duly enrolled within six months, and executed eleven years before the death of the grantor, but after its execution it was left in the custody of the grantor, and the amount of the annuity was not paid during his life, although he contributed largely to the charities intended to have been benefited. The existence of the deed was not made known to the objects of the charity for ten years, at which period a cheque was given by the grantor for the arrears of the annuity, but the cheque was returned upon an alleged understanding between the parties to that effect:—Held, upon these facts and the evidence adduced in support of the bill, that an agreement or design existed among the parties to the deed, that payment of the annuity was not to be enforced during the life of the grantor; that it was not necessary such design should be expressed on the face of the deed in order to bring the case within the Statute of Mortmain; and that the deed was, therefore, invalid; but as the litigation was caused by the grantor himself, the costs were to be paid out of the fund. *Way v. East*, 23 Law J. Rep. (N.S.) Chanc. 209; 2 Drew. 44.

By his will a testator gave a reversionary interest in personal estate to the mayor, jurats, and commonalty of the town of F, to be applied by them in such manner and for such purposes as they should judge to be most for the benefit and ornament of the town:—Held, upon appeal, affirming a decree of the Master of the Rolls, that this was a good charitable gift, although the discretion given to the trustees might extend to an application of the fund in violation of the statute 9 Geo. 2. c. 36. (the Mortmain Act), the presumption being that where trustees of a testamentary gift for charitable purposes have, by the terms of the gift, a discretion to apply the benefit of the gift either in a way which the law allows or which the law disallows, they will act in a lawful manner. *The Mayor, Aldermen and Burgesses of Faversham v. Ryder*, 23 Law J. Rep. (N.S.) Chanc. 905; 5 De Gex, M. & G. 350; 18 Beav. 318.

A testator, by his will, gave all the residue of his personal estate (including leasehold property) to the mayor and corporation of S, upon trust to employ the income as they might think fit, in such manner as might best promote the study and advancement of the sciences of natural history, astronomy, antiquities, and classical and oriental literature, in the town of S, such as by forming a public library, botanic garden, observatory, and collections of objects in connexion with the above sciences; such

library, garden, and collections to be formed and kept at his leasehold houses in S:—Held, that this bequest was valid under the 8 & 9 Vict. c. 43. *Harrison v. the Mayor, &c. of Southampton*, 23 Law J. Rep. (N.S.) Chanc. 919; 2 Sm. & G. 387.

A testator gave 400*l.* to three trustees to invest in government or on real securities and to pay the income to poor persons of the town of R, and after the death of the survivor of the trustees, he gave the sum and the securities on which it might be invested to the corporation of R, whom he appointed trustees, to apply the income in manner aforesaid for ever. The testator afterwards empowered his trustees to apply the capital and income for or towards establishing any almshouses for the benefit of poor persons in R as they might think advisable; and added, that it was his wish that his trustees should commence the building of such almshouses as soon as might be after his death:—Held, that the legacy of 400*l.* was void within the Statute of Mortmain. *Martin v. Wellstead*, 23 Law J. Rep. (N.S.) Chanc. 927.

A testatrix bequeathed to a charity the residue of her personal estate, including a sum secured on mortgage of the town hall rates of Birmingham. These rates were by act of parliament authorized to be levied upon the occupiers of houses, and remedies were given for recovering the same by summons before a Justice of the Peace, who was empowered to issue a warrant to levy the rate by distress of the occupiers' goods and chattels and to sell the same, and in case of there being no sufficient distress, to commit the defaulting party to prison:—Held, that this mortgage was one "affecting" real estate within the Mortmain Act (9 Geo. 2. c. 36), and therefore that the gift of it to the charity was void. *Thornton v. Kempson*, 23 Law J. Rep. (N.S.) Chanc. 977; Kay, 592.

A, having the intention of disposing of the bulk of his property after his death for charitable purposes, consulted a solicitor, who told him that if he should leave it by will upon trust for these purposes, the will would be void, by reason of the Statute of Mortmain; and that, if he should leave it by will to his wife, B, without any trust expressed, but should impose on her an obligation to employ it for those purposes, the bequest to her would be void. A, after this advice, by a will, bequeathed all his property to B, from various conversations with A, knew of his wishes and intentions, and knew that he had an expectation that, if he left his property to her, she would employ it in carrying out his intentions. A bill was filed, by some of the next-of-kin of A, against B, for the purpose of having the bequest to her declared void, on the ground that the property was subject to a trust prohibited by the Statute of Mortmain. No evidence was given that A had imposed any obligation on B. B, by her answer (after an admission to the above effect), denied that any obligation had been imposed on her by A, or that she had made any promise to A. The bill was dismissed. *Lomax v. Ripley*, 24 Law J. Rep. (N.S.) Chanc. 254; 3 Sm. & G. 48.

The doctrines of the Court as to secret trusts to evade the Statute of Mortmain. *Ibid.*

The shares of incorporated companies holding land are real estate in the absence of any legislative declaration to the contrary, and as such are within the

provisions of the Mortmain Act. *Ware v. Cumberlege*, 24 Law J. Rep. (N.S.) Chanc. 630; 20 Beav. 503.

A testator devised freehold estate to the then minister of the Roman Catholic chapel at L and his successors, ministers of the said chapel, for ever. He also gave to T W, minister of the Roman Catholic chapel at K, and to his successors, for ever, certain other estates; and he further gave to the officiating minister of the chapel at Kendal the rents and profits of two estates for seven years next after his decease:—Held, that all these devises were void, they being intended solely for the benefit of the church, and not of the individual. *Thornber v. Wilson*, 24 Law J. Rep. (N.S.) Chanc. 667; 3 Drew. 245.

A testator, by his will, executed more than three calendar months before his death, devised two freehold houses in Brighton to trustees, in trust to sell and invest the proceeds and pay the income to his wife for life, and at her death to pay over the principal to the treasurer for the time being of the "Incorporated Society for Promoting the Enlargement, Building and Repairing of Churches and Chapels," to be applied to the uses and purposes of that society:—Held, (affirming the decision of Wood, V.C.) that such a gift was not within the scope of the 43 Geo. 3. c. 108, and could not be sustained as a gift of the proceeds of sale to the extent of 500*l.*, but was void under the Mortmain Act, 9 Geo. 2. c. 36. *The Incorporated Church Building Society v. Coles*, 24 Law J. Rep. (N.S.) Chanc. 713; 5 De Gex, M. & G. 324; 21 Law J. Rep. (N.S.) Chanc. 103; 1 Kay & J. 145.

The intent of the act, 43 Geo. 3. c. 108. was to protect a gift for one specific church, chapel, &c., and not a vague and general gift for the enlargement, building and repairing of churches generally. *Ibid.*

A bequest of 4,500*l.* to the mayor and corporation of Newcastle, in trust for the purpose of establishing a hospital for twelve poor widows, with a monthly allowance of 20*s.* to each, the surplus to be applied in providing for them coals and clothing annually, or any other necessary they may require. The above bequest to be carried into effect at the death of the testator's sisters, or during their lives if they should think proper, in which case they should be allowed to name the first inmates:—Held, that the Court could not execute this trust without providing permanently a house for a hospital, and therefore the gift was void. *Dunn v. Barnas*, 1 Kay & J. 596.

Nor was the gift rendered valid by proof that the testator was a member of the corporation of Newcastle, and that he knew that the corporation had been in the habit of supplying land for the purposes of establishing charities which were endowed by like bequests, for the will should point specifically to land already in mortmain as that to which the gift was intended to apply in order to avoid the effect of the statute. *Ibid.*

A bequest of a legacy to be applied towards establishing a school at A, provided a further sum could be raised in aid thereof, if necessary,—Held, to import an intended outlay of the sum in building a school-house at the place referred to; and, therefore, to be a void bequest within the Statute of Mortmain. *Attorney General v. Hull*, 9 Hare, 647.

A bequest of shares in a canal navigation company for charitable uses, held to be good; but a bequest of

securities upon the tolls, rates and duties, and upon the general estate of the company, created by assignment thereof by way of mortgage, as being a charge upon land,—held to be void under the statute 9 Geo. 2. c. 36. *In re Langham's Trust*, 10 Hare, 446.

Gift of stock "for the establishment of a charity school" held void. *In re Clancy*, 16 Beav. 295.

Totill Fields Improvements bonds held not to be within the Statute of Mortmain. *Bunting v. Marriott*, 19 Beav. 163.

MUNICIPAL CORPORATION.

- (A) CHARTER OF INCORPORATION.
- (B) QUALIFICATION OF MEMBERS.
- (C) ELECTION OF MEMBERS.
 - (a) *Aldermen and Councillors.*
 - (b) *Voting Papers.*
- (D) BURGESS ROLL.
 - (a) *Who to be on.*
 - (b) *Revising.*
 - (c) *Signing.*
- (E) APPOINTMENT, SALARY AND DUTIES OF OFFICERS.
- (F) COMPENSATION TO OFFICERS.
- (G) TOWN CLERK.
- (H) BYE-LAWS.
- (I) BOROUGH FUND.

(A) CHARTER OF INCORPORATION.

A charter of King James the Second granted and confirmed to the corporation of the master pilots, &c. of Newcastle-upon-Tyne, "that all persons, as well subjects as strangers born, being owner or owners of any goods, &c. brought in any ship from beyond the seas into the river Tyne, or the creeks or members aforesaid, or any creek or member belonging to the said port of Newcastle-upon-Tyne, shall from time to time, as often as such goods shall be brought in, pay an ancient duty heretofore lawfully, usually, and accustomedly paid to the said company, &c. called primage, that is to say, 2*d.* for every tun of wine, &c. and all other goods, &c. rated and accounted by the tun (fish killed and brought in by Englishmen only excepted), and 3*d.* for every last of flax, &c. or any other goods, &c. rated and accounted by the last, in manner following, that is to say, aliens and strangers born, and all other such person or persons which with their said ships or vessels shall arrive within the said port or in any of the said creeks or members, and not belonging to the same, before they depart with their ships or vessels from the said port or from the said creeks shall pay the duties aforesaid for and in the name of primage as is aforesaid; and every free merchant and other inhabitant of Newcastle aforesaid arriving with their said ships or vessels within the said river of Tyne shall pay the duties aforesaid within ten days after the landing of the said goods as aforesaid upon lawful demand." At the close of the charter there was a clause confirming to the master pilots "all lands and privileges, ancient duties and profits which they had theretofore lawfully used and enjoyed." Then followed immediately a proviso "that the several and respective sums thereby granted or mentioned to be granted

or confirmed, &c. were to be received and taken in lieu of all other duties, &c. theretofore granted or received, and that no further or other duties should at any time be demanded, paid, or received on account thereof." The defendants below were natives and merchants of Sunderland, which was a creek or member of the port of Newcastle-upon-Tyne. They brought their own goods by sea in their ships into Sunderland, and refused to pay the primage on such goods claimed by the corporation, who thereupon brought an action against them to recover it. On the trial the corporation put in the charter, and also gave evidence of ancient and modern usage, that all persons, including those resident in Sunderland, who being owners of goods brought them into Sunderland in ships from beyond sea, had paid primage. The defendants objected that the charter did not impose the liability to the payment of primage on Sunderland merchants bringing their goods by ship into Sunderland, and that the evidence of usage was not admissible to aid in the interpretation of the charter:—Held, that the corporation were not precluded by the charter from claiming primage in respect of goods imported into Sunderland by Sunderland merchants; that the charter was not incompatible with such claim, and that evidence of usage was admissible in support of it. *Bradley v. the Master Pilots and Seamen of Newcastle-upon-Tyne*, 23 Law J. Rep. (N.S.) Q.B. 35; 2 E. & B. 427.

(B) QUALIFICATION OF MEMBERS.

The name of the defendant, an inhabitant householder of a borough, appeared in the rate-books of the borough of 1848-9, in respect of the occupation of a public-house, for which also he paid his share of the rates in 1848. On the 14th of August 1848 he let the public-house, but retained in his occupation a warehouse that had formed part of the premises, and on the 4th of September 1848 gave notice to the overseers of his having so let the house, and claiming to be rated in respect of his occupation of another house in the borough. His name, however, was not regularly inserted in the rate-books in respect of the latter house until March 1849, nor did he pay any rate in respect of it until the 21st of September 1848, and upon the revision of the burgess lists for the year 1848-9, his name was objected to and struck out:—Held, in an action for penalties, under the Municipal Act, 5 & 6 Will. 4. c. 76. s. 53, for acting as a town councillor on the 14th of February 1849, without being duly qualified, that the defendant continued entitled to be on the burgess list of the borough for the year 1848-9, and therefore qualified in that respect to act as a councillor. *Whalley v. Bramwell*, 20 Law J. Rep. (N.S.) Q.B. 53; 15 Q.B. Rep. 775.

The question in such cases is the qualification with reference to his title to be upon the burgess list and not the burgess roll. *Ibid*.

By section 28. of the Municipal Corporations Act (5 & 6 Will. 4. c. 76), no person is qualified to be elected a councillor during such time as he has any share or interest in any contract or employment with, by, or on behalf of the council:—Held, that a party who had entered into an existing contract for profit with the council was disqualified, although by reason of its not being under seal he could not have sued the

corporation upon the contract. *Regina v. Francis*, 21 Law J. Rep. (N.S.) Q.B. 304; 18 Q.B. Rep. 526.

By 7 Will. 4 & 1 Vict. c. 78. s. 23, all applications for a *quo warranto* to question the elections of corporate officers are to be made before the end of twelve calendar months "after the election, or the time when the person against whom application is made shall have become disqualified".—Held, that where a party had entered into a continuing contract with the council, the disqualification continued during the existence of the contract, and that a *quo warranto* might be applied for, notwithstanding more than twelve months had elapsed from the time of the election, or from the time when the disqualification first attached. *Ibid*.

At an election for two councillors for St. John's Ward, in the borough of Blackburn, T was one of the candidates elected. Some of the burgesses who voted for T, after they had voted, received from T's agent a ticket, and were directed to go and did go to a particular inn, where they were shewn into a room, and upon presenting the ticket received the sum of 2s. 6d., and from another agent of T. one or two 4d. tickets for ale and spirits, as a gift. Others of the burgesses entitled to vote at the said election, and who voted for T, signed the voting papers required to be handed in not in their real names, but in the names by which they were by mistake described on the burgess roll. The grounds of objection in a rule *nisi* for a *quo warranto* information against T were, the reception of votes for T from persons not entitled to vote; or who fraudulently personated persons who were entitled to vote; and the reception of votes from persons who had been bribed to vote for T:—Held, upon the first ground, first, that as the persons were entitled to vote, the objection taken was answered, the misnomer in the burgess roll being cured by the 142nd section of the 5 & 6 Will. 4. c. 76; and, secondly (supposing the objection had been raised), that the fact of the burgesses having voted in wrong names did not vitiate their votes; and, by *Lord Campbell, C.J.*, upon the second ground, that as there appeared to be evidence from which a jury might have inferred an agreement with the voters before voting that they should receive 2s. 6d. for their votes, that would have been a ground for making the rule absolute. *Regina v. Thwaites*, 22 Law J. Rep. (N.S.) Q.B. 288; 1 E. & B. 704.

A, who had contracted with the council of a borough, acting as local board of health, for the performance of certain public works in the borough, bought of the defendant, who was a tradesman, articles required in the course of these works:—Held, that this was not such a contract or employment as disqualified the defendant from holding a corporate office under the 5 & 6 Will. 4. c. 76. s. 28. *Le Fewere v. Lankester*, 23 Law J. Rep. (N.S.) Q.B. 254; 3 E. & B. 530.

The defendant and three other persons had contracted with the Commissioners under a local act to sink an artesian well for the purpose of supplying the town with water. This contract and the works were afterwards assigned over to the Commissioners by deed, who thereby released the contractors, and covenanted to pay them a certain sum which had been already incurred, and a further sum of 850*l.* in case the Commissioners should either abandon the works or complete them, and obtain a specified sup-

ply of water from the well. The contractors also covenanted with the Commissioners for quiet enjoyment, and not to molest them in the completion of the works. All the powers and contracts of the Commissioners were transferred to the council, acting as local board of health, by the Public Health Act:—Held, that this contract was “a security for the payment of money only” within the meaning of the 5 & 6 Vict. c. 104. s. 1, and did not, therefore, disqualify the defendant from holding a corporate office under the 5 & 6 Will. 4. c. 76. s. 28. *Ibid.*

Quære—whether section 28. of the 5 & 6 Will. 4. c. 76. disqualifies for the office of mayor as well as that of alderman or councillor. *Ibid.*

Semble—that a contract with the town council acting as local board of health in a corporate district operates as a disqualification under the Municipal Corporations Act. *Ibid.*

The 5 & 6 Will. 4. c. 76. s. 28. enacts that no person shall be qualified to be a councillor unless (*inter alia*) he “be rated to the relief of the poor in such borough upon the annual value of not less than 15*l.*”—Held, that this refers to the sum inserted in the rate-book as “rateable value,” and not as “gross estimated rental.” *Baker v. Marsh*, 24 Law J. Rep. (n.s.) Q.B. 1; 4 E. & B. 144.

(C) ELECTION OF MEMBERS.

(a) Aldermen and Councillors.

At a meeting of the town council a minority of the councillors present delivered voting papers to the mayor for certain persons to be elected aldermen. The mayor and the majority of the town councillors had been advised that the day was not the proper one for the election. The mayor consequently declined to proceed with the election, and no election was declared. It was, in fact, the duty of the council to have proceeded to the election of aldermen on that day, had they known the law:—Held, that the act of the minority was not the act of the town council; that the election had not been part held, but that there had been no election; and that, consequently, a mandamus might issue calling upon the council to proceed to elect aldermen. *Regina v. the Mayor, &c. of Bradford*, 20 Law J. Rep. (n.s.) Q.B. 226; 2 L. M. & P. P.C. 35.

M was elected a town councillor of the borough of B without his knowledge or consent, but being informed that he would be liable to a fine if he refused to serve, he, on that ground, agreed to accept the office, and made the necessary declaration. No application was made to him to resign the office. A rule nisi for an information in the nature of a *quo warranto* to shew by what authority he held the office having been obtained, he, as soon as he heard of it, expressed his willingness to resign, and allowed the rule to be made absolute without supporting the validity of his election. *Regina v. May*, 20 Law J. Rep. (n.s.) Q.B. 268; 2 L. M. & P. P.C. 144.

Held, that he was not liable for costs if within a week he made a valid resignation, or if an information in the nature of a *quo warranto* were filed at the expense of the prosecutor, if M at his own expense within a week after the filing of the information put in an invalid disclaimer; but that, failing these alternatives, the rule was to be made absolute with costs. *Ibid.*

S and H were rival candidates for the office of town councillor of a borough. An objection was taken at the election to the validity of certain votes in S's favour, which turned the election. The mayor overruled the objection, and S took his seat. The rival candidate obtained a rule nisi for an information in the nature of a *quo warranto* against S. The latter thereupon declined to shew cause, and expressed a willingness to resign his seat:—Held, that S was liable to the costs of the information, as he had been a candidate for the office. *Regina v. Sidney*, 20 Law J. Rep. (n.s.) Q.B. 269; 2 L. M. & P. P.C. 149.

At an election for two councillors of a borough on the 1st of November 1851, A, B and C were candidates. A and B had the greatest number of votes, and were returned as elected; but B was disqualified, and the voters had notice of his disqualification. In July 1852 judgment of ouster was signed in a *quo warranto* filed against B. On the 26th of October 1852, C, by a notice, required the council to admit him as a councillor, and to administer to him the declaration required by the 5 & 6 Will. 4. c. 76. s. 50. On the 8th of November 1852, C made the declaration, and on the 9th of November voted at the election for mayor, when his vote was rejected:—Held, that C was elected on the 1st of November 1851, and ought to have been then returned; and that having made the declaration before the 9th of November 1852, he was entitled to vote at the election of mayor. *Regina v. Coaks*, 23 Law J. Rep. (n.s.) Q.B. 133; 3 E. & B. 249.

Section 50. of the 5 & 6 Will. 4. c. 76. requiring persons elected councillors to make the declaration within five days after they have notice of their election, applies only to persons who are returned as elected; and the five days are to be computed from their notice of their return. *Ibid.*

(b) Voting Papers.

At the election of a town councillor, a candidate, whose place of residence was “Newmarket Road” was described in the voting papers as of “Gonville Place.” “Gonville Place” was situated in a different ward from “Newmarket Road,” but had until a few days previous to the election been the residence of the candidate:—Held, that that was not an inaccurate description of a place stated in a voting paper which was cured by section 142. of the 5 & 6 Will. 4. c. 76, which applies only to the inaccurate description of a right place, not to the accurate description of a wrong place. *Regina v. Coward*, 20 Law J. Rep. (n.s.) Q.B. 359; 16 Q.B. Rep. 819.

The 5 & 6 Will. 4. c. 76. s. 32. enacts, that the election of councillors shall be by voting papers “containing the Christian names and surnames of the persons voted for, with their respective places of abode and descriptions.”—Held, that the words “place of abode” mean “place of residence,” and that voting papers describing the candidate as of his place of business are void, even though it be found as a fact that he is as well known by that description as by his place of residence. *Regina v. Hammond*, 21 Law J. Rep. (n.s.) Q.B. 153; 17 Q.B. Rep. 772.

Where at an election of councillors for a borough, the voting paper is signed with the surname and the initial of the Christian name of the burgess voting, it is a sufficient compliance with section 32.

of the 5 & 6 Will. 4. c. 76. *Regina v. Avery*, 21 Law J. Rep. (N.S.) Q.B. 428; 18 Q.B. Rep. 576.

The voting paper described the property in respect of which a Burgess voted, as "Pilton Street." He was described in the Burgess roll as "of Pilton," and his qualifying property "House, in the Street." It appeared in evidence that Pilton consisted of only one main street, which was called "Pilton Street," or "the Street" indiscriminately:—Held, that the voting paper was sufficient. *Ibid*.

In the voting paper handed in at the election of a councillor for a borough, the voter described himself "of King Street, in the parish," &c. In the Burgess roll he appeared to be rated for a house in Minster Street. It appeared that King Street and Minster Street joined, and that in his business as a mercer the voter occupied jointly a house numbered in King Street, which was the corner house where the two streets met, and the adjoining house in Minster Street. They were separate houses, and had a distinct entrance door in each street; and in his bills the voter's place of business was described as of No. 8, King Street and 63, Minster Street:—Held, that as the houses were occupied as one, the description in the voting paper was such as would be commonly understood within the meaning of the 5 & 6 Will. 4. c. 76. s. 142, and, therefore, that the variance between it and the Burgess roll was no valid ground of objection under the 33rd section of the same act. *Regina v. Gregory*, 22 Law J. Rep. (N.S.) Q.B. 120; 1 E. & B. 600.

(D) BURGESS ROLL.

(a) Who to be on.

By a local act of the borough of K, owners of dwelling-houses within the borough of a less yearly rent than 10*l*. were to be rated to the poor instead of the occupiers. The overseers were, by section 2, empowered to compound with the owners at one-third the rate where the "annual rent and value" did not amount to 7*l*., and at one-half the rate where the annual rent or value amounted to 7*l*. but did not amount to 10*l*. Sect. 15, provided that nothing in the act was to prejudice or affect any municipal or parochial franchises of the occupiers, but that they might claim to be put on the Burgess roll as if that act had not passed, and the occupiers had been rated and assessed to the poor in their own names. M claimed to be put on the Burgess roll of the borough of K in respect of a house which he occupied as tenant at a yearly rent of 7*l*. The house was stated in the poor-rate to be of the gross estimated value of 6*l*. 10*s*., and of the rateable value of 5*l*. 4*s*. His landlord had compounded with the overseers at one-third the poor-rate, and had duly paid his composition. The borough-rates of K were paid out of the poor-rates:—Held, that under the local act the criterion for composition was the rent which could fairly be obtained when the premises were let, or the value for which they could be let when they were vacant; but that the title of the occupier to be put upon the Burgess roll could not be effected by any mistake in the amount of the composition between the owner and overseers; that the overseers were entitled to include the borough-rate in the composition as part of the poor-rate; and that payment of the composition was equivalent to the payment of the borough-rate. *Regina v. the Mayor and Assessors*

of *Kidderminster*, 20 Law J. Rep. (N.S.) Q.B. 281; 2 L. M. & P. P.C. 201.

(b) Revising.

A notice of claim, made under section 17. of the 5 & 6 Will. 4. c. 76, to be inserted on the Burgess roll of a municipal corporation must state the parish in which the property is situate in respect of which the claim is made. *Regina v. the Mayor and Assessors of Kidderminster*, 20 Law J. Rep. (N.S.) Q.B. 281; 2 L. M. & P. P.C. 201.

A person whose name had been omitted by mistake from the list of burgesses of a borough sent in a claim to be inserted on the Burgess list. He signed the claim with the initials of his Christian names and with his surname in full. He did not attend before the mayor and assessors to support his claim, but the overseer who had omitted the name by an oversight stated that the claim was good, and shewed to the court of revision the poor-rate book containing the names of the claimant. There was no other person of the same name in the borough, and the court of revision were well acquainted with the person and handwriting of the claimant. They, however, rejected the claim, on the ground that the signature by initials of the Christian names was insufficient. The Court held, that the mayor and assessors had sufficient information as to the meaning of the initials to have warranted them in inserting the name of the claimant on the Burgess list, and granted a mandamus to the mayor commanding him to insert the name on the Burgess roll. *Regina v. the Mayor of Hartlepool*, 21 Law J. Rep. (N.S.) Q.B. 71; 2 L. M. & P. P.C. 666.

If the Burgess lists of a municipal corporation be defective and null, and the mayor and assessors decline to revise them, they are not bound to revise the lists of claimants who claim to be inserted on the Burgess lists. *In re the Mayor and Assessors of Harwich*, 21 Law J. Rep. (N.S.) Q.B. 193; 1 Bail C.C. 18.

The notice of objection to the name of a person being retained on the Burgess list of a borough, given to the party objected to, was in the following form:—"To J B. I hereby give you notice that I object to your name being retained on the Burgess list of the borough of H." The notice did not describe J B as he was described in the Burgess list:—Held, that the notice was sufficient under the 5 & 6 Will. 4. c. 76. s. 17. *Regina v. the Mayor and Assessors of the Borough of Harwich*, 22 Law J. Rep. (N.S.) Q.B. 216; 1 E. & B. 617; overruling s. c. 22 Law J. Rep. (N.S.) Q.B. 81; 1 Bail C.C. 95.

(c) Signing.

[See 16 & 17 Vict. c. 79. s. 14.]

Under the Municipal Corporations Act, 5 & 6 Will. 4. c. 76. s. 15, each of the overseers, including the churchwardens, is bound to make out, sign and deliver the Burgess list of the parish. *Clarke v. Gant* (in error), 22 Law J. Rep. (N.S.) Exch. 67; 8 Exch. Rep. 252.

In an action for a penalty against a churchwarden for neglecting to sign the Burgess list, though the declaration contained no averment that there were any persons in the parish entitled to be put on the Burgess list, the Court, after verdict for the plaintiff, held the declaration good. *Ibid*.

(E) APPOINTMENT, SALARY AND DUTIES OF OFFICERS.

[See titles BOND, (B)—COALS.]

The Municipal Corporations Act, 5 & 6 Will. 4. c. 76. s. 92. enacts, "That after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest of all monies belonging to the corporation, shall be paid to the treasurer, and by him carried to the account of the '*Borough Fund*,' which fund shall be applied towards payment of the salary of the mayor, &c., and of the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint."—Held, that an officer appointed by the council with a salary cannot maintain an action of debt against the corporation for arrears of such salary. *Addison v. the Mayor, &c. of Preston*, 21 Law J. Rep. (N.S.) C.P. 146; 12 Com. B. Rep. 108.

The Municipal Corporations Act, 5 & 6 Will. 4. c. 76. s. 58. directs the council of every borough every year to appoint a treasurer, and to take such security for the due execution of his office as they shall think proper. The treasurer, by section 60, is to account to the council, at such times during the continuance of his office, or within three months after the expiration of his office, and in such manner as the council shall direct. By the 5 & 6 Vict. c. 89. s. 6, the treasurer, instead of being appointed annually, is to hold his office during the pleasure of the council, but no alteration is thereby made in the nature or duties of the office. M had, before the 6 & 7 Vict. c. 89, been elected treasurer of a borough for a year, and was ordered by the council to render an account of cash in his possession at every quarterly and adjourned meeting, and at any special meeting, if required. The defendant entered into a bond as surety for the due performance of his duty by M "during the whole time of his continuing in the said office in consequence of the said election, or under any annual or other future elections of the said council":—Held, first, that the council might legally take such security to remain in force under any number of successive elections; and, secondly, that the liability of the surety was by the terms of the bond extended to a continuance in office by M under an election during the pleasure of the council; and that there was no alteration in the time or mode of accounting, by reason of his holding the office for an indefinite period, which would discharge the surety. *The Mayor, &c. of Berwick-upon-Tweed v. Oswald*; *The Same v. Renton*; and *The Same v. Dobie*, 22 Law J. Rep. (N.S.) Q.B. 129; 1 E. & B. 295.

To a declaration in covenant on this bond, the defendant pleaded that after the making of the bond, and before any of the breaches of covenant alleged, the said M and others as his sureties executed and delivered to the plaintiffs another bond (to the same effect as that declared upon) in full satisfaction and discharge of the said bond in the declaration mentioned, and of all covenants, &c. therein contained, and that the plaintiffs then accepted the said other bond in full satisfaction and discharge of the said bond in the declaration mentioned and of all covenants, &c.:—Held, on demurrer to this plea, that it was not good either by way of accord and satisfaction, or of release. *Ibid.*

The 102nd section of the Municipal Corporations Act, 5 & 6 Will. 4. c. 76, provides that it shall not be lawful for the clerk to the Justices of a borough to act in the prosecution of any offender committed for trial by the Justices to whom he is clerk; "and any person being an alderman, or councillor, or clerk of the peace of any borough, who shall act as clerk to such Justices, or shall otherwise offend in the premises," shall forfeit 100*l.*:—Held, that the penalty of 100*l.* did not attach to a clerk to the borough Justices (not being an alderman, councillor, or clerk of the peace of the borough) who acted in the prosecution of offenders committed for trial by the borough Justices. *Coe v. Lawrence*, 22 Law J. Rep. (N.S.) Q.B. 140; 1 E. & B. 516.

The 7 Will. 4. & 1 Vict. c. 78. s. 38. does not deprive the council of a city or borough of all controul over the government and regulation of the gaol or house of correction of the city or borough, which was transferred to the council by the 5 & 6 Will. 4. c. 76. Under the proviso in that section, the council have a discretionary power as to the salary to be paid to the governor of such gaol or house of correction, and may refuse to confirm an order made by Justices of the city or borough, for the payment of an amount of salary which the council consider excessive. *Regina v. the Mayor, &c. of York*, 22 Law J. Rep. (N.S.) M.C. 73; 1 E. & B. 588.

The 11 & 12 Vict. c. 14. s. 2. authorizes the establishment of a "police superannuation fund" in boroughs, which is to be applied in paying superannuation or retiring allowances to police-constables as follows: if a constable has served fifteen years he is entitled "to retire on a superannuation allowance" equal to half his pay; but if he is then able and willing to continue to serve "he shall then receive" his full pay "and one-third also and no more of the above-named allowance from the superannuation fund." By section 3. "no police-constable shall be entitled to superannuation who is under fifty years of age," unless reported unfit for service:—Held, that a police-constable who had served fifteen years and continued in the force, but who was under fifty years of age, was not entitled to receive the reduced allowance under section 2. *Hobson v. the Mayor, &c. of Kingston-upon-Hull*, 24 Law J. Rep. (N.S.) Q.B. 51; 3 E. & B. 986.

The deputy day oyster meters of the City of London are entitled by immemorial custom to an account and equal distribution of all monies receivable by them for unloading the oyster boats within the limits of the port of London; and that, notwithstanding they are deputies of a body, formerly the deputies of, and now represented by the corporation of London (the measurers of all merchandise and wares brought into the port of London), and may consequently be subject to any alterations by the corporation in the rights and duties of their office. *Thompson v. Daniel*, 22 Law J. Rep. (N.S.) Chanc. 507; 10 Hare, 296.

The corporation cannot, either as representing its former deputies, or in its own corporate character, appoint deputy oyster meters, to hold their office upon terms different from those prescribed by the general body of the meters; but when the appointment is made by the corporation, the rights and duties incident to the office attach upon the person whom the corporation appoints. *Ibid.*

A Court of equity will not charge a defendant with wilful default in respect of payments which the plaintiff has not any legal right to recover. *Ibid.*

(F) COMPENSATION TO OFFICERS.

[To Coroners, see title COUNTY.]

Where an officer of a corporation, who has been deprived of his office, and is entitled to compensation under the Municipal Corporations Act, 5 & 6 Will. 4. c. 76, appeals against the amount awarded him by the corporation to the Lords Commissioners of the Treasury, the latter have, under section 66, of that statute, power to award him at their discretion either a gross sum or an annuity for life or for a less time, and to make the annuity commence at a future or at a bygone period. But they have no power to award such officer compensation in respect of any portion of the time during which he held such office. *Regina v. the Mayor, &c. of Lichfield*, 20 Law J. Rep. (n.s.) Q.B. 383; 16 Q.B. Rep. 781.

On such an appeal by a town clerk discharged from office in January 1844, the Lords Commissioners of the Treasury by a Treasury minute stated that they had ascertained the annual average of profits of the office for the last five years before the passing of the act, and had fixed the annual net amount of compensation at 50l. 18s., and subsequently made an order averred to be made in pursuance of such minute, and directed that the discharged town clerk should receive as compensation 50l. 18s. per annum, such annuity to commence on the 9th of September 1835; and they ordered a copy of the minute as well as of the order to be transmitted to the mayor. A copy of the minute was, in fact, transmitted to such discharged town clerk. The Court held, that in accordance with the intention of the Lords Commissioners the minute and the order might be read together; and as it then appeared to the Court that the Commissioners meant 50l. 18s. to be the full compensation for each year's loss of office, and as they had awarded the annuity to commence on the 9th of September 1835, the town clerk not being discharged until January 1844, that they had awarded compensation for a time in respect of which they had no power to give it, namely, while the town clerk held office; and that the order, therefore, was bad *pro tanto*. *Ibid.*

(G) TOWN CLERKS.

Although a town clerk, who has acted as solicitor to a municipal corporation, cannot recover his professional costs against them in an action without proving a retainer under the corporate seal, yet, where an order for payment of such costs has been made by the town council, the mere absence of a retainer under seal will not be a sufficient ground for quashing the order under 7 Will. 4. & 1 Vict. c. 78. s. 44, if the costs were incurred under resolutions of the town council. *Regina v. Prest*, 20 Law J. Rep. (n.s.) Q.B. 17; 16 Q.B. Rep. 32.

Where a town council, having laid a borough rate, proceeded to enforce its payment, but were threatened with litigation if they persevered, and in consequence directed their town clerk to consult counsel and take measures to ensure them against the threat,—Held, that the costs occasioned thereby were properly chargeable upon the borough fund under 5 & 6 Will. 4. c. 76. s. 92. *Ibid.*

A town clerk was appointed to his office on the basis of a report which fixed his salary at 250l. a year, and defined his duties to be (*inter alia*) "to prepare all precepts, orders, and other documents required for laying borough rates, to abide by and see that all orders of the council are properly carried out, and all necessary documents prepared for so doing, and to act as the professional adviser of the mayor and council in the business of the council;" and it also provided, "that he be paid the usual professional charges for conducting or opposing bills in parliament, conducting actions or suits, &c., preparing leases, &c., and also be paid all travelling and other expenses out of pocket":—Held, that he was entitled to be paid all such extra costs as were *bonâ fide* incurred for the purpose of warding off threatened litigation, whether litigation did or did not in fact result. *Ibid.*

By the 6 & 7 Vict. c. 18, the town clerks of boroughs are directed to prepare the lists of persons entitled to vote for the election of members of parliament, and by the 55th section, "the expenses incurred" by them in carrying the act into effect are to be repaid:—Held, that the words "expenses incurred" are confined to costs out of pocket, and that a town clerk is not entitled to any further remuneration for the time and labour he may devote to the performance of the duties imposed on him by the act. *Regina v. the Governor and Guardians of the Poor of Kingston-on-Hull*, 22 Law J. Rep. (n.s.) Q.B. 324; 2 E. & B. 182.

(H) BYE-LAWS.

[See COMPANY.]

The Mercers Company was one of the ancient guilds of the city of London, and by a charter of the 17 Ric. 2, the commonalty of the company were empowered to elect annually four wardens out of the commonalty. From 1391 to 1463 the practice was for the outgoing wardens to appoint their successors. From 1463 to the present time a select body had existed under the name of the court of assistants, who held their offices for life and supplied vacancies in their own body by self-election out of the whole commonalty. The court of assistants had, since 1463, always elected the wardens from the commonalty of the company, and of late years exclusively from among the members of their own court. No instance was to be found of wardens having ever been elected by the commonalty at large:—Held, that this usage was sufficient to warrant the inference of a bye-law delegating to the court of assistants the power of electing wardens; and that such a bye-law was valid, notwithstanding that it limited the right of election to a select and self-elected portion of the whole body. *Regina v. Powell*, 23 Law J. Rep. (n.s.) Q.B. 199; 3 E. & B. 377.

(I) BOROUGH FUND.

[See *ante*, (G), and title ALE AND BEERHOUSES.]

The 92nd section of the statute 5 & 6 Will. 4. c. 76, enabled the surplus of the borough fund to be applied for the public benefit of the inhabitants and improvement of the borough. By an act subsequently passed, the corporation of the city of N were authorized to levy certain tonnage dues to be applied in a specified manner, and after they were satisfied, the remainder to be applied to certain purposes, some of which were the same as those to which the surplus

of the borough fund was made applicable; and distinct accounts were directed to be kept of the tonnage dues and borough fund. The treasurer mixed the two funds at his bankers'. The corporation proposed to obtain an act of parliament for improving a river flowing through the city, and applied money from the funds at the bankers in paying certain expenses. An information was filed by the Attorney General, at the relation of rate-payers, praying an injunction to restrain this application to parliament at the expense of the borough fund, and the same was granted: and, on appeal from that decision, the appeal motion was refused, with costs. *Attorney General v. the Corporation of Norwich*, 21 Law J. Rep. (N.S.) Chanc. 139.

The borough fund is a trust fund, and is so constituted by the Municipal Corporations Act. *Ibid.*

Where a bill had been presented to parliament containing powers for the construction of waterworks, and for the doing of acts which, if done, would interfere with the stream of a river passing through a particular borough town, so as to prevent the efficient action of the stream in removing the sewage of the town, and thus indirectly affect the value of the rateable houses in the borough, the tolls of the market, and the other property forming the borough fund, and the corporation had applied part of the surplus of the borough fund in a partially successful opposition to the passing of the bill, it was decided by one of the Vice Chancellors, that under the Municipal Corporations Act, the corporation, whether they had any surplus borough fund or not, were justified in applying their funds in opposing such a bill: and upon appeal it was held, that the payment of such expenses out of such a fund was not so clearly contrary to the spirit of the 90th and 92nd sections of that act, which provides for the application of the surplus of the borough fund, as to warrant the Court in granting an interlocutory injunction to restrain such application. *Attorney General v. the Mayor, Aldermen and Burgesses of Wigan*, 23 Law J. Rep. (N.S.) Chanc. 429; 5 De Gex, M. & G. 52; Kay, 268.

MURDER.

[See BAIL—MANSLAUGHTER—WOUNDING.]

Two prisoners were indicted for the murder of M P by violence. The third and most material count charged the murder to have been effected by blows inflicted by the prisoners on the 5th of November, the 1st of December, and the 1st of January, and on divers other days between the 5th of November and the 1st of January. On the trial evidence was given of assaults committed by the prisoners on the deceased, one on the 5th of November 1849, one about the end of November, and one about the 11th of December. The counsel for the prosecution, in his address to the jury, had opened these assaults as conducing to the death, but he added, that if he failed in proving that they had conduced to the death, they would furnish evidence of the animus of the prisoners. It was proved, by further evidence, that the death, which took place on the 4th of January, was caused exclusively by one particular blow inflicted shortly before the death; and as there was no evidence to shew that either of the prisoners had struck that blow,

they were acquitted. Being subsequently indicted for having on the 10th of November 1849, assaulted M P, the prisoners pleaded a plea which, setting forth the indictment for murder, averred that the indictment included divers assaults against M P, and that the prisoners were acquitted upon the said indictment, and that the assaults included in the felony and murder charged upon them in the said indictment, were the same as those charged in the present indictment. The Crown replied, "that the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment." On the second trial, it was proved that evidence had been given on the former trial of the above-mentioned assaults, and no evidence was given on the second trial of any other assaults than of those proved on the first trial. On the second trial, as on the first, it was proved that the death was caused by the particular blow, distinct from these assaults. The Commissioner, before whom the second trial took place, told the jury that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find for the Crown. The jury, thereupon, returned a verdict of guilty. On a case reserved, stating the above facts, it was held, by a majority of the Judges (eight to six) that the prisoners could not, on the trial for murder, have been convicted of assault under the statute 7 Will. 4. & 1 Vict. c. 85. s. 11, as the assaults committed by them, although relied on by the Crown as conducing to the death, were proved by the evidence to have been unconnected with the homicide of the deceased; that, therefore, the general acquittal on the indictment for murder was no bar to a subsequent indictment for assault in respect of those very assaults. *Regina v. Bird*, 20 Law J. Rep. (N.S.) M.C. 70; 2 Den. C.C. 94.

MUTINY.

[In the Navy, see 17 & 18 Vict. c. 6. And see title SOLDIERS AND SAILORS.]

The Mutiny Act and the Articles of War apply only to Her Majesty's forces. *Wolton v. Gavin*, 20 Law J. Rep. (N.S.) Q.B. 73; 16 Q.B. Rep. 48.

NEGLIGENCE.

[See titles CARRIER—COMPANY—MASTER AND SERVANT—SHIP AND SHIPPING.]

A having contracted with a railway company to construct a branch line, made a sub-contract with F & H to erect a bridge for part of the line. C, who was foreman to F & H, at a salary of 250*l.* a-year for attention to their general business, contracted with F & H for a specific additional sum to erect the necessary scaffolding for the bridge, F & H furnishing the materials, the gas-lights included. One of the poles of the scaffolding rested upon a sleeper which was in the highway and above the level of the pavement. In consequence of the want of sufficient light to shew the obstruction, the plaintiff fell against the sleeper and was injured. Subsequent to the accident additional lights were put up at the expense of F & H:—Held, that

F & H were not liable, but that the plaintiff's remedy lay against C. *Knight v. Fox*, 20 Law J. Rep. (n.s.) Exch. 9; 5 Exch. Rep. 721.

The defendants, lessees of a ferry over a river, ran steamboats across for the conveyance of passengers and goods for hire. They also carried animals, but it was not their practice to take charge of the animals when on board. The plaintiff having paid the usual fare, led his mare on board at one side of the river, and remained with her until the steamboat reached the other side. For landing the passengers and animals the defendants had provided a moveable slip, leading from the boat to a landing barge. The slip had a handrail which had been twice recently, to the defendants' knowledge, broken by the pressure of a horse on landing, and in the handrail was an iron spike which appeared whenever the rail gave way. The defendants had also been cautioned that the slip was unsafe. They, notwithstanding, continued to use the slip, leaving the broken rail slightly tied up, so that it appeared sound. Over this slip the plaintiff proceeded to lead his mare towards the shore, but the mare pressed against the rail, the latter gave way, and the iron spike concealed in it injured her severely:—Held, that the defendants, as ferrymen, were bound to provide proper means for the embarkation and landing of the animals they carried for hire, and that, although the mare was under the controul and management of the plaintiff, they were liable for the injury to her in consequence of their culpable negligence in allowing an improper slip to be used. *Willoughby v. Horridge*, 22 Law J. Rep. (n.s.) C.P. 90; 12 Com. B. Rep. 742.

To sustain an action for an injury caused by the negligent driving of the defendant, the injury must have been caused by the negligence of the defendant only, without the negligence of the plaintiff contributing in any way to the accident. *Williams v. Richards*, 3 Car. & K. 81.

It is the duty of a person, who is driving over a crossing for foot passengers at the entrance of a street, to drive slowly, cautiously and carefully; but it is also the duty of a foot passenger to use due care and caution in going upon such crossing, so as not to get among the carriages, and thus receive injury. *Ibid.*

NEWSPAPER.

[See STAMP.]

NEW TRIAL.

[See PRACTICE.]

NIGHT POACHING.

[See GAME.]

If persons to the number of three or more are together in one party armed by night in any land for the purpose of destroying game there, and the land consists of several closes, and one of such persons be in one close and another in a different close of the land, they may be convicted under the statute 9 Geo. 4. c. 69, s. 9. The conviction will not be affected by the circumstance that one of the closes

is an inclosed field and another an open waste, and that each is in the occupation of different tenants. *Reginu v. Uezzell*, 20 Law J. Rep. (n.s.) M.C. 192; 3 Car. & K. 150.

Where in a criminal case a witness is ill, and is attended by a surgeon, the Judge at the trial will not receive the witness's deposition in evidence under the stat. 11 & 12 Vict. c. 42. s. 17, unless the surgeon attend at the trial to prove that the witness is unable to travel; but where a witness is permanently disabled and is not attended by a surgeon, other evidence that the witness is unable to travel may be sufficient; but where the witness is attended by a surgeon, and a person prove at the trial that he, on the 18th of March, saw the witness in bed, and that he appeared ill, the commission day being the 21st and the trial the 23rd, this is not sufficient proof of the illness of the witness to render his deposition admissible in evidence. *Regina v. Riley*, 3 Car. & K. 116.

In an indictment for night poaching it is sufficient to allege that the land is land "of and belonging to J," without stating it to be "in the occupation of J." *Ibid.*

NOTICE.

[See ACTION—EVIDENCE—LANDLORD AND TENANT—PRACTICE.]

NUISANCE.

[See Stat. 18 & 19 Vict. cc. 111, 116.—and titles ANIMALS—EASEMENT—INJUNCTION—MASTER AND SERVANT—MINE—PRACTICE; New Trial.]

(A) ACTION FOR.

(B) ABATEMENT OF.

(A) ACTION FOR.

A declaration in case alleged that the defendant was possessed of a theatre and of a stage therein, on which dramatic entertainments were performed, and of a dressing-room therein, and a floor underneath the stage, in which was a certain hole of great depth, across and along which said floor the performers at the theatre were accustomed to pass, from and to the said dressing-room, to and from the said stage; that the defendant hired the plaintiff to perform at the said theatre, and the plaintiff did perform in a certain opera, performed under the management and for the profit of the defendant; and it then became and was the duty of the defendant to cause the said floor to be so sufficiently lighted, and the said hole to be so fenced and guarded, during and until a reasonable time after the said performance, as to prevent any accident to those passing across and along the said floor from the stage to the dressing-room. That the defendant, well knowing the premises, permitted the said floor to be insufficiently lighted, and the hole to be open without any sufficient fence, during and until, &c., by reason whereof the plaintiff, who immediately after the performance was passing from the stage along the said passage to the dressing-room, fell down the said hole, and was grievously injured:

—Held, first, that the facts stated did not raise the duty the breach of which was alleged; secondly, that the express allegation of duty was immaterial, and could not help; and, therefore, that the declaration was bad in arrest of judgment. *Seymour v. Maddox*, 20 Law J. Rep. (N.S.) Q.B. 327; 16 Q.B. Rep. 326.

If A employs another to do a lawful act, and he in doing it commits a public nuisance, A is not responsible. *Peachey v. Rowland*, 22 Law J. Rep. (N.S.) C.P. 81; 13 Com. B. Rep. 182.

Aliter—if the act to be done necessarily involves the committing a public nuisance. *Ibid*.

The defendant had, more than twenty years before the action, constructed a sewer or watercourse through property of his own, and then occupied by him. In 1845 the defendant let a house, shop and cellar to the plaintiff, which the defendant down to that time also occupied with the property. In 1851 the sewer or watercourse burst, and thereby the plaintiff's cellar and goods were damaged; and the plaintiff thereupon brought an action against the defendant for negligently and improperly making and constructing the sewer, and keeping and continuing the same negligently and improperly made and constructed, and so causing the damage. The jury found that the sewer was not originally constructed with proper care, and it was proved that it had been continued in the same state:—Held, that upon the letting of the premises to the plaintiff, a duty arose on the part of the defendant to take care that that which was before rightful did not become wrongful to the plaintiff, because that would be in derogation of the defendant's own demise to the plaintiff; and that upon this ground, as also upon the principle *sic utere tuo ut alienum non ledas*, the action was maintainable. *Alston v. Grant*, 23 Law J. Rep. (N.S.) Q.B. 163; 3 E. & B. 128.

(B) ABATEMENT OF.

The Nuisances Removal and Diseases Prevention Act, 1848 (11 & 12 Vict. c. 123.) gives power to Justices to order the owner or occupier of premises to remove any nuisance therein, and if such order be not complied with by such owner or occupier, the guardians of the poor may enter the premises to remove the nuisance. By section 3. all costs and expenses incurred in obtaining such order or in carrying the same into effect, shall be deemed to be money paid for the use and at the request of the owner or occupier of the premises in respect whereof such costs and expenses shall have been incurred, and may be recovered by the guardians as such in any county court, or, if they think fit, before two Justices:—Held, that this provision overrides section 53. of the 9 & 10 Vict. c. 95, and that the county court has jurisdiction to hear a plaint for such costs and expenses, notwithstanding that a question of title to land arises in it. *Regina v. Harden*, 22 Law J. Rep. (N.S.) Q.B. 299; 2 E. & B. 188.

Where a party is charged in a county court with a liability arising from his being owner of land, and he disclaims being the owner of that land, this raises a question of title within the 9 & 10 Vict. c. 95. s. 58. *Ibid*.

OATH.

[See Stats. 17 & 18 Vict. c. 125. s. 20; also 16 & 17 Vict. c. 78. as to appointment of persons to administer oaths in Chancery, and 17 & 18 Vict. c. 78. in the Court of Admiralty.]

OF ABJURATION.

The statute 6 Geo. 3. c. 53. imposing the oath of abjuration is still in force. *Salomons v. Miller* (in error), 22 Law J. Rep. (N.S.) Exch. 169; 8 Exch. Rep. 778: in the court below, *Miller v. Salomons*, 21 Law J. Rep. (N.S.) Exch. 161; 7 Exch. Rep. 475.

Though the form of the oath given in the act is "I, A B, do truly and sincerely acknowledge," &c. "that our Sovereign Lord King George is lawful and rightful king of this realm," &c., in administering the oath, it is to be modified according to circumstances by using the name of the party swearing instead of A B, and by substituting the name of the sovereign on the throne for the name of "King George," with the other requisite verbal alterations. *Ibid*.

The concluding paragraph, "and I do make this recognition, acknowledgment, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian," is an essential portion of the substance of the oath, and no part of it can be omitted or altered. Therefore, where a Jew elected member of parliament, on taking his seat, repeated after the officer of the house the oath of abjuration down to the expression "upon the true faith of a Christian," but purposely omitted those words, and afterwards voted as a member, it was held, that he had not taken the abjuration oath, and was consequently liable to the penalty for voting without having done so, imposed by the acts of 1 Geo. 1. st. 2. c. 13. s. 17. and the 6 Geo. 3. c. 53. s. 1. *Ibid*.

POWER TO ADMINISTER.

A Master extraordinary in the Court of Chancery has no authority to administer an oath in a suit in the Court of Admiralty. *Regina v. Stone*, 23 Law J. Rep. (N.S.) M.C. 14; 1 Dears. C.C. 251.

An arbitrator appointed under the 77th section of the County Courts Act, 9 & 10 Vict. c. 95, has no authority to administer an oath; and if he does so, any party or witness cannot be convicted of perjury on an oath so sworn. *Regina v. Hallett*, 20 Law J. Rep. (N.S.) M.C. 197; 3 Car. & K. 130.

OUTLAWRY.

[See BAIL—LIBEL.]

Grounds and Proceedings for Reversal of.

A plea is not issuable which has been already decided to be bad by the judgment of a Court. *Beauclerk v. Hook* (in error), 20 Law J. Rep. (N.S.) Q.B. 485.

In error to reverse outlawry, the error assigned being that, at the time of issuing the *exigi facias*, the plaintiff in error was beyond the seas, the defendant pleaded that the plaintiff left the realm before the awarding of the *exigi facias*, and voluntarily remained absent; and that he had notice that he was about to be demanded at the county courts, and might have returned before they were holden:—Held, that this plea was not issuable. *Ibid*.

A rule to reverse an outlawry for error in fact, where the defendant in error has not pleaded to the assignment of errors within the time allowed, is a rule to shew cause only, and is not absolute in the first instance; but upon such rule being made absolute, no terms will be imposed. *Howard v. Kershaw*, 20 Law J. Rep. (N.S.) Exch. 237; 6 Exch. Rep. 541.

In a writ of error brought to reverse a judgment of waiver against a woman, the judgment was called a judgment of outlawry:—Held, upon plea of *nul tiel record*, that this was a fatal variance, and that the defendant in error was entitled to judgment. *Burnett v. Phillips*, 20 Law J. Rep. (N.S.) Exch. 337.

The defendant, who had been outlawed in an action of assumpsit for a debt of 20*l.*, brought a writ of error to reverse the outlawry on matter of fact. He still remained abroad, and appeared on the writ of error by attorney. After verdict in his favour, he obtained a rule for judgment, absolute in the first instance, and signed judgment of reversal of the outlawry, without putting in special bail to the action. The Court, at the instance of the plaintiff, set aside the judgment as irregular, on the ground that the defendant was bound to have put in special bail on signing judgment of reversal, he having appeared by attorney, and the action being brought for a debt exceeding 20*l.* *Commerell v. Beauclerk*, 21 Law J. Rep. (N.S.) Q.B. 137; 1 Bail C.C. 1.

A rule to set aside proceedings to outlawry, for irregularity, was discharged with costs, on the ground that the affidavit did not purport to be made by an attorney duly authorized by the defendant. The irregularity being admitted, the defendant, although he had not paid the costs of the former motion, was allowed to make a second application for the same purpose, but only on payment of the costs of the second rule. *Skinner v. Carter*, 16 Com. B. Rep. 548.

PARENT AND CHILD.

[See INFANT.]

General Points.

This Court will not support the re-settlement of family estates between a father and son when the father obtains extensive advantages to the prejudice of the son and his family, in the absence of unequivocal proof that the whole of the facts were known to the son, that the purposes of the deed were fully explained to him, and the operation of the respective provisions known to him. *Hoghton v. Hoghton*, 21 Law J. Rep. (N.S.) Chanc. 482; 15 Beav. 278.

Where, therefore, a re-settlement of family estates was made, in which the son, as tenant in tail, joined and re-settled the estates to such uses as the father and son should jointly appoint, with remainder to the father for life, with remainder to the son for life, with remainder to the first and other sons of the son successively in tail male, with remainder to such uses as the father surviving should appoint, with remainder to the second and other sons of the father for life, with remainder to their first and other sons in tail male, with remainder to any other son of the father in tail male, with remainder to the daughters of the father successively for life, with remainder to the first and other sons of each daughter successively in tail male, with remainder to the father in fee; and power was

reserved to the father to appoint by deed or will jointure of 2,000*l.* per annum for any future wife, to be reduced to 1,500*l.* per annum in case he appointed 500*l.* per annum in favour of any stranger; it was set aside. *Ibid.*

But various arrangements for the relief of the family estates from existing burthens, though the father obtained some advantages, were supported, on the ground that the effect of the transactions was known to the son, and even acquiesced in by him. *Ibid.*

Affidavits under the 13 & 14 Vict. c. 35. not admitted to prove that the son's marriage was entered into on the faith of that re-settlement. *Ibid.*

A father claiming to be tenant by the curtesy of land belonging in equity to his deceased wife, filed a bill in 1826 as next friend of his daughter for partition. In 1830 a decree was made and partition ordered, and in 1833 the Court directed the daughter's share to be conveyed to the father for a term until she came of age, upon trust to pay the rents for her maintenance, and the conveyance was so made. Before that bill was filed the father was advised that he had no claim as tenant by the curtesy, and on the conveyance he was advised, by other counsel, that he had, though his opinion was afterwards retracted. The first and second opinions were communicated to him. He performed the trusts until the daughter came of age, and after that time he accounted for the rents to her. In 1847 she married, and on her and her husband bringing ejectment against the father in 1852, he filed a bill claiming to be tenant by the curtesy, but the claim was dismissed by one of the Vice Chancellors, and he appealed from the decree:—Held, that the plaintiff having entered as trustee for his daughter, had held the land as trustee after she attained twenty-one, and could not set up that possession as his own; that the lapse of time between the decree of 1830 and the filing of the bill in 1852 was a bar; that the daughter having married on the faith of the father's representation that the estate was hers, he could not disturb her title, for although the Court will relieve against mistake in law, yet here the father, three years after the decree, had his attention brought to the state of his own title, and still continued to treat the title of the daughter as paramount to his own. *Stone v. Godfrey*, 23 Law J. Rep. (N.S.) Chanc. 796; 5 De Gex, M. & G. 76; 1 Sm. & G. 590.

By merely making provisions for grandchildren, grandparents do not necessarily place themselves in *loco parentis*. *Lyddon v. Ellison*, 19 Beav. 565.

In every case of a gift to a parent by a child shortly after the child attains majority, the Court looks with jealousy upon the transaction, more especially when the parent has during the minority been guardian of the child's property, and in receipt of the rents of a considerable estate, and throws upon the parent the onus of shewing plainly and unequivocally that the gift was made not in consequence of representation on his part, but by the spontaneous act of the child, and that the child had full knowledge of the nature of the deed by which the gift was effected and of his own position and rights in reference to the property. *Wright v. Vanderplank*, 2 Kay & J. 1.

A deed was executed by a lady five months after

she came of age, disentailing part of her estate, and giving, for a nominal consideration, an estate for life in the disentailed part to her father, who, during her minority, had been her guardian and in the receipt of the rents of her estates:—Held (*obiter*), that if a bill had been filed shortly after the transaction, either before or possibly after the lady's marriage, which was solemnized sixteen months after the execution of the deed, the transaction could not have been supported, the deed itself not explaining the nature of the transaction, and it not being shewn that the daughter had proper professional advice, that the nature of the transaction was explained to or understood by her, or that the gift was spontaneous or made at a time or under circumstances when she was free from parental influence. *Ibid*.

But a bill which, after the daughter's decease, and nearly ten years after the execution of the deed, was filed by her husband, on whom her rights had devolved, praying to have the father declared a trustee of the life interest, and an account of the rents which accrued during his daughter's minority or afterwards, was dismissed on the ground of laches; it appearing (*inter alia*) that the plaintiff was aware of all the circumstances previously to his marriage; and the Court being of opinion upon the evidence that eight years before the bill was filed both the plaintiff and his deceased wife had acquiesced in the transaction. *Ibid*.

A father left his home where he was residing with his wife and children, infants, four daughters then ten, nine, eight, and four years of age, and two sons, aged six and three years. He was apprehended, committed and arraigned for the commission of an unnatural crime, but no witnesses appearing he was acquitted. He immediately left England, and remained abroad eight months. Five years after the trial he petitioned this Court, praying that his wife might be ordered to deliver up the children (the daughters being fifteen, fourteen, thirteen and nine years old, and the sons eleven and eight years of age), and if necessary that writs of *habeas corpus* might issue for that purpose. The petition was supported by the affidavit of the petitioner, and was served on the wife only. Affidavits were filed on behalf of the respondent, and amongst them an affidavit of the solicitor of the wife, who had been the solicitor for the petitioner, and in that capacity had interviews with him while in gaol awaiting his trial, offering to state conversations that took place between them if authorized by the petitioner so to do, and an affidavit by another witness referring, as an exhibit, to the depositions taken before the magistrates. The petitioner himself made two affidavits in reply, in one of which he denied the charge against him, and in the other, sworn three days later, he again denied the charge, and gave an explanation of the cause why he was at the place where and in the company in which he was when apprehended. The Court, being satisfied upon the materials before it that the petitioner had so conducted himself as that he ought to be treated as if he were a guilty man, dismissed the petition. *Anonymous*, 2 Sim. N.S. 54.

The Court will refuse to give possession of children to their father if he has so conducted himself as that it will not be for the benefit of the infants, or it will affect their happiness, or if they cannot

associate with him without moral contamination, or if, because they associate with him, others will shun their society. If it be established to the satisfaction of the Court that the father of children from ten to two years of age is to be considered as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children, even after he has escaped conviction. *Semble*—that under such circumstances, if the children were with their father, it would be the duty of the Court to remove them. *Ibid*.

Desertion of Children.

If a woman, in breach of her maternal duty, wilfully abandons her infant child of too tender years to provide for itself, she is not indictable at common law unless her abandonment cause an injury to the health of the child. Evidence "that the child had suffered injury, but not to any serious extent," does not sufficiently support the averment in the indictment, that the health of the child had been greatly and materially injured. *Regina v. Philpott*, 22 Law J. Rep. (N.S.) M.C. 113; 1 Den. C.C. 179.

If a woman be indicted for neglecting to supply her infant bastard child with proper food, and it be alleged that she was able and had the means of supporting it, it is not enough to shew that she might have obtained the means if she had applied to the relieving officer of the union. *Regina v. Chandler*, 24 Law J. Rep. (N.S.) M.C. 109; 1 Den. C.C. 453.

An indictment alleged that the prisoner Mary H, with intent to injure the inhabitants of the parish of B, and to burthen them with the maintenance of her bastard child of tender age, then unable to move or walk or provide for itself or make its wants known, did unlawfully and injuriously abandon and desert the said child in the said parish, without having provided any means for the support of the said child, the said child not being settled in the said parish, as she, the prisoner, well knew, to the great damage of the inhabitants of the said parish. There was a second count laying the intent to be to injure and burthen certain persons named, then being the overseers of the parish of B:—Held, that the indictment was bad, as the abandoning the child with intent to throw on the parish the burthen of its maintenance as casual poor was not an indictable offence; and that the indictment could not be sustained as an indictment for neglect of natural duty in abandoning the child, as there was no averment that the prisoner had the means of providing for it, or that the child's health had suffered injury by the abandonment. *Regina v. Hogan*, 20 Law J. Rep. (N.S.) M.C. 219; 2 Den. C.C. 277.

PARLIAMENT.

[As to the limitation of time for elections, see Statutes 16 & 17 Vict. c. 15. and 16 & 17 Vict. c. 68. In Scotland, 16 & 17 Vict. c. 28.]

- 1.—RIGHTS AND PRIVILEGES OF MEMBERS.
- 2.—PRACTICE OF.
- 3.—REGISTRATION OF VOTERS.

- (A) QUALIFICATION.
 - (a) *Personal Disqualification.*
 - (b) *Conveyances to multiply Votes.*
 - (c) *In Cities and Boroughs.*
 - (d) *In Counties.*
- (B) NOTICE OF CLAIM.
- (C) NOTICE OF OBJECTION.
- (D) PRACTICE.
 - (a) *Signing Case.*
 - (b) *Delivery of Paper Books.*
 - (c) *Hearing.*

4.—BRIBERY.

1.—RIGHTS AND PRIVILEGES OF MEMBERS.

[See title OATH.]

On a trial a member of parliament may be asked whether Mr. L was Speaker of the House of Commons on a particular day, but if he be asked how a member voted, he will not be compelled to answer if he decline doing so, and have not the leave of the House to give evidence. *Chubb v. Salomons*, 3 Car. & K. 75.

A member of the House who acts as a teller on a division is not an "officer of the house." *Ibid.*

2.—PRACTICE OF.

[See title ERROR.]

The House of Lords is at liberty, without regard to the form of an appeal, or the points raised upon it, to put questions of law to the Judges. *Bright v. Hutton*, 3 H.L. Cas. 341.

Quere—whether the House of Lords, like any other Court of Justice, may, in a subsequent case, overrule a previous decision of its own. *Ibid.*

The Judges were required to answer a question put by the House. One of them differed from the rest. The opinions of the majority were stated by one of their number, and, in the statement, the principle on which the dissentient Judge formed his opinion was set forth to his satisfaction. The House did not require him to state his reasons at length. *Salman v. Webb*, 3 H.L. Cas. 510.

The Judges were summoned to answer questions of law: they differed in opinion on these questions. Most of the Judges being on circuit, two of their number attended on a day fixed by the House for receiving the answers, and proposed to read answers which embodied their own opinions and those of their brethren. The House adjourned the matter till the majority of the Judges should have returned from the circuit, so as to be able to attend in person, and individually express their reasons for their opinions. It was intimated that this permission to dispense with the attendance of any of the Judges to whom questions had been put, and who differed in their answers, must not be drawn into a precedent. *Egerton v. Brownlow*, 23 Law J. Rep. (n.s.) Chanc. 345; 4 H.L. Cas. 1.

A judgment of the House of Lords given on an appeal cannot be reversed; but where such appeal and judgment have been obtained by suppression and misrepresentation, the House will afterwards discharge the order granting the leave to appeal and the order constituting the judgment thereon. *Towney v. White*, 4 H.L. Cas. 313.

When it is ordered that counsel be heard on a question as to the regularity of an appeal, the party objecting has the right to begin. *Geils v. Geils*, 1 Macq. H.L. Cas. 36.

Where there were two respondents, having distinct interests, the House allowed two counsel to be heard for each. *The Parish of South Leith v. Allen*, 1 Macq. H.L. Cas. 93.

Proper course in such a case. *Ibid.*

3.—REGISTRATION OF VOTERS.

(A) QUALIFICATION.

(a) *Personal Disqualification.*

By the 22 Geo. 3. c. 41. s. 1, "No commissioner, &c., or other officer or person whatsoever concerned or employed in the charging, collecting, levying, or managing the Customs or any branch thereof," is to have a vote. An "extra-glut tide-waiter" is a person whose name is on a list, confirmed by the Commissioners of Customs, of persons ready to act as occasional tide-waiters in boarding vessels for the purpose of watching the cargoes to be examined by the proper officer of the Customs, and liable to be called on to act whenever there may be occasion. He is paid by the job, and makes the declaration required by 8 & 9 Vict. c. 85. s. 10. once for all upon his appointment, which declaration is made by all the officers of the Customs:—Held, that such a person is "an officer or person employed in the collecting the Customs," and is not entitled to a vote. *Pownall v. Hood*, 21 Law J. Rep. (n.s.) C.P. 12; 11 Com. B. Rep. 1.

(b) *Conveyances to multiply Votes.*

[See *Phillpotts v. Phillpotts*, title DEED, ante, p. 239.]

(c) *In Cities and Boroughs.*

The premises in respect of which a vote for a borough was claimed, under 2 Will. 4. c. 45. s. 27, consisted of a two-stalled stable, built of brick, with another brick building annexed, but of a lower elevation, and to which also a wooden building was annexed, in three compartments, each of which, as well as the two brick buildings, had an opening into the same yard; but there was no internal communication. All three were occupied together under the same landlord, and used by the claimant for a wheelwright's business:—Held, that this was "a building" within the meaning of the statute. *Pownall v. Dawson*, 21 Law J. Rep. (n.s.) C.P. 14; 11 Com. B. Rep. 9.

By 11 & 12 Vict. c. 90. no person is entitled to be registered as a voter unless, on or before the 20th of July he shall have paid all assessed taxes which have become payable by him previous to the 5th of January preceeding. By the 43 Geo. 3. c. 161. s. 23. the assessed taxes are payable, and are to be paid quarterly on the 20th of July, the 20th of September, the 20th of December, and the 20th of March. By the 48 Geo. 3. c. 141. s. 1. the collectors are directed to collect the assessed taxes in equal moieties within twenty-one days after the 10th of October and the 5th of April; but with a proviso, that nothing therein contained shall be construed to alter the time when the duties are made payable by the previous acts. The quarter's house-tax due from the appel-

lant on the 20th of December was not demanded till the 11th of April following, and he did not pay it before the 20th of July:—Held, that the quarter's assessed taxes, which by the 43 Geo. 3. c. 161. s. 23. become payable on the 20th of December, are taxes which, in the language of the 11 & 12 Vict. c. 90, have become payable before the succeeding 5th of January, although no demand for payment has been previously made; and that therefore the appellant was not entitled to be placed on the register. *Ford v. Smedley*, 22 Law J. Rep. (N.S.) C.P. 35; 12 Com. B. Rep. 622.

The appellant claimed to vote in respect of the occupation of premises described as a "house and garden," and held under the same landlord at one entire rent. The house alone would not let for 10*l.*, and the garden was separated from it by waste land and a row of buildings:—Held, that the word "therewith" in the 27th section of the Reform Act had reference to time and not to locality, and that therefore the circumstance of the garden being separate from the house did not invalidate the qualification, as the house alone would not have let for 10*l.* *Collins v. Thomas*, 22 Law J. Rep. (N.S.) C.P. 38; 12 Com. B. Rep. 639.

A, a freeman of the borough of Shrewsbury paying scot and lot, for upwards of two years last past, and down to the 25th of March 1851, occupied and resided in a house on the Wyle Cop, within the ancient and present limits of the borough, and, since the 25th of March, down to and on the 31st of July, occupied and resided in a house at Coton Hill, without the ancient but within the present limits of the borough. The revising barrister, holding him to be disqualified by the 2 Will. 4. c. 45. s. 32, expunged his name from the list of freemen voters:—The Court, without hearing any argument (the counsel for the respondent admitting that he could not support it), reversed the decision. *Jarvis v. Peele*, 11 Com. B. Rep. 15.

(d) *In Counties.*

A mortgagor of freehold premises in possession of the rents and profits is not entitled to be registered as a county voter under 6 & 7 Vict. c. 18. s. 74, unless he receives therefrom 40*s.* by the year, after deducting money paid annually by him by way of interest on a sum secured by a mortgage which contains no mention of interest, the time for repayment of the principal sum mentioned in such mortgage having expired; such annual payment being in fact a consideration for remaining in possession. *Lee v. Hutchinson*, 20 Law J. Rep. (N.S.) C.P. 4; 8 Com. B. Rep. 16.

Per *Maule, J.*—The true construction of the words "over and above the interest of any money secured by mortgage" in the freeholder's oath, 28 Geo. 3. c. 36. s. 6. is, "money secured," not "interest secured." *Ibid.*

A case stated that the respondent, being minister of a congregation, occupied premises worth more than 40*s.* per annum, under the trusts of a deed, one of which trusts was "to permit the minister for the time being to reside in the premises rent free," and that the evidence of the respondent's appointment was his own statement that it was for life. The legal estate was in the trustees:—Held, that there being no appeal upon questions of evidence, the case dis-

closed an equitable estate for life in the respondent, entitling him to a vote. *Burton v. Brooks and Burton v. Cove*, 21 Law J. Rep. (N.S.) C.P. 7; 11 Com. B. Rep. 41.

The claimant, a member of a building society, purchased land of the yearly value of 6*l.* and mortgaged it to the trustees of the society for the amount of the purchase-money, which they had advanced to him. He was also a holder of three shares in the society. By the rules of the society he was bound to pay 1*s.* 6*d.* weekly for each share (11*l.* 14*s.* per annum). And by the mortgage, which was in accordance with the rules of the society, power was reserved to the trustees, on neglect or refusal to observe any of the regulations, &c. to sell the premises, &c. and receive the rents. By the mortgage a sum equal to 5*l.* per cent. as premium for prior advances was to be paid and secured; and the sum fixed to be paid for incidental expenses was 6*s.* per annum, which was also secured. Of the 11*l.* 14*s.* per annum, 2*l.* 16*s.* was appropriated to the payment of interest on the money still due upon the mortgage, and for incidental expenses, and the remainder was taken in part discharge of the mortgage debt, and a receipt given from time to time:—Held, that the whole 11*l.* 14*s.* must be deducted from the annual value of the estate, and therefore that the claimant had not an estate of the value of forty shillings by the year, within the meaning of 8 Hen. 6. c. 7. and 6 & 7 Vict. c. 18. s. 74, and was not entitled to a vote for a knight of the shire. *Beamish v. Overseers of Stoke*, 21 Law J. Rep. (N.S.) C.P. 9; 11 Com. B. Rep. 29.

Where a person claimed a vote in respect of a freehold which was of the annual value of 5*l.*, but it appeared that the land with other land of the claimant, of the yearly value of 50*l.*, was mortgaged for 300*l.*, and that the interest payable on the mortgage was 15*l.* a year:—Held, that the interest might be apportioned, and that the claimant was entitled to his vote. *Moore v. the Overseers of Carisbrook*, 22 Law J. Rep. (N.S.) C.P. 64; 12 Com. B. Rep. 661.

The appellant claimed, with twenty-nine other persons, to vote in respect of certain freehold premises which were let at a gross rent. During the six preceding years the landlords had voluntarily paid for repairs:—Held, that the question whether the annual value of the freehold was reduced by such payments below 60*l.* depended upon the rent which could be obtained if the tenant had to keep the premises in repair; and that the revising barrister, having found that the rent which could be obtained in that case would be less than 60*l.*, the several persons in whom the freehold was vested were not entitled to vote. *Hamilton v. Bass*, 22 Law J. Rep. (N.S.) C.P. 29; 12 Com. B. Rep. 631.

The 8 & 9 Vict. c. 6, an Allotment Act, empowers deputies appointed under its provisions to make small allotments of land to resident freemen of *L.*, to be held by them so long as they shall be willing to hold the same, and pay the rent, and conform to certain regulations. All the land is vested in the deputies as trustees; and they have the power to sell with the concurrence of a majority of a meeting of freemen occupiers:—Held, that the allottees have freehold estates which entitle them to vote for members of parliament, as their estate may continue for life, and is not determinable on the mere will of the grantors.

Beeson v. Burton, 22 Law J. Rep. (N.S.) C.P. 33; 12 Com. B. Rep. 647.

The owners in fee of a plot of land, subject to a rent-charge, granted a portion of it to ten as tenants in common in fee, subject to payment of 4l. 5s. as a proportion of the charge. The grantors covenanted to pay, and to keep the grantees indemnified as to the remainder of the charge; and that the grantees, if called upon to pay, should have power to distrain on the residue of the land, which was sufficient to meet that remainder:—Held, that although each portion of the land was liable for the whole amount of the rent-charge, yet as the grantees could enforce contribution against the grantors for all beyond 4l. 5s., that amount only was to be deducted in estimating the grantees' interest with reference to the franchise. *Barrow v. Buckmaster*, 22 Law J. Rep. (N.S.) C.P. 65; 12 Com. B. Rep. 664.

The appellant claimed to vote in respect of a freehold which he let for 40s. a year, he agreeing to pay the usual tenant's rates. If he had not so agreed he could only have obtained 40s. minus the amount of those rates:—Held, that the appellant had not an estate of the clear yearly value of 40s., and therefore that he was not entitled to vote. *Moorhouse v. Gilbertson*, 23 Law J. Rep. (N.S.) C.P. 19; 14 Com. B. Rep. 70.

The criterion of value of a freehold, for the purpose of voting, under 8 Hen. 6. c. 7, is not the annual amount which the land actually produces, but what it reasonably may produce. Therefore, where A bought two pieces of land fit for building purposes from a freehold land society, for 150l., and they were conveyed to him in fee, and he had been offered a ground-rent of 15l. a year for them, and it appeared they were worth 15l. a year for building, but if let to a tenant for any other purpose they would not produce a rent of 40s. a year,—Held, that A was entitled to vote, although his land in its existing state was not worth 40s. a year. *Asbury v. Henderson*, 24 Law J. Rep. (N.S.) C.P. 20; 15 Com. B. Rep. 251.

(B) NOTICE OF CLAIM.

Where the description in the notice of claim given to the overseers, under section 38. of 6 & 7 Vict. c. 18, of the situation of the premises in respect of which a borough vote is claimed, is not strictly accurate, but is, in the opinion of the revising barrister, sufficient to give notice for what premises the claim really is, it is his duty, not to amend the claim, but to proceed as if the claim had been strictly accurate in its description. *Eaden v. Cooper*, 21 Law J. Rep. (N.S.) C.P. 32; 11 Com. B. Rep. 13.

(C) NOTICE OF OBJECTION.

The respondent claiming a vote for the city of C received a notice of objection from the appellant, who described himself therein as "on the list of freemen for the city of C." It appeared that besides the list of freemen for the city entitled to vote for members of parliament, there was a list called the Freemen's Roll, kept for municipal purposes:—Held, that the revising barrister was right in deciding that the notice was sufficient, under the 17th section of the 6 & 7 Vict. c. 18, as affirming that the objector was on the list of freemen entitled to vote.—*Dissentiente*, *Maule, J. Feddon v. Sawyers*, 22 Law J. Rep. (N.S.) C.P. 15; 12 Com. B. Rep. 680.

DIGEST, 1850—1855.

The 7th section of 6 Vict. c. 18. requires that a notice in the form set out in Schedule A annexed thereto, or to the like effect, should be served upon the person whose vote is intended to be objected to:—Held, that a notice in the following terms, "Take notice, that I object to your name being retained on the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts," was sufficient notice to a person that his vote for the county would be objected to. *Lambert v. Overseers of St. Thomas, New Sarum*, 22 Law J. Rep. (N.S.) C.P. 31; 12 Com. B. Rep. 643.

The overseers of parish C, in the city of W, have to prepare two lists of voters, one according to the form No. 3. Schedule B of the 6 Vict. c. 18. containing the names of the 10l. occupiers, and the other, according to No. 4. in the said schedule, containing the names of those whose rights were reserved under the Reform Act. The following notice of objection to the name of a 10l. occupier on the former list was sent to the overseers:—To the Overseers of C: I give you notice that I object to the name of J A being retained on the list of persons entitled under the Reform Act to vote for the City of W:—Held, that the notice was sufficient. *Huggett v. Lewis*, 24 Law J. Rep. (N.S.) C.P. 38.

(D) PRACTICE.

(a) *Signing Case.*

Where the case transmitted to the Court of Common Pleas contains no signature of the revising barrister at the end of it, the Court of Common Pleas cannot entertain the appeal. But the Court allowed an appeal to be argued, the respondent consenting to have the signature inserted. *Burton v. Brooks*, and *Burton v. Cove*, 21 Law J. Rep. (N.S.) C.P. 7; 11 Com. B. Rep. 41.

Where the case transmitted to the Master, under the 6 & 7 Vict. c. 18. ss. 42, 64, is not signed, as well as indorsed, by the revising barrister, the Court will not hear the appeal, where the respondent does not appear. *Burton v. Blake*, 11 Com. B. Rep. 47.

(b) *Delivery of Paper Books.*

The Court refused to hear an appeal (or to allow it to stand over), where the appellant had failed, on the respondent's default, to deliver copies of the case to the two junior puisne Judges. *Shedden v. Butt*, 11 Com. B. Rep. 27.

(c) *Hearing.*

Where no counsel appears for the respondent, the counsel for the appellant will be heard, upon proving service of the notice of appeal. *Pownall v. Hood*, 21 Law J. Rep. (N.S.) C.P. 12; 11 Com. B. Rep. 1.

The Court adjourned the hearing of an appeal, in order to give the appellant time to give the notice required by the statute 6 & 7 Vict. c. 18. ss. 42, 64, the case not having been settled and delivered to the appellant until the eighth day of term. *Burton v. Blake*, 11 Com. B. Rep. 47.

4. BRIBERY.

[See Stat. 17 & 18 Vict. c. 102.]

Debt to recover a penalty, under the 2 Geo. 2. c. 24, for corrupting a voter. The first count of the declaration alleged the corrupting to have been by promising the voter, at his request, to pay to one W G

for and on the account of such voter 41*l.* 5*s.*, then claimed from the voter by W G; by then promising the voter to pay W G 10*l.*, to wit, on &c., and the residue of the said sum by monthly instalments of 5*l.* The second count stated the corrupting to have been by giving, at the request of the voter, to W G 10*l.* for and on account of a debt of 41*l.* 5*s.* claimed to be due from the voter to W G, and by then promising W G, at the voter's request, to pay the residue of the said debt by certain instalments which were specified. Upon the trial, it appeared that the voter had applied to the defendant for money to redeem his boat held by W G as a security for a debt of 41*l.*, and thereupon the defendant promised to try and obtain the release of the boat, provided the voter would give his vote for a particular candidate named; that the defendant in London then corresponded on the subject with H at Harwich, the person in possession of the boat, on behalf of W G, the result of which was that the defendant paid 10*l.* in London to the credit of H with the Harwich Bank on account of the debt to W G, and pledged himself to pay the balance of 31*l.* 5*s.* and the attendant expenses in monthly instalments of 5*l.*, and the boat was thereupon released and given up to the voter, who afterwards voted for the candidate named. It did not, however, appear that the voter had ever promised to vote for such candidate. —Held, first, that it is necessary to state accurately the actual agreement, when the means of corruption rests in agreement only, and therefore that had the first count stood alone, there might have been a fatal objection to the declaration, on the ground of variance. Secondly, that proof of the allegation in the second count of the actual payment of 10*l.* by the defendant to W G at the voter's request, was sufficient to support the action, and that the other allegations might be treated as surplusage. *Baker v. Rusk*, 20 Law J. Rep. (N.S.) Q.B. 106; 15 Q.B. Rep. 370.

Held, also, that the venue in the action had been properly laid in Essex. *Ibid.*

PARTIES TO ACTIONS.

- (A) PLAINTIFFS.
- (B) DEFENDANTS.

(A) PLAINTIFFS.

Debt to recover 300*l.* as for a total loss under a deed-poll or policy of insurance, sealed with the common seal of the company (the plaintiffs in error). The declaration set out the policy, which, after reciting that the said M. Kearney had represented that he was interested in or duly authorized, as owner, agent, or otherwise, to make the insurance hereinafter mentioned with the said company, and had covenanted to pay a certain premium, stipulated, amongst other things, that it was agreed by and on behalf of the company that the capital stock and funds of the said company should, according to the provisions of the deed of settlement of the said company be subject and liable to make good and should be applied to pay and make good, all such losses and damages as might happen to the subject-matter of the said policy in respect of the sum of 300*l.* insured, which insurance was thereby declared to be

upon cargo, goods, or freight (valued at interest), of and in the good ship *Mary*, whereof Noonan (the other defendant in error) was master; that the capital stock and funds of the company should alone be liable, according to the deed of settlement, to make good all claims and demands whatsoever under or by virtue of the said policy, and that no shareholder of the company should be in anywise liable to any claims or demands, nor be charged by reason of the said policy beyond the amount of his shares in the capital stock of the company. It was then averred that the defendants (the plaintiffs in error) became insurers for 300*l.* upon the freight of the said vessel; that divers goods had been shipped on board the said vessel to be carried for freight, and that from thence until the happening of the loss the plaintiffs (the defendants in error) were interested in the freight of the goods so shipped:—Held, first, that there was an absolute covenant on the part of the company to pay the sum insured when a loss should happen, and that it was not necessary to aver in the declaration that the capital stock and funds were sufficient according to the deed of settlement; the want of funds being a matter to be pleaded, on the part of the company, if a defence at all. Secondly, that an action of debt was maintainable. Thirdly, that Noonan was sufficiently designated in the deed-poll as a party interested with whom the company contracted, to entitle him to join as a plaintiff in the action. *The Sunderland Marine Insurance Co. v. Kearney*, 20 Law J. Rep. (N.S.) Q.B. 417; 16 Q.B. Rep. 925.

The plaintiff, acting on behalf of the members of an orchestra, to which he himself belonged, signed a proposal, "on behalf of the members of the orchestra," to continue their services, provided the defendant would guarantee certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found that he acted on behalf of himself as well as the rest:—Held, that the contract was joint, and that he could not recover. *Lucas v. Beale*, 20 Law J. Rep. (N.S.) C.P. 134; 10 Com. B. Rep. 739.

The defendant, as surveyor of the highways, had incurred large legal expenses in defending certain appeals against orders for stopping up highways, without the previous sanction of the parish. At a meeting of the vestry, where his accounts were gone into, the items for these expenses were objected to, and opposition was threatened to be made to his accounts before the Justices. The defendant ultimately offered to pay 50*l.* in discharge of the attorney's bill for costs, if no opposition were offered to the passing of his accounts before the magistrates. The vestry accepted the offer, and the plaintiff and other vestrymen signed a minute to the above effect. They also entered and signed a minute at the foot of the defendant's account, that the 50*l.* was to be paid to his successor in office, who happened to be the plaintiff. The accounts were passed without opposition, but the defendant did not pay the 50*l.* The plaintiff consequently sued him for it in the county court:—Held, that there was no evidence of any contract with the plaintiff alone to entitle him to maintain an action alone for the 50*l.*; that if the 50*l.* was to be treated as part of the balance of the public money in

the hands of the outgoing surveyor, the method of recovering it was not by action, but by summary application under the statute 5 & 6 Will. 4. c. 50. s. 103. *Kilham v. Collier*, 21 Law J. Rep. (N.S.) Q.B. 65.

A being in want of money applied to D & S, who were in partnership, for an advance. They sent him an acceptance by D alone, and A agreed that if he discounted that acceptance he would give to D & S his own acceptance. He discounted D's acceptance, but failed to give his cross-acceptance. D was afterwards sued on his acceptance by the holder of it, and paid it out of the money of D & S. D then sued A for money paid:—Held, that the action could be maintained by D alone upon the implied contract to indemnify him, which arose when he paid the acceptance upon which he alone was liable to be sued. *Driver v. Burton*, 21 Law J. Rep. (N.S.) Q.B. 157; 17 Q.B. Rep. 989.

J W and the plaintiff, being trustees under the will of W W, in 1847, demised a house to the defendant by indenture for four years ending at Michaelmas 1851. J W died in January 1848. An action for use and occupation having been brought by the plaintiff for rent accrued subsequently to January 1848,—Held, that the plaintiff was entitled to maintain the action, and was not bound to sue as surviving trustee. *Wheatley v. Boyd*, 21 Law J. Rep. (N.S.) Exch. 39; 7 Exch. Rep. 20.

Two members of a joint-stock company, but which was not completely registered, in their own names, entered into a contract by their agent, but which was, in fact, for the benefit of the company:—Held, that they might sue and be sued upon the contract. *Clay v. Southen*, 21 Law J. Rep. (N.S.) Exch. 202; 7 Exch. Rep. 707.

Assumpsit on a policy of insurance on goods, alleging an average loss. By the policy a portion of the premium was to be returned if the risk ended in England. Fourth plea, set-off; demurrer. Sixth plea, bankruptcy of plaintiff. Replication, that before the bankruptcy plaintiff transferred the goods and the policy and his right to recover for the loss to F; and that he sued as trustee for F. Rejoinder, that before the bankruptcy the risk ended in England, whereby the plaintiff became entitled under the policy to a return of the premiums. Demurrer:—Held, first, that the fourth plea was bad, as the action was for unliquidated damages. Held, further, that the rejoinder was no answer to the replication to the sixth plea, because, although the beneficial interest under the policy, so far as related to the return of the premiums, passed to the assignees, and though there was only one contract, yet that the bankrupt was entitled to sue on the policy as trustee for F to recover for the loss, as two separate actions on the policy were maintainable, one for the return of the premium and another for the loss. *Boddington v. Castelli* (in error), 23 Law J. Rep. (N.S.) Q.B. 81; 1 Exch. Rep. 879.

In covenant by the plaintiff, as secretary of the joint-stock company, for calls, the declaration stated, that by indenture made by and between the several persons whose names and seals were, or might thereafter be, thereunto subscribed, and who had sealed and delivered, or who might seal and deliver the same, of the first part, and W and M, persons nominated to be covenantees for the benefit of the company, of

the second part, the parties of the first part covenanted with the parties of the second part (*inter alia*) to pay the calls. Averment, that whilst the defendant was a shareholder, and after the execution by the defendant of the said indenture as aforesaid, the directors made a call. Breach, non-payment. The declaration contained no direct averment that the defendant executed the indenture. By the 4 & 5 Vict. c. xciii, after reciting that difficulties had arisen in legal proceedings by or against the company, since by law all members must be named in such proceedings, and that it was expedient that the company should be rendered capable of suing and being sued in the name of a nominal party, it was enacted, that, in all actions by or on behalf of the company, it should be sufficient to proceed in the name of the secretary as the nominal plaintiff:—Held, on writ of error, first, that the statute authorized the secretary to sue on this covenant; and, secondly, that the words "after the execution by the defendant of the indenture as aforesaid," implied that the defendant had subscribed, sealed and delivered the indenture, and that they were, upon general demurrer, equivalent to such an averment. *Sutherland v. Wills*, and *Murray v. Wills*, 5 Exch. Rep. 715.

(B) DEFENDANTS.

The defendants had given the plaintiff a guarantee, which, after stating the consideration, was in the following form:—"We undertake and guarantee that the said sum of 400*l.* and interest shall be duly paid to you when the said acceptance arrives at maturity, in the proportion of 200*l.* each." This was signed by both the defendants:—Held, that they were not liable jointly for the whole amount. *Fell v. Goslin*, 21 Law J. Rep. (N.S.) Exch. 145; 7 Exch. Rep. 185.

A plaintiff had performed work by order of the defendants, who were members of a committee of a society for the protection of trade, to which society the plaintiff was a subscriber:—Held, that he was not incapacitated from suing the defendants by reason of a partnership with them, and that the jury were warranted by the evidence and the rules of the society in finding the defendants personally liable. *Caldicott v. Griffiths*, 23 Law J. Rep. (N.S.) Exch. 54; 8 Exch. Rep. 890.

PARTIES TO SUITS.

(A) NECESSARY OR PROPER PARTIES.

- (a) Generally.
- (b) Administration Suits.
- (c) Creditors' Suits.
- (d) Mortgage Suits.

(B) JOINDER OF.

(C) OBJECTIONS AS TO.

(A) NECESSARY OR PROPER PARTIES.

(a) Generally.

Purchasers of timber subsequently restrained from being cut not necessary parties to the bill for injunction. *Marker v. Marker*, 20 Law J. Rep. (N.S.) Chanc. 246; 9 Hare, 1.

The surviving partner of a firm is a necessary

party to a claim by a creditor for payment out of the estate of a deceased partner of a partnership debt. *Hills v. Macrae*, 20 Law J. Rep. (N.S.) Chanc. 533; 9 Hare, 297.

The personal representatives of a defendant having been made parties to a suit by a bill of revivor, pleaded that their testatrix assigned her interest *pendente lite*, and that they never took any interest in the subject-matter of the suit. The plea was allowed. *Nutting v. Hebden*, 20 Law J. Rep. (N.S.) Chanc. 555; 14 Beav. 11.

The trustees of a dissenting chapel, being required by the men subscribers to the congregation, communicants therein, under a power contained in their trust deed, mortgaged it to secure 600*l.* A power of sale was inserted in the mortgage-deed; the mortgagee transferred his security to T M H, upon whose decease the land was sold to J S for 600*l.*, and he immediately afterwards sold it to a railway company for 1,150*l.* Upon a bill filed by the trustees for an account, and to obtain a declaration that J S was assignee of the mortgage only, and also to have the balance of the purchase-money secured for the trustees as part of the trust estate,—Held, that it was not sufficient to make some of the men subscribers to the congregation parties only, but that they were all necessary parties to the suit. *Minn v. Stant*, 20 Law J. Rep. (N.S.) Chanc. 614; 15 Beav. 49.

The personal representative of the vendor of real estate is a necessary party to a suit by the heir of the vendor against the purchaser, alleging that the purchase-money was not paid, and seeking to set aside the conveyance. And where such personal representative is made a defendant by supplemental suit, the purchaser is a necessary party to such suit. *Wilkinson v. Fowkes*, 22 Law J. Rep. (N.S.) Chanc. 137; 9 Hare, 193, 592.

The rule that a plaintiff who seeks equity must do equity, only extends to matters affecting the relief which the plaintiff seeks. *Ibid.*

One of several shareholders in a joint-stock company cannot file a bill against the directors and the company to withdraw himself from the co-partnership, on the ground of fraud and misrepresentation in the formation of the company, without making the other shareholders parties to the record. *Macbride v. Lindsay*, 22 Law J. Rep. (N.S.) Chanc. 165; 9 Hare, 574.

Bill to set aside a settlement as having been obtained from the plaintiff fraudulently and by means of misrepresentation and undue influence acquired over her by the trustees. One of the trustees was entitled to one-twelfth of the trust fund, subject to the life interest of the plaintiff. The trustees were the only defendants to the bill:—Held, on an objection for want of parties—first, that, notwithstanding stat. 15 & 16 Vict. c. 86, s. 42, rule 9 and r. 51, the question at issue in the cause could not be tried in the presence of the trustees only, without any of the absent persons beneficially interested under the settlement. Secondly, that it was not necessary that all such persons should be made parties, although some of them not being next-of-kin of the settlor, must be so, and cause ordered to stand over, that one of the infants not being next-of-kin might appear by counsel at the hearing. *Read v. Prest*, 1 Kay & J. 153.

Where one of two executors was indebted to the testator at the time of the testator's decease, and was sued by his co-executor for the recovery of the debt and the realization of a security which had been given for it:—Held, that the *cestuis que trust* under the will were not necessary parties to the suit. *Peake v. Ledger*, 4 De Gex & Sm. 137.

A joint-stock banking company, subsisting under the 7 Geo. 4. c. 46, having become insolvent and ceased to carry on business, the public officer instituted a suit charging certain of the directors as defendants with losses during the time when the business was carried on by means of unauthorized speculations in shipping and collieries, and of a fraudulent transaction by a deed of arrangement with a debtor to the company, who was also made a defendant, and praying relief in respect of all these matters, and particularly to have the deed set aside. On the demurrer of one of the directors,—Held, that the suit was properly instituted by the public officer, although the company had ceased to carry on business; that it was not necessary to make the directors and trustees who were not charged with the improper transactions and frauds parties; but it appearing that the manager was mixed up in the transactions, that it was necessary to make him a party. *Harrison v. Brown*, 5 De Gex & Sm. 728.

Held, also, that although there were several distinct transactions, as to which the liabilities might be several, yet that it would lead to a mischievous multiplicity of suits if the demands were divided, and a demurrer for multifariousness was disallowed. *Ibid.*

On a bill for the execution of the trusts of a will, directing the sale and distribution of the proceeds of real estate, framed according to the old practice, and bringing all the residuary devisees and legatees before the Court:—Held, that the trustees of a settlement of the share of one of the residuary legatees, made on her marriage, ought to be parties; but that the children of the marriage would be sufficiently represented by such trustees. *Densem v. Elworthy*, 9 Hare, App. xlii.

Where a plaintiff at his option may either file his bill against A and B, or against A alone, and he takes the former course, and B afterwards dies, he cannot at the hearing by waiving relief against B's estate proceed against A alone in the absence of B's representatives. *The London Gaslight Co. v. Spottiswoode*, 14 Beav. 264.

Where one of several trustees dies pending a suit which does not seek to charge them personally in that character, his representatives are not necessary parties, for the trusteeship survives. *Ibid.*

A cause was ordered to stand over to make the assignees of a bankrupt defendant parties. They were made parties by amendment. An objection raised by the co-defendants, that they ought to have been made parties by supplemental bill, was overruled. *Ibid.*

Bequest in trust to invest and pay the interest of a moiety to A, and afterwards to her children, and the other moiety to B, and afterwards to her children. The interest on a moiety of 1,000*l.* invested on mortgage was paid to A for thirty years. On her death the mortgage was got in:—Held, that A's children could maintain a suit for their moiety without making B and her children parties. *Hares v. Stringer*, 15 Beav. 206.

A testator gave the interest of his residue to W and his wife, with remainder to the testator's grandchildren. W died twenty-nine years after the testator, and his wife applied for the income. The Court, being unable to decide on her right, in consequence of the absence of some parties, allowed her in the meanwhile to receive a portion of the income, on her undertaking to refund if necessary. *Moffat v. Burnie*, 16 Beav. 298.

Where all persons beneficially interested are parties to a special case, the trustees ought to be omitted. *Darby v. Darby*, 18 Beav. 412.

(b) *Administration Suits.*

Bill by four of the next-of-kin of an intestate, for the administration of his estate, on behalf of themselves and all others the next-of-kin. The bill alleged that the next-of-kin were very numerous, but no evidence of that fact was adduced. Upon an affidavit, under the 13 & 14 Vict. c. 35, that the next-of-kin were upwards of twenty in number, the Court made the usual administration decree. *Smith v. Leathart*, 20 Law J. Rep. (N.S.) Chanc. 202.

One of three executors and trustees filed a claim to have the testator's real and personal estate administered, making his co-executors alone (not including any person beneficially interested) parties:—Held, that the suit was defective. *Leslie v. Smith*, 5 De Gex & Sm. 78.

The testator after giving the income of his residuary real and personal estate to A for life, and after her decease to B for life, directed his trustees then to sell his estates and divide the proceeds amongst "the following persons or their heirs for ever,—the grandchildren of C, the grandchildren of D, and the grandchildren of E:—Held, that the word "heirs" was to be construed heirs according to the nature of the property, and it being in this case given as money, "heirs" was construed "next-of-kin"; that the grandchildren of C, D and E living at the death of the testator, and afterwards born during the lives of the tenants for life, and the next-of-kin of any of them who predeceased the surviving tenant for life, were entitled to the residuary estate, the next-of-kin of each deceased grandchild taking the deceased grandchild's share; that the words "for ever" did not alter the character of the persons who were to take, the only import of such words being that the persons who were to take took absolutely. *Doddy v. Higgins*, 9 Hare, App. xxxii.

That the Court being satisfied that neither the heirs-at-law nor the personal representatives of the deceased grandchildren had any reasonable ground of claim, it was not necessary to make them parties to the suit. *Ibid.*

That the other grandchildren and the next-of-kin of the deceased grandchildren of the testator must be brought before the Court on the further prosecution of the suit, by being served with notice of the decree under the 8th rule of the 42nd section of the Act, 15 & 16 Vict. c. 86. *Ibid.*

Where an estate is to be sold under the decree of the Court the general rule (with a possible exception in some cases of extreme difficulty) is, that all the parties interested in the proceeds must, to secure a proper and advantageous sale and protect the title of purchasers from being open to inquiry or impeachment, be parties to the suit, or be served with notice

of the decree under the 8th rule of the 42nd section of the act, 15 & 16 Vict. c. 86. *Ibid.*

The 51st section of the act, 15 & 16 Vict. c. 86, which empowers the Court to adjudicate on questions between some only of the parties, does not render the decision binding on the absent parties, as the 42nd section of the same statute does, when notice of the decree has been served under the 8th rule. *Ibid.*

The expense of ascertaining the kinship of the next-of-kin of the deceased grandchildren ought to fall upon the general estate of the testator, as such next-of-kin are, equally with the surviving grandchildren, his legatees; and, therefore, as the number of grandchildren must be ascertained before the fund could be divided, it would be unjust to the next-of-kin of the deceased grandchildren that the inquiry should stop without ascertaining their kinship, thereby throwing the expense of such proof upon their shares of the fund. *Ibid.*

A distinction between suits by creditors and suits by legatees is, that in suits by creditors, where one sues on behalf of others, the law gives a power to the trustees to deal with the estate, which it does not give in the case of legatees. *Ibid.*

Form of order for administration, dispensing with the representatives of deceased executors and trustees as parties to the suit, when incapacitated persons are interested in the estate. *Whittington v. Gooding*, 10 Hare, App. xxix.

Cases in which the residuary estate of one testator having devolved upon another, it is proper to join the executors of the first testator in a suit to administer the estate of the second, and to take the account of both in one suit. *Young v. Hodges*, 10 Hare, 158.

In a suit for administration against the administrator with the will annexed, and the widow, to whom the assets had been assigned, such administrator was alleged and proved to be out of the jurisdiction:—Held, that the suit could not proceed in the absence of a legal personal representative. *Donald v. Bather*, 16 Beav. 26.

Some of the residuary legatees under a will may file a claim against the executors, without making the other residuary legatees parties; but the others ought to be summoned before the Master. *Watson v. Young*, 1 Sim. N.S. 114.

(c) *Creditors' Suits.*

By a deed between A of the first part, B and C, stated to be creditors of A, of the second part, and the creditors of A who should execute the deed, of the third part, A assigned his property to B and C, on trust to pay H a sum of money in respect of a lien on some of the property, and to divide the residue among the creditors. B never executed the deed, and his executors filed a bill to set it aside. The bill alleged that B had died directly after the date of the deed, that C was a bankrupt, that H had not any lien, and had acted improperly in the matter, and that it was the interest of the creditors who had executed the deed that it should be set aside. The only defendants were C, his assignees, and H:—Held, that one or more of the creditors who had executed the deed were necessary parties to the suit. *Gore v. Harvey*, 20 Law J. Rep. (N.S.) Chanc. 74.

The widow of a deceased debtor, without taking out letters of administration, got in all the assets of her husband and compounded with his creditors.

Upon a claim by a creditor to obtain payment of a debt due to him in full,—Held, that a legal personal representative of the intestate ought to be made a party, and leave was given to amend. *Crescor v. Robinson*, 21 Law J. Rep. (N.S.) Chanc. 64; 14 Beav. 589.

A testator dying in the Mauritius appointed executors in that country, and left the residue of his property to his mother in England. The executors in the Mauritius transmitted the residue to England, but the mother of the testator having died, the amount was paid to her executors, who paid all her debts exceeding the amount to which she became entitled from the testator's estate. The plaintiff was a creditor of the testator, and filed a claim to obtain payment of his debt, or to have the testator's estate administered:—Held, that the Mauritius executors were improperly made parties to this claim, and that the plaintiff could not have relief against the executors of the testator's mother without having a legal personal representative of the testator constituted in this country, a party to the suit. *Silver v. Stein*, 21 Law J. Rep. (N.S.) Chanc. 312.

(d) *Mortgage Suits.*

In a suit for foreclosure commenced under the old practice, the trustees of the equity of redemption if in settlement do not sufficiently represent the *cestuis que trust* under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86. s. 42, r. 9). The *cestuis que trust* will still be necessary parties to the suit. *Goldsmith v. Stonehewer*, 22 Law J. Rep. (N.S.) Chanc. 109; 9 Hare, App. xxxviii.

In a foreclosure suit, the devisees and executors of the mortgagor represent the *cestuis que trust* of the equity of redemption under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86. s. 42, r. 9), and the *cestuis que trust* are not necessary parties to the suit. *Hannam v. Riley*, 22 Law J. Rep. (N.S.) Chanc. 110; 9 Hare, App. xl.

In a foreclosure suit all the parties who had controul over as well the mortgaged property as the personal estate of the mortgagor were on the record: and the Court held, under the 42nd section, rule 9, of the 15 & 16 Vict. c. 86, that the *cestuis que trust* of the mortgaged estate were not necessary to be made parties. *Salc v. Kitson*, 22 Law J. Rep. (N.S.) Chanc. 344; 3 De Gex, M. & G. 119.

On the hearing of a foreclosure claim, it appeared that the equity of redemption was vested in trustees on certain trusts, and that the persons interested under the trust were not made parties. The Court ordered that the persons so interested should be made parties, or that evidence should be given that they knew of the proceedings, and did not object. *Tudor v. Morris*, 22 Law J. Rep. (N.S.) Chanc. 1051; 1 Sm. & G. 508.

As a general rule, all persons beneficially interested in an equity of redemption ought to be made parties to a foreclosure suit. The object of rule 9. s. 42. of the Chancery Amendment Act is merely to give authority to the Court in certain cases to treat a trustee as representing the property, and to dispense with the making the *cestuis que trust* parties. *Cropper v. Mellersh*, 24 Law J. Rep. (N.S.) Chanc. 430.

In a suit for foreclosure against the infant heir-at-law of the mortgagor, the Court refused to act on the 15 & 16 Vict. c. 86. s. 42. r. 9, dispensing with the

parties beneficially interested in the equity of redemption of the mortgaged premises, where the devisees in trust under the will of the mortgagor had disclaimed, and there were not before the Court any adult parties who could be in possession of funds to redeem the estate. *Young v. Ward*, 10 Hare, App. lviii.

Upon a claim by a mortgagee against mortgagors, and against the trustees under an assignment of the equity of redemption for the benefit of the mortgagors' creditors, whose names appeared in a schedule to the deed which they executed:—Held, that although the deed gave the trustees a power of sale, with a clause making their receipts good discharges, the scheduled creditors were necessary parties to the suit. *Thomas v. Dunning*, 5 De Gex & S. 618.

In a foreclosure suit a trustee, in whom was vested the legal estate in the mortgaged property, and who had agreed to convey it to the plaintiff when required, is a necessary party. *Hichens v. Kelly*, 2 Sm. & G. 264.

Since the 15 & 16 Vict. c. 86, the trustees of a mortgage represent the *cestuis que trust* sufficiently to protect the mortgagor; but where the trustees, or the representatives of the trustees, alone are parties, the Court requires the *cestuis que trust* to be also represented, in order to secure the due application of the trust property. *Stanfield v. Hobson*, 16 Beav. 189.

A, being tenant for life of an estate, and the owner of a charge of 20,000*l.* thereon, mortgaged the 20,000*l.* to B for 14,000*l.* He afterwards mortgaged it and other property to C for 24,000*l.* A died, and the succeeding tenant for life prayed a redemption against C, on payment of such a sum as was due on account of the 6,000*l.* (thus splitting the charge of 20,000*l.* into two portions):—Held, that both B and the executors of A were necessary parties to such a suit. *Lord Kensington v. Bowverie*, 16 Beav. 194.

Pending a suit by a mortgagor for redemption the plaintiff became an insolvent, and he also aliened the property. Neither his assignees nor his alienee were made parties, and in their absence an order was made foreclosing the plaintiff:—Held, that the assignees in insolvency were not bound by the assignment to them by the insolvent being *in invitum*, but that it was binding on the alienee *pendente lite*, and those claiming under him. Held, also, that the latter could not avail themselves of the objection of the absence in the suit of the former. *Wood v. Surr*, 19 Beav. 551.

(B) JOINDER OF.

One of several *cestuis que trust*, who is also the personal representative of a deceased defaulting trustee, cannot be joined as co-plaintiff with the other *cestuis que trust* in a bill to charge the estates of the other deceased co-trustees with the loss of the trust funds. Such a bill will be dismissed for misjoinder, with costs as to the defendants who raised the objection by answer, and without costs as to all the other defendants. *Griffith v. Van Heythausen*, 20 Law J. Rep. (N.S.) Chanc. 337; 9 Hare, 85.

In a suit so framed, the defect was first disclosed by amendment to the original bill, and the newly-appointed trustees, against whom no relief was pray-

ed, did not insist upon the objection, either by their answer or at the hearing, and were desirous that the suit should proceed.—The bill was, notwithstanding, dismissed as against them, without costs. *Ibid.*

The joining in a claim parties whose interest is contingent, to ask for the preservation of a fund is not multifarious, or a misjoinder of parties. *Davies v. Davies*, 21 Law J. Rep. (N.S.) Chanc. 543.

A testatrix gave certain property to her two daughters, and made one of them her executrix. The two daughters mortgaged a portion of the real estate by deposit of title deeds, and the money borrowed was partly for the purpose of paying the debts of the testatrix and partly for the private purposes of the two daughters. The daughter who was executrix died, and appointed as her executrix the plaintiff, who thereby became the representative of both mother and daughter. A bill was filed, by a creditor, to have both estates administered, and a decree was made for the sale of the mortgaged estate. The plaintiff now filed a bill against the equitable mortgagees to have the title deeds of the estate delivered up:—Held, that under the new law providing that no suit shall be dismissed on account of misjoinder, the plaintiff, in her character of representative of the daughter and of the mother, was entitled to file this bill. *Carter v. Sanders*, 23 Law J. Rep. (N.S.) Chanc. 679; 2 Drew. 248.

Held, also, that the plaintiff, though personal representative only, might obtain relief as to the real estate; and that as the deeds were only deposited with a creditor for advances, relief could be granted against the equitable mortgagees. *Ibid.*

A bill by a married woman suing by her next friend to set aside a compromise of her right to certain real estates, as having been fraudulently obtained, against the parties to the fraud and her husband, alleging that the latter had refused to join as co-plaintiff; this refusal was not proved in the cause, and the husband appeared in support of the bill. An objection to the frame of the suit, that the husband ought to have joined as co-plaintiff, held invalid. *Smith v. Pincombe*, 3 Mac. & G. 653.

A bill was filed by husband and wife, partly in respect of the wife's separate estate; but she sued by her next friend. An objection for misjoinder was overruled. *Meddowcroft v. Campbell*, 13 Beav. 184.

A defendant objected to a suit for want of parties alleged to be interested under an instrument not proved. The objection was overruled, and a decree made reserving their rights. *Ibid.*

A defendant, A B, objected that C D was a necessary party. A B's title in the suit being disallowed, the objection was also overruled. *Ibid.*

(C) OBJECTIONS AS TO.

The defendants raised an objection for want of parties to the plaintiff's bill. The plaintiff amended the bill, and added these parties, but omitted to serve them, alleging that they resided in Scotland, out of the jurisdiction:—Held, that the plaintiff having acceded to the objection, and having added the parties by amendment, was bound to serve them; and that their residing in Scotland was not a valid reason for their not being served. *Moodie v. Bannister*, 22 Law J. Rep. (N.S.) Chanc. 1052; 1 Drew. 514.

Held, also, that the objection having been taken

by the answer and allowed, the defendants were entitled to the costs of the day. *Ibid.*

PARTITION.

Form of a decree for partition, since the 13 & 14 Vict. c. 60, where infants are parties to the suit for the partition. *Bowra v. Wright*, 20 Law J. Rep. (N.S.) Chanc. 216; 4 De Gex & S. 265.

The partition of a manor and its franchises will be decreed in equity. *Hanbury v. Hussey*, 20 Law J. Rep. (N.S.) Chanc. 557; 14 Beav. 152.

Tenants in common, plaintiffs in a suit for redemption, are not entitled to a decree for partition in the same suit against the will of the mortgagee. *Watkins v. Williams*, 21 Law J. Rep. (N.S.) Chanc. 601; 3 Mac. & G. 622.

In a suit for partition of an estate between two sisters, the Commissioners appointed under the decree divided the property into moieties, but were unable to agree as to which moiety should go to each sister. The Court pointed out what circumstances ought to be taken into consideration, and directed the Commissioners to make a separate return. Upon their continuing to disagree, a new commission was directed, and a third Commissioner appointed, in order to avoid the necessity of making a partition by drawing lots. *Canning v. Canning*, 23 Law J. Rep. (N.S.) Chanc. 879; 2 Drew. 434.

A suit for partition. The plaintiffs were entitled to a moiety of an estate, and the other moiety belonged to A for life, with remainder to B, an infant, in fee. A scheme of partition was prepared under the direction of the plaintiffs and A. The Court, at the hearing, made a decree for partition according to the scheme without a commission. *Stanley v. Wrigley*, 24 Law J. Rep. (N.S.) Chanc. 176; 3 Sm. & G. 18.

Upon the partition of certain lands the mines of lead and coal, and other mines and minerals, were excepted:—Held, that the term "minerals" included only such substances as were dug out of the earth by means of a mine, that is, by means of a pit or tunnel having a roof overhead, and did not include limestone rock, which in the present instance was worked by means of an open quarry having no roof. *Davell v. Roper*, 24 Law J. Rep. (N.S.) Chanc. 779; 3 Drew. 294.

The plaintiff in a partition suit was entitled to six-sevenths of the estates and had the title-deeds:—Held, that the proper form of decree as to the documents of title was for the delivery to the defendant of such of them as related exclusively to the land which should be allotted to him, and for the retainer by the plaintiff of the rest, he undertaking to abide by any order which the Court might make as to the same, with liberty for either party to apply. *Jones v. Robinson*, 3 De Gex, M. & G. 910.

Seem—that a devise on trust to sell and dispose of property, consisting partly of an undivided share, does not authorize the trustees to concur in a partition; but where trustees who had such a trust concurred in a partition which was shewn to be beneficial to the *cestuis que trust*, who were infants, the Court on a claim to which the infant *cestuis que trust* were parties made a decree that the lands should be taken to be divided according to the partition already

made. *Brassy v. Chalmers*, 4 De Gex, M. & G. 528.

One of two tenants in common of an estate agreed to grant a lease of the mines under it:—Held, that the lessee was entitled to a decree for specific performance and for a partition of the estate. *Heaton v. Dearden*, 16 Beav. 147.

A partition will not be set aside on light grounds, or for light matters, or for mere inequality of value of the allotments, if, in making it, the Commissioners have honestly exercised their own judgment. *Peers v. Needham*, 19 Beav. 316.

It is not necessary that in making a partition an aliquot share of each species, or of each house (if it be house property), should be allotted to each of the tenants in common. *Ibid*.

But where, under a decree for partition amongst three tenants in common, which did not empower the Commissioners to order owelty of partition, the Commissioners, upon some previous understanding that two of the tenants in common were willing to take one of the two houses comprising the property without severance, allotted that house to them and the other to the third tenant in common, the return was suppressed. *Ibid*.

PARTNERS.

(A) PARTNERSHIP.

(a) Constitution and Effect of.

(1) In general.

(2) Participation of Profits.

(b) Dissolution of.

(1) What amounts to.

(2) Notice to dissolve.

(3) Cause of Dissolution.

(4) Agreement to dissolve.

(c) Construction and Validity of Contracts creating it.

(d) Change of Firm.

(e) Effect of Death of Partner.

(f) Accounts.

(B) RIGHTS AND LIABILITIES.

(C) POWERS AND DISABILITIES.

(D) ACTIONS AND SUITS.

(A) PARTNERSHIP.

(a) Constitution and Effect of.

(1) In general.

[See *Caldicott v. Griffiths*, title PARTIES TO ACTIONS.]

A deed of assignment in the usual form to trustees, for the benefit of creditors, which empowers the trustees to employ the debtor or other person in winding up his affairs and in collecting and getting in his estate, and in carrying on his trade, if thought expedient, is a valid deed, and does not constitute a partnership between the creditors. *Coate v. Williams*, 21 Law J. Rep. (N.S.) Exch. 116; 7 Exch. Rep. 205.

A, being entitled to certain letters patent, for a money consideration granted an exclusive licence to B & Co. for the whole of the term; and by deed

covenanted with B & Co. to serve them as manager of the business for the same period, with power to B & Co., in case of the bankruptcy or insolvency of A, or breach of the covenants on his part, to determine the engagement by notice in writing. B & Co. covenanted with A, that each of the partners would diligently employ himself in the business, and that A should have the management thereof under their directions; that, if A should have duly observed the covenants, B & Co. would pay him a gross sum of money at the expiration of the licence; and further, by way of salary, such a sum of money, every quarter-day, as should be equal to 40% per cent. of the net proceeds of the business, and in case of A's death before, would pay his executors during the remainder of the term 30% per cent. upon the net profits; and it was provided that, in case B & Co. discontinued the business, A should have the option of purchasing their interest in the licence and the stock, &c.; but that nothing therein contained should constitute A a partner. After the business had been carried on for a time under this arrangement, B & Co. discharged A from being manager on the ground of neglect, who thereupon filed his bill, praying that B & Co. might be enjoined from excluding him from the management, and for an account:—Held, upon appeal, that the interest of A was not that of a partner in the concern, and that he had no equity; and an injunction before the hearing granted by the Court below was discharged. *Stocker v. Brockelbank*, 20 Law J. Rep. (N.S.) Chanc. 401; 3 Mac. & G. 250.

Observations as to the style and character of affidavits. *Ibid*.

A mere authority in a will to continue the testator's assets in trade, does not authorize the executors to trade with them; and partners trading with such assets, with notice, are bound to inquire into the trusts upon which they are held, and are liable in respect of them. *Travis v. Milne*, 20 Law J. Rep. (N.S.) Chanc. 665; 9 Hare, 141.

The usual annual stock-takings of a firm do not necessarily represent the true value of a partner's share in the partnership property; and if the object be merely to ascertain the profit and loss of the year, the correctness of the value set upon the items and liabilities of the firm is of infinitely less importance than where the object is to ascertain the exact value of a partner's share and interest. *Ibid*.

An executor not proving the will until after his co-executors had improperly invested the testator's assets cannot justify taking no step in respect of or interfering with them for a considerable period. *Ibid*.

By mercantile custom, one partner may by advances for the purpose of business become a creditor of the firm for the amount, and has a right to be credited with interest, if there be no express contract to the contrary.—Per Lord Justice Knight Bruce, Lord Justice Turner doubting. *In re the German Mining Company*, 22 Law J. Rep. (N.S.) Chanc. 926; 4 De Gex, M. & G. 19.

Surviving partners held by inference deduced from their conduct to have carried on their business on the same terms as the original partners. *King v. Chuck*, 17 Beav. 325.

In a partnership between A, B & C there was a stipulation that if one died the survivors should take

the business and pay his executors his capital as appearing on the last account. A died, and B and C carried on the business without articles. B afterwards died. The Court from the conduct of the parties inferred that B and C carried on their business on the same terms as to winding up on the death of either as those which applied to the first partnership between A, B & C, and decreed C to pay to B's executors his capital as appearing on the last account. *Ibid.*

(2) *Participation of Profits.*

W entered into the following agreement with C: "W engages to take charge of the glebe lands of C, his wife undertaking the dairy and poultry, at 15s. a week, till Michaelmas 1850, and afterwards at a salary of 25l. a year, and a third of the clear annual profit, after all expenses of rent and rates, labour and interest on capital, &c., are paid, on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by W, who occupies it as bailiff, in addition to his salary:—Held, that this agreement constituted the relation of master and servant between C and W, and not that of partners; that W was not a menial servant, but a labourer; and that the agreement was admissible in evidence, though unstamped, as it fell within the exemption in the Stamp Act as an agreement for the hire of a labourer. *Regina v. Wortley*, 22 Law J. Rep. (N.S.) M.C. 44.

The plaintiff and the defendant were tailors; the plaintiff employed the defendant to obtain orders for him, and agreed to allow him a certain share of the profits by way of commission upon such orders. The defendant carried on the business with the plaintiff, but his name was not joined with that of the plaintiff. All goods were ordered and paid for by the plaintiff, and all debts were paid to him alone; the defendant set up a partnership; but it was held, that a right to a share of the profits did not necessarily create a partnership; and there was no evidence to prove a partnership on the part of the defendant. *Andrews v. Pugh*, 24 Law J. Rep. (N.S.) Chanc. 58.

(b) *Dissolution of.*

(1) *What amounts to.*

Two solicitors carried on business in co-partnership, but for no definite period; one of them gave notice of an immediate dissolution, and refused the other access to the offices:—Held, that the partnership was to be considered as in existence until wound up, and that the excluded partner was entitled to have access to the offices. *Roberts v. Eberhardt*, 23 Law J. Rep. (N.S.) Chanc. 201; Kay, 148.

(2) *Notice to dissolve.*

Under articles of agreement between three partners, the partnership was to be dissolved by notice from any of them, on breach of the articles by the others or other. Notice of dissolution having been given by one of the partners, in consequence of a breach of the articles by another, and the third partner having adopted the notice, it was held, that the partnership was dissolved as to all, but without the consequences of the non-offending partner which attached, under another clause of the articles, to a

general dissolution. *Smith v. Mules*, 21 Law J. Rep. (N.S.) Chanc. 803; 9 Hare, 556.

(3) *Cause of Dissolution.*

Decree made for the dissolution of a partnership in consequence of the lunacy of one of the partners. *Leaf v. Coles, in re Coles*, 1 De Gex, M. & G. 171.

(4) *Agreement to dissolve.*

By a deed of dissolution of a partnership the retiring partner agreed to assign to the continuing partner all his share in the partnership property, subject to the payment of the retiring partner's share of the debts, and it was agreed that a deed should be executed by which the continuing partner should covenant to pay the debts, and to indemnify the retiring partner and his estate therefrom. No further deed was executed. The continuing partner six years afterwards assigned a policy of assurance which had formed part of the partnership property to a mortgagee for securing money lent, the mortgagee having had notice of the deed of dissolution. The continuing partner became bankrupt, having neglected to pay some of the debts of the partnership, and such debts were recovered against the estate of the retired partner who had died:—Held, (affirming a decision of the Master of the Rolls), that the provisions of the deed of dissolution did not create a charge upon the property assigned in favour of the retired partner:—Held, also, per *Lord Justice Knight Bruce*, that even if it had created a charge, still, as the debt was not scheduled or specified, the receipt of the continuing partner would effectually discharge the mortgagee. *In re Langmead's Trusts*, 24 Law J. Rep. (N.S.) Chanc. 589, 237; 20 Beav. 20.

(c) *Construction and Validity of Contracts creating it.*

Two persons seized of freeholds agreed to carry on business in partnership upon the premises for fourteen years, and that if either died during that term, the survivor should purchase the freeholds at a stated price. The fourteen years having expired, they by parol agreement continued the partnership "on the old terms." One afterwards died intestate:—Held, that the stipulation as to purchase was binding, and that the freeholds were converted into personal estate, and did not pass to the heir. *Essex v. Essex*, 20 Beav. 442.

Admissibility of evidence of a parol contract as to the continuance of a partnership where real estate is concerned. *Ibid.*

A tradesman bequeathed his residuary estate, including his stock in trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds, and to invest the same and pay the annual income to Sarah his wife, and after her decease to Mary, his wife's sister, and after the decease of the survivor of Sarah and Mary he gave his residuary estate to another person absolutely. After the date of the will, Mary married, and her husband and the testator entered into partnership under articles, which contained a proviso that if the testator should die during the partnership leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and

excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who, under this provision, claimed his interest in the partnership:—Held, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled under the partnership articles to such share. *Page v. Cox*, 10 Hare, 163.

A trust may well be created in the absence of any expression importing confidence, and the obligation on the surviving partner created by the partnership articles with reference to the legal interest in the partnership did not in substance differ from a trust, and therefore the articles of partnership created a trust in favour of the wife, to arise on the death of the testator leaving a widow surviving, which would attach on the property as it should then exist. *Ibid.*

Articles made between three partners directed that the real and leasehold estate of the partnership should be treated as partnership stock, and that before any division of profits the rates, repairs, &c. should be paid, and 5% per cent. interest set apart on the capital and paid to the partners in the proportions in which they had advanced it. They afterwards purchased other estates, the purchase-money of which was by the conveyances expressed to be paid by the three partners in equal proportions. The partners subsequently executed a deed, reciting the fact that the purchase-money had been wholly paid by two of the partners, and declaring that until the third partner should pay into the partnership capital a sum equal to that paid by each of the other partners, he should stand possessed of the undivided third part of the estate in trust for them (the other two partners). Upon the dissolution of the partnership, the third partner not having paid any portion of his capital, the Court held, that the real and leasehold estate was nevertheless part of the partnership capital, and that the effect of the declaratory deed was to charge the legal interest of the third partner by way of mortgage, with the proportionate share of the capital which he ought to have advanced. *Tibbitts v. Phillips*, 10 Hare, 355.

Held, also, that in the interim after a dissolution, and whilst the affairs of the partnership were being wound up, the third partner had ceased to be entitled to the benefit of a provision in the articles allowing him a salary and the occupation of a house belonging to the partnership, as managing partner, and that a receiver must be appointed. *Ibid.*

Articles of partnership provided that it should be lawful for the holder of two-thirds or more of the partnership shares for the time being to expel any partner, by giving him notice thereof under their hands in the form thereby prescribed, and that immediately after giving such notice a notice of the dissolution as to the expelled partner should be signed by the partners and published, with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided, that if a partner became bankrupt, insolvent, or was expelled, his interest should cease as to profit and loss as if he had died on the day of such bankruptcy

insolvency, or expulsion, and that the amount of his share should be ascertained and payment secured by the same arrangement as would have been applicable in case of his decease; and it was also provided that the shares of retired, deceased, bankrupt, insolvent, or expelled partners, should be disposed of in such way either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided that in the case of making certain arrangements there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel. The articles also provided for the adjustment of the partners' accounts within sixty days after the 30th of June in each year, when an inventory of all the stock, debts, &c. should be made, with proper allowances, so as to ascertain the partnership property, profit and loss, and the shares of the respective partners, which shares were to be carried to their respective accounts; and it was provided that the share of any partner who might wish to retire, if his retirement were consented to by the majority of the others, was to be taken by the continuing partners at the amount at which the same stood at the time for making the yearly rest or settlement:—Held, that the power of expulsion of a partner might be exercised by two-thirds of the partners, without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion, but that the power must be exercised with good faith, and not against the truth and honour of the contract. *Blisset v. Daniel*, 10 Hare, 493.

That such a power must be understood to exist not for the benefit of any particular parties holding two-thirds or more of the shares, but for the benefit of the whole society or partnership. *Ibid.*

That it could not be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value. *Ibid.*

That the power was not properly exercised at the exclusive instance of one partner, and in consequence of his representation to the other partners made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners. *Ibid.*

(d) *Change of Firm.*

The plaintiff, a customer of a banking firm, having brought an action against the firm, was nonsuited, on the ground of two of the defendants not being members of the firm at the time of the accruing of the cause of action. Negotiations on the subject of the action had been going on for several years, during which the defendants had not questioned their liability to be sued, and in a bill in equity filed by them against the plaintiff, after pleading and before trial, had stated that the liabilities of the previous firm had been transferred to themselves, and further stated who the members of the firm were when the cause of action accrued. The Court, to prevent the operation of the Statute of Limitations, set aside the nonsuit, and gave the plaintiff leave to amend the

declaration by striking out the two defendants who had been erroneously included in the action. *Crawford v. Cocks*, 20 Law J. Rep. (N.S.) Exch. 169; 6 Exch. Rep. 287.

(e) *Effect of Death of Partner.*

The plaintiffs were the owners of a woollen mill, which had been occupied by a firm consisting of Abraham, Samuel and William R. William having become a debtor to the defendant, and having died intestate, Abraham took possession of the mill and machinery, and carried on the business without taking out administration to William. The plaintiffs having distrained for rent due from the firm, Abraham, on behalf of the firm, assigned to the plaintiffs, in the nature of a mortgage, the fixtures and machinery in satisfaction of the rent in arrear. The defendant afterwards brought an action against Abraham R, as executor *de son tort* of William, recovered judgment, and took the machinery and fixtures in execution:—Held, in an action of interpleader, first, that there was no survivorship as to the property in joint chattels in the case of partnership, whether existing between merchants or manufacturers, or any other description of traders. *Buckley v. Barber*, 20 Law J. Rep. (N.S.) Exch. 114; 6 Exch. Rep. 164.

Secondly, that the surviving partners had no power, by virtue of the partnership relation, of transferring to the plaintiffs by way of mortgage a legal title to the share of the deceased partner William; and that, at all events, the transaction was not within the scope of any implied authority which a surviving partner might have to wind up the affairs of the partnership. *Ibid.*

Quere—whether the partners could have given title by a sale of the share of the deceased partner William made for the payment of his debts and their own. *Ibid.*

Fourthly, admitting that Abraham, by joining in the conveyance of all the property to the plaintiffs, would, if he had been lawful executor, have been estopped from claiming the property of his testator as against them, yet the act of an executor *de son tort* had no such effect, for his act being good against the true representative only where it is lawful, and such as the true representative is bound to perform in the due course of administration, the transfer by Abraham was not such an act, and therefore the third part of the goods might be seized under the defendant's execution against the goods of the deceased partner William. *Ibid.*

Fifthly, that the defendant, by suing Abraham as executor, had not thereby admitted him to be rightful executor, and might, therefore, treat him as executor *de son tort*, and dispute the validity of his transfer to the plaintiffs. *Ibid.*

(f) *Accounts.*

A and B agreed to carry on business in partnership together, according to the terms contained in certain articles under seal. By these articles it was stipulated that each partner should be true and just to the other in his contracts, receipts, payments and dealings, and each of them bound himself to the other in the penal sum of 5,000*l.* for the due performance of the covenants, articles and agreements thereinbefore contained. A died, and, in a suit to administer his estate, there was found due from him to B, on the

partnership account, the sum of 11,000*l.*:—Held, that 5,000*l.* part of this sum, was to be taken as a specialty debt, but that the residue was to be deemed only a simple contract debt. *Powdrell v. Jones*, 23 Law J. Rep. (N.S.) Chanc. 606; 2 Sm. & G. 305.

By articles of partnership, A agreed to enter into partnership with B in the profession of a surgeon for seven years from the date of the articles. The articles recited that A and B had separately practised as surgeons in the neighbourhood of C; but that the practice of A had been greater than that of B, and that it had been agreed that B should pay to A a premium of 900*l.* as a consideration for A and B entering into the partnership. A became bankrupt in a year and a half after the commencement of the partnership. In a suit by B against the assignees of A for an account of the partnership dealings,—Held, that B was entitled to be allowed in the partnership accounts a proportional part of the premium which had been paid. *Freeland v. Stansfield*, 23 Law J. Rep. (N.S.) Chanc. 923; 2 Sm. & G. 479.

It was agreed between two solicitors, Sims and Unwin, upon entering into partnership together, that Sims should alone continue to be the receiver of the rents and profits of certain estates, and steward of certain manors, and to act in the direction of the same, and alone to sign receipts for the payment of the fines, rents and profits thereof, and to receive the sums; and all such sums when received were to be paid to the account of the parties for whom the same were received, and until payment to continue in the custody of Sims; but the fees and salary were to form part of the partnership profits, and the expenses of making up the courts and accounts, were to be sustained in the proportions of the other part of the partnership business. Sims died indebted in respect of certain sums received by him as receiver and as steward. Unwin paid the amount of such sums; and upon a bill filed to administer the estate of Sims, it was held, that the emoluments being received by Sims in respect of a personal office, and not of a trade or business, and Unwin not being liable to be charged with these items, they could not be allowed to him in the partnership accounts. *Alston v. Sims*, 24 Law J. Rep. (N.S.) Chanc. 553.

The distinction between joint and separate assets is not restricted to the cases of the distribution under a bankruptcy or insolvency; it applies equally to the case of the administration of assets of deceased partners. *Ridgway v. Clare*, 19 Beav. 111.

In the administration of the assets of a deceased partner, when both partners are solvent, there is no distinction made between joint and several creditors; they are all paid; and in taking the partnership accounts the joint debts thus paid will be allowed in account by the surviving partner. *Ibid.*

If the estate of the deceased partner be insolvent and that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share. *Ibid.*

If both the deceased and surviving partners are insolvent, then the joint creditors must resort in the first instance to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied. *Ibid.*

If both partners die before administration takes place, the rule is the same. *Ibid.*

Claim of retiring partner to a share in the value of the goodwill of the business disallowed. *Hall v. Hall*, 20 Beav. 139.

Two persons entered into partnership for twenty-one years, but in consequence of disagreements and misconduct disputes ensued. The partnership was dissolved by decree, one consenting to retire, and the other to take the stock and effects at a valuation:—Held, that the retiring partner was not entitled to any allowance for his share of the goodwill, no provision being made by the partnership articles for such an allowance on a dissolution by death, or by the retirement of one partner by notice during the term. *Ibid.*

As to the equity of set-off for partnership debts paid by a continuing partner against a legal debt, due from him to a retired partner upon a bond for a private loan. *Lee v. Flood*, 2 Sm. & G. 250.

One of two partners, as bankers, lent to his partner a sum of money on the joint and several bond and covenant of the borrower and another person in 1821, and died in 1833. The obligor continued to pay interest till 1843, when he died, and his executors paid interest up to 1847. On the death of the obligee in 1833 some settlement of banking affairs was come to between his executor and the surviving partner and another subsequently admitted, which the executor alleged was final, but was disputed. The executor of the obligee then became a partner, and other changes subsequently took place in the firm, each new firm taking upon itself all the former liabilities and assets. In 1847 the firm in which the executor had continued a partner became bankrupt. In a suit for the administration of the estate of the obligor certain creditors of the firm, on promissory notes given prior to 1833, whose debts had been adopted by the successive firms, were admitted as separate creditors of his estate. The executor of the obligee was admitted as a creditor for the loan, and no equitable set-off for contribution was allowed, none having been established in respect of the said estate of the obligee being separately liable to the creditors, although it was probable that, in winding up the partnership affairs, some claim by the obligor's estate against the estate of the obligee might be established. *Ibid.*

(B) RIGHTS AND LIABILITIES.

[See title *MINE*.]

In 1832 A employed B & C, then in partnership as attorneys, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid the 500*l.* to C, who, however, did not inform either B, his partner, or A of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838; but both before and after the dissolution, and after the death of A, which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A and his representatives up to 1848 by C. In 1846 the 300*l.* was paid to C, and the mortgage deed was given up by C, but no re-conveyance was ever executed. Neither A nor his representatives had any knowledge of these facts until 1848. Entries had been made by

C in the partnership books of the receipts and payments, but B had no knowledge of the transaction subsequent to the original advance of the 500*l.*:—Held, in an action by the executors of A against B and C, that the Statute of Limitations was a bar to the action. And, *semble*, that B was not liable for these acts of C, as they were not within the scope of his partnership authority. *Sims v. Bruton*, 20 Law J. Rep. (N.S.) Exch. 41; 5 Exch. Rep. 802.

The business of a scrivener is not within the ordinary scope of the business of an attorney, and one member of a partnership firm of attorneys cannot, therefore, render his copartner liable, simply by receiving money indefinitely for the purpose of being laid out on mortgage security which might afterwards be obtained. *Harman v. Johnson*, 22 Law J. Rep. (N.S.) Q.B. 297; 2 E. & B. 61.

The plaintiff, who was a female customer of a banking firm, was advised by Wood, one of the partners in the bank, to dispose of certain Dutch bonds, and to place the money upon better security. He then proposed that it should be lent to his own son. This proposal was acquiesced in by the plaintiff in consequence of her having great confidence in the firm. The money was paid out by a cheque upon the bank to a third person named, or bearer, and the plaintiff received a promissory note for repayment, with a guarantee from Wood. Wood absconded, and the security proved to be worthless. Upon bill filed against the other members of the firm, it was held, that they were not liable for the loss, as the transaction was not within the scope of a banker's business, and was not recommended or sanctioned by the other partners. *Bishop v. the Countess of Jersey*, 23 Law J. Rep. (N.S.) Chanc. 483; 2 Drew. 143.

Upon the dissolution of a partnership a deed was executed, whereby the retiring partner assigned the debts to the continuing partners, giving them an irrevocable power of attorney to receive them, and covenanting not to interfere in their collection. The surviving partners continued their dealings with one of the debtors to the old firm, and without the sanction of the retiring partner, took a security in their own name for the aggregate amount of the old and new debts:—Held, that they thereby made themselves personally responsible to the retiring partner for his share of the debt. Held also, that they would have been equally liable as partners independently of the deed. *Lees v. Laforest*, 14 Beav. 250.

Refusal to refer to arbitration in pursuance of an agreement, is not of itself a sufficient reason for refusing costs to a successful party. *Ibid.*

Two partners on the termination of their partnership came to an arrangement, for mutual convenience, that a third person should collect the outstanding assets; it was acted upon for some time, and then one of the partners died:—Held, that the surviving partner could not repudiate the agreement and alone collect the debts, but that the executors of the deceased partner had a right to have a receiver appointed. *Davis v. Amer*, 3 Drew. 64.

After the dissolution of a partnership between two sharebrokers, one of them deposited with the bankers of the firm shares contracted to be purchased by the firm before the dissolution, with power to sell the shares, in order to raise the requisite sum to complete the purchase:—Held, that the power of sale was not an unauthorized delegation of the powers of a mem-

ber of a dissolved firm, but was valid and effectual. *Butchart v. Dresser*, 3 De Gex, M. & G. 543; 10 Hare, 453.

The authority of a partner continues after a dissolution for all purposes of winding up, and if it be unduly exercised, the remedy is by applying to the Court for the appointment of a receiver. *Ibid.*

(C) POWERS AND DISABILITIES.

One of several partners was employed to purchase goods for the firm. He, unknown to his co-partners, purchased goods of his own at the market price, but he made a considerable profit thereby:—Held, that the transaction could not be sustained; and that he was accountable to the firm for the profit thus made. *Bentley v. Craven*, 18 Beav. 75.

(D) ACTIONS AND SUITS.

[See PARTIES TO ACTIONS.]

A and B, being partners, kept an account with C as their banker. On the banker's claiming a balance against the firm, A demanded an explanation from B, and B wrote to him that the balance was his own private debt, and that the firm had nothing to do with it. Subsequently B gave the banker a promissory note for this balance signed in the partnership name. A having been compelled to pay this note,—Held, that he might recover the whole from B in an action for money paid to his use. *Cross v. Cheshire*, 21 Law J. Rep. (n.s.) Exch. 3; 7 Exch. Rep. 43.

Semble—that an affidavit sworn before the deemster of the Isle of Man is not receivable without proof that he has power to take affidavits. *Ibid.*

Where the object of the suit is the specific performance of partnership articles and the continuance of the partnership business and not for a dissolution, it is not the practice of the Court to appoint an interim receiver and manager; but, *semble*, where a partner was so conducting himself as to endanger the partnership concern, there the Court would appoint an interim receiver and manager. *Hall v. Hall*, 20 Law J. Rep. (n.s.) Chanc. 585; 3 Mac. & G. 79.

Legatees can sustain a bill against the executors and the surviving partners of their testator, although collusion between the executors and surviving partners is not alleged or proved. *Travis v. Milne*; *Milne v. Milne*, 20 Law J. Rep. (n.s.) Chanc. 665; 9 Hare, 141.

Two tenants in common of a mine had been working it jointly when a disagreement arose, and then one of them continued to work it, but the other refused to co-operate with him in doing so or in providing funds for some alleged necessary expenses, though he did not interfere with the management. The managing partner filed a bill for an account and a receiver, but did not pray a dissolution of the partnership. Upon a motion for a receiver, it was held, that the Court could not, at the instance of the managing partner, where there had been no interference on the part of the other, appoint a receiver. *Roberts v. Eberhardt*, 23 Law J. Rep. (n.s.) Chanc. 201; Kay, 148.

A prospectus was issued by the promoters of an undertaking for the establishment of a company in France as a *société en commandite*. A number of shares having been taken, the statutes of the company were drawn up in the French language, and

executed in France by the shareholders (most of them English subjects), by which the company was constituted a *société en commandite*, with limited liability, and a *conseil de surveillance* and *gérant* (or manager) appointed. The company never was registered. A bill was filed by some of the shareholders against the members of the *conseil de surveillance* and others, charging misapplication of the property of the company, and praying for an account, and for the removal of the *conseil de surveillance* and of the *gérant*, and the appointment of others to act in their stead:—Held, on demurrer to the bill, that the defendants having obtained money on representations that they were enabled to act according to the scheme of the intended association; and acquired property on the faith of those representations, the Court would secure the money and property for the benefit of those persons for whom they had undertaken to apply it, although it might be impossible to carry out the purposes for which the money was originally subscribed. *Butt v. Montezuc*, 24 Law J. Rep. (n.s.) Chanc. 99; 1 Kay & J. 98.

Exclusion is a sufficient ground for appointing a receiver in partnership cases; but partners may, by contract, provide for an exclusion on the happening of certain events. *Blakeney v. Dufaur*, 15 Beav. 40.

Upon a motion for a receiver of a partnership, the Court will not determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights. *Ibid.*

In a decree for the dissolution of a partnership, a defendant was ordered to concur in procuring the insertion of notice of dissolution in the London Gazette. *Troughton v. Hunter*, 18 Beav. 470.

A testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the goodwill of the concern. The credit in which the bank was, rendered capital unnecessary; and at the testator's death, the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account as a customer. After his death the surviving partners admitted into the firm his son, who was his executor, but who was not admitted into the firm in that character; and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor for the administration of the testator's estate,—Held, that he was not accountable to the testator's estate for the profits which he had received as a partner in the bank. *Simpson v. Chapman*, 4 De Gex, M. & G. 154.

A partnership of a great number of persons was constituted before the passing of the Joint-Stock Companies Registration Act. The members subscribed a certain sum and received a sort of scrip certificate, specifying the number of shares to which each was entitled. No deed was executed, nor was any register of shareholders kept. They occasionally held meetings, at one of which the defendant and another person were appointed sole directors and trustees of the property of the association, which consisted of mines, plant and slaves in the Brazils. The defendant survived his co-trustee, and disputes having arisen, a bill

was filed against him by the plaintiff, who was a derivative shareholder, by purchase, of one of the scrip certificates, for an account of the receipts and payments of the defendant and of the debts of the association, and for payment of such debts and a division of the profits, and for a receiver and injunction, but the bill did not pray for a dissolution. Pending a motion for a receiver and injunction, the defendant clandestinely left England for Brazil. *Quære*—whether the association was legal:—Held, that the plaintiff having been treated by the defendants as a member of the association could maintain the suit. Held, also, that he had an equity to secure the property of the association, and for that purpose a receiver was appointed. *Sheppard v. Owenford*, 1 Kay & J. 491.

PATENT.

- (A) WHEN VALID OR VOID.
 - (a) *Novelty in the Invention.*
 - (b) *New Combination.*
 - (c) *Entering Caveat against.*
 - (d) *Error in Enrolment.*
- (B) SPECIFICATION.
 - (a) *Validity and Construction of.*
 - (b) *Enrolment and Disclaimer.*
- (C) EXTENSION OF LETTERS PATENT.
- (D) REPEALING LETTERS PATENT.
- (E) ASSIGNMENT AND LICENCE TO USE.
- (F) INFRINGEMENT.
 - (a) *What amounts to.*
 - (b) *Injunction and Account.*
 - (c) *Action for.*
 - (1) *Pleas.*
 - (2) *Particulars of Breaches and Objections.*
 - (3) *Inspection of Machinery.*

(A) WHEN VALID OR VOID.

- (a) *Novelty in the Invention.*

In the ordinary process of dyeing by means of madder, the colouring matter is obtained from fresh madder by the application of hot water. The refuse, after boiling, is called "spent madder." It had long been known to dyers that a portion of the colouring matter remained in the spent madder, but it was not known how to extract it, as it remained in combination with the plant. Recently it was discovered that by means of acid and hot water the pure colouring matter of madder called "garancine," could be obtained from fresh madder, and that this process extracted all the colouring matter of the plant. The plaintiff obtained a patent for a new manufacture of garancine by applying the same process of acid and hot water to the spent madder. Since his invention the spent madder, which was previously worthless, became valuable:—Held, in an action for an infringement of the plaintiff's patent, that it was not a question of law for the Judge, but of fact for the jury, whether the plaintiff's invention was a new manufacture of garancine. *Steiner v. Heald*, 20 Law J. Rep. (N.S.) Exch. 410; 6 Exch. Rep. 607.

The defendant had obtained a patent for an

improvement in packing hydraulic and other machines by means of a lining of soft metal, the effect of which was to make certain parts of the machines air and fluid tight. Subsequently to this the plaintiff discovered that soft metal had the effect of diminishing friction, and of preventing the evolution of heat when applied to the surfaces in contact of machines in rapid motion, and subject to pressure; and he embodied the application of that discovery to machines in a patent. Held, that the plaintiff's application of the soft metal differed essentially from that of the defendant, and that the plaintiff's patent was new. *Newton v. Vaucher*, 21 Law J. Rep. (N.S.) Exch. 305; 6 Exch. Rep. 859.

A patent was taken out in 1839 for an improved method of making cast steel by fusing carburet of manganese with ordinary steel or iron. The specification applied not only to the use of the carburet of manganese itself, but to the use of its constituent parts (oxide of manganese and carbon) by introducing them separately into the crucible and fusing them with the iron. Several years before the patent was obtained five or six firms were in the habit of manufacturing steel by fusing it with oxide of manganese and carbon in the way described in the patent, and had used the steel so produced in the way of their trade and without concealment. Two only of these firms had kept the method a secret. In an action for infringing the patent, to which there was a plea denying the novelty of the invention and alleging that it had been publicly used and vended before the granting of the patent,—Held, that the above evidence supported the plea, and that the patent was invalid. *Heath v. Smith*, 23 Law J. Rep. (N.S.) Q.B. 166; 3 E. & B. 256.

Previous to a patent being granted gelatine was obtained by submitting large pieces of hides to the action of caustic alkali or by reducing them to pulp in a paper machine and employing blood to purify the product. The invention claimed consisted in cutting the hides into shavings, thin slices, or films, whereby the use of blood in the process of purification became unnecessary. The specification did not state whether they were to be cut wet or dry, or to what degree of thinness, or what was the minimum of heat they ought to be subjected to in the subsequent processes. It was proved that they might be cut either wet or dry, and that the thinner they were cut the better if the fibrine texture was preserved, and that the most satisfactory result would be obtained if no more heat was used than would dissolve the gelatine in the shortest period. The defendant cut the hides wet and about twelve to the inch:—Held, that the invention was the subject of a patent, and that the defendant had infringed it. *Wallington v. Dale*, 23 Law J. Rep. (N.S.) Exch. 49; 7 Exch. Rep. 888.

A patent had been obtained for improvements in the means and apparatus for working under water, in order to produce excavations and building foundations of lighthouses, piers, jetties, and other structures under water. The specification described a cylinder or caisson of iron, divided into compartments and chambers, which was to be sunk to the bottom of the water, in the place where the foundation was to be made. The water was to be forced out and kept out of the caisson by an air-pump, so that by means of the valves and passages specified

workmen might descend within the caisson and excavate at the bottom, and send up the materials to the surface through it. When a sufficient depth was attained, the foundation was to be laid, and built up of concrete or other materials within the caisson, each chamber of which was to be thus filled in turn, until the surface was reached, and the lower portion of the caisson itself was to be left as part of the permanent foundation, inclosing the solid mass of concrete or stone. The specification concluded by saying that the inventor claimed the mode of constructing the interior of a caisson in such a manner that the workpeople might be supplied with compressed air, and be able to raise the materials excavated, and to make and construct foundations of buildings as above described. In an action for infringement of the patent, it was pleaded that the invention was not any manner of new manufacture, and the defendants proved that a patent had been obtained for a caisson similar in its construction, but which was to be applied to facilitate excavating, sinking and mining, by keeping out, by means of the compressed air to be forced in, any water that might be met with during the operations:—Held, that the inventor claimed the construction of the caisson itself, and that as this was not new, the Judge was right in telling the jury that the invention was not a new manufacture. *Bush v. Fox* (in error), 23 Law J. Rep. (n.s.) Exch. 257; 9 Exch. Rep. 257.

The prior deposit of articles, of novel manufacture, in a warehouse for sale, is a sufficient publication to defeat a patentee's claim to novelty in the invention of similar articles. *Mullins v. Hart*, 3 Car. & K. 297

(b) *New Combination.*

A claim for a patent for improvements in the mode of doing anything by a known process, is sufficient to entitle the claimant to a patent for his improvements, when applied either to the process as known at the time of the claim or to the same process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the improvements claimed, and their application. *Electric Telegraph Co. v. Brett and Little*, 20 Law J. Rep. (n.s.) C.P. 123; 10 Com. B. Rep. 338.

There may be a patent for a combination of old and new mechanism; and such patent will be infringed by using so much of the combination as is material; and it will not be less an infringement because the result is attained by the substitution of a mechanical equivalent. *Sellers v. Dickinson*, 20 Law J. Rep. (n.s.) Exch. 417; 5 Exch. Rep. 312.

Where a patent is granted for a combination of several things, some of which are old and some new, the question for the jury is whether, taking the specification altogether, that which is claimed as a whole is new; and the imitation by a chemical or mechanical equivalent of a part of the combination, which is both material and new, is an infringement. *Newton v. the Grand Junction Rail. Co.*, 20 Law J. Rep. (n.s.) Exch. 427, note; 5 Exch. Rep. 331.

Declaration for infringement of a patent for "certain improvements in valves or plugs for the passage of water or other fluids." Pleas—not guilty; that the plaintiffs were not the first inventors; and that the invention was not new. At the trial, the plain-

tiffs put in the specification, which, after describing the invention, claimed as "the improvements" three things, each of which, taken by itself, was old:—Held, that on these issues the patentee might give evidence that the real invention he claimed was a combination of these three things, and that the specification was not conclusive evidence on this point. *Bateman v. Gray*, 22 Law J. Rep. (n.s.) Exch. 290; 8 Exch. Rep. 906.

Semble—that the specification was bad. *Ibid.*

(c) *Entering Caveat against.*

Where a caveat was lodged before the Great Seal was affixed to a patent, the Lord Chancellor declined to enter into the merits of the opposition, but referred the matter back to the Attorney General. *In re Fawcett's Patent*, 2 De Gex, M. & G. 439.

(d) *Error in Enrolment.*

Clerical error, consisting of the insertion of the name of "Charles" instead of "George" in the enrolment of a patent, ordered to be amended. *In re Dismore*, 13 Beav. 533.

(B) SPECIFICATION.

(a) *Validity and Construction of.*

A declaration in *scire facias* to repeal a patent "for improvements in instruments used for writing and marking, and in the construction of inkstands" contained suggestions, alleging want of novelty and utility in "a certain part" of the said invention; and that the defendant had not properly described the "said" invention, &c. The pleas denied all the suggestions in the declaration. Objections were filed with the declaration under the 5 & 6 Will. 4. c. 83. s. 5, specifying (*inter alia*) claim No. 6, in the specification, as objected to for want of novelty and utility. After issue joined, the defendant procured to be enrolled a disclaimer under the 5 & 6 Will. 4. c. 83. s. 1, disclaiming (*inter alia*) the claim No. 6. The claims not disclaimed were for improvements in pen-holders and pencil-cases, and in the construction of inkstands. Those disclaimed were for pens, and instruments used for marking with a stamp:—Held, first, that such disclaimer, though enrolled subsequently to issue joined, was admissible for the defendant, and to be read as part of the original specification put in by the prosecutor. Secondly, that it was not necessary to plead the disclaimer *pvis darrein continuance*. Thirdly, that the objections filed with the declaration under the 5 & 6 Will. 4. c. 83. s. 5, are not part and parcel of the record, so as to be incorporated with the issues, and shew that those specific objections are in issue; and that, therefore, it could not be taken that issue had been joined upon the objections which went to the disclaimed parts of the invention, and that those issues must therefore be tried. Fourthly, that the disclaimer, being admitted, proved the issues as to a "certain part" of the invention not being new or useful, in favour of the defendant, the prosecutor at the trial having abandoned all objections, except to the sixth claim in the specification, which had been disclaimed. Fifthly, that the title of the patent as regarded "instruments used for writing and marking" was satisfied by the inventions for improvements in pen-holders and pencil-cases, which may be described as

instruments used for writing and marking with pens and pencils. *Regina v. Mill*, 20 Law J. Rep. (n.s.) C.P. 16; 10 Com. B. Rep. 379.

Semble—in actions or suits, not being proceedings by *scire facias*, and which were not pending at the time of the enrolment of a disclaimer under the 5 & 6 Will. 4. c. 83. s. 1, the disclaimer is to be deemed and taken to be a part of the patent or specification from the time of the granting of the letters patent, and not from the time of its enrolment only. *Ibid*.

A declaration in case for the infringement of a patent, "for improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits," alleged that the defendants had used "the said invention." The specification of the patent made nine several claims in respect of different improvements. The jury having found an infringement in respect of one of such improvements, that was held to be a sufficient finding of the infringement alleged in the declaration. *The Electric Telegraph Co. v. Brett*, 20 Law J. Rep. (n.s.) C.P. 123; 10 Com. B. Rep. 838.

The title of the patent and every part of the specification in which directions were given for putting the apparatus in use, mentioned "metallic circuits" as the means by which the electric current was to be conveyed, but no claim was made in respect of such circuits. At the time of the patent it was not known, but it was subsequently discovered, that the earth might be used to complete the circuit to an extent of almost one-half of the circuit, and that metal might be dispensed with to that extent, and the defendants had always used this new discovery:—Held, nevertheless, that the defendants, having been found by the jury to have adopted a part of the plaintiffs' invention, the patent had been infringed. *Ibid*.

The jury found that "the sending of signals to intermediate stations" was a new invention of the patentees and had been adopted by the defendants. There was a distinct claim in the specification for this improvement, and the method of carrying it into effect was pointed out:—Held, that this was the proper subject of a patent; and that the idea and method being obvious and simple did not make any difference; and that the plaintiffs were entitled to a verdict in respect of such finding, although by the defendants' method signals were sent *from* as well as *to* intermediate stations. *Ibid*.

The plaintiffs' system was worked by six wires, but no specific claim was made to any particular number of wires or any particular system of making the signals. The defendants used only one wire, and made the signals in a different manner by counting repeated deflections of the needle:—Held, that a finding of the jury "that as a whole the *system* of counting with one wire and two needles is not the same as the system of the plaintiffs," did not entitle the defendants to a verdict, the plaintiffs' claim not being to any particular system, but to the particular improvements pointed out in his specification. *Ibid*.

In the specification of a patent for "improvements in looms for weaving," the plaintiff declared that his improvements applied to that class of machinery called power-looms, and consisted "in a novel arrangement of mechanism, designed for the

purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." After describing the manner in which that was done in ordinary looms, the specification proceeded thus:—"The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or slay striking against the 'frog' (which is fixed to the framing). In my improved arrangement the loom is stopped in the following manner:—I make use of the 'swell' and the 'stop-rod-finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever which bears against the 'swell,' but instead of its striking a stop or 'frog' fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre and throw a clutch-box (which connects the main driving-pulley to the driving-shaft) out of gear, and allows the main driving-pulley to revolve loosely upon the driving-shaft, at the same time that a projection on the lever strikes against the 'spring-handle' and shifts the strap; simultaneously with these two movements, the lower end of the vertical beam causes a break to be brought in contact with the fly-wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock." After the date of the plaintiff's patent, the defendant obtained a patent for "improvements in and applicable to looms for weaving," and amongst them he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus the "clutch-box" was not used, but instead of it the "stop-rod-finger" acted on a loose piece or sliding frog; but instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever, and by reason of the pin travelling on an inclined plane the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms, by means of the action of the "clutch-box" in combination with the action of the break, was new and useful; also that the plaintiff's arrangement of machinery for bringing the break into connexion with the fly-wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially the same as the plaintiff's:—Held, upon these findings, first, that the specification was good; secondly, that the defendant had infringed the patent. *Sellers v. Dickinson*, 20 Law J. Rep. (n.s.) Exch. 417; 5 Exch. Rep. 312.

The specification of a patent for improved arrangements for raising ships' anchors, claimed as the invention of the patentee, a cable-holder, which it described thus:—"The scolloped shell in which the iron chain cable appears in the drawing is upon a new plan, to hold, without slipping, a chain cable of any size, as shewn by the opening form of the scollops at the top and bottom of figure 2." It also claimed as the invention of the patentee, "the new form of a scolloped shell (as shewn in figure 2), in conjunction with the arrangements hereinbefore described." A drawing

attached to the specification shewed that the inner sides of the cable-holder and the scollops were not to be parallel, but should converge towards the centre of the cable-holder. In an action for an infringement of the patent, it was proved that the specification and drawings would enable a competent workman to make a cable-holder which would hold chains of different sizes:—Held, that the specification did not sufficiently describe the nature of the invention; that it was at least ambiguous whether it was an invention of a cable-holder to hold a chain and carry one size, or to hold cables of different sizes, and was therefore bad. *Hastings v. Brown*, 22 Law J. Rep. (n.s.) Q.B. 161; 1 E. & B. 450.

A obtained a patent for "an improved turning-table for railway purposes," and in his specification gave a description of the machinery, of which no part was, in fact, new, except certain suspending rods. The combination, however, was both new and useful. In the specification, the patentee claimed as his invention the "improved turning-table hereinbefore described, such my invention being to the best of my knowledge and belief entirely new":—Held, that the specification was insufficient for not shewing what was new and what old. *Holmes v. the London and North-Western Rail. Co.*, 22 Law J. Rep. (n.s.) C.P. 57; 12 Com. B. Rep. 531.

Declaration for infringement of a patent for "certain improvements in valves or plugs for the passage of water or other fluids." Pleas—Not guilty; that the plaintiffs were not the first inventors; and that the invention was not new. At the trial, the plaintiffs put in the specification, which, after describing the invention, claimed as "the improvements," three things, each of which, taken by itself, was old. *Batesman v. Gray*, 22 Law J. Rep. (n.s.) Exch. 290; 8 Exch. Rep. 906.—*Semle*—That the specification was bad.

The plaintiff took out a patent for "improvements in machinery for raising and impelling water," and his specification described his machinery as consisting of a wheel with hollow spokes into which water was introduced, and which, being made to rotate, expelled the water in the spokes, and caused a corresponding portion of water to rise up and supply its place, thereby maintaining a continuous flow. The specification described the wheel as part of the machinery, and stated that the patentee did not confine himself to the number or use of hollow spokes, but in some cases proposed to substitute circular discs with water channels between, and generally to construct the wheel of any configuration so as it had channels in the interior for the passage of the liquids, and was adapted to neutralize the effects of suction by having a corresponding degree of suction on each side. The specification disclaimed the plaintiff's being the discoverer that liquids may be raised by centrifugal force, or the sole application of machinery for raising water by centrifugal force, and claimed as the invention the construction of machinery, for raising and impelling water by means of introducing it into compressed air by virtue of centrifugal force imparted thereto by such machinery, and was the application of the before-mentioned inventions, both when used in combination or separately. The use of a hollow wheel for raising water by virtue of centrifugal force was not a new invention; but the plaintiff's improvement consisted in a new combination of the

hollow wheel with suction pipes placed on each side of it, so as to admit the water on both sides of the wheel, and thereby preserve its equilibrium:—Held, (in an action for infringing the patent) that the specification was bad, as it described the wheel as part of the invention, and did not clearly shew that it was old, and not claimed by the plaintiff. *Telley v. Easton*, 23 Law J. Rep. (n.s.) Q.B. 77; 2 E. & B. 956.

(b) Enrolment and Disclaimer.

A patent was granted "for improvements in the manufacture of gelatinous substances, and in the apparatus to be used therein," with the usual proviso as to the enrolment of the specification within six months. Before the expiration of the six months, the grantee assigned all his interest in the patent. He then, by leave of the Solicitor General, disclaimed that part of the title contained in the words "and in the apparatus to be used therein," a copy of which disclaimer was filed by the Clerk of the Patents of England, the original having been duly certified. In an action by the assignee of the grantee for an infringement, the declaration stated the patent to have been granted for "certain improvements in the manufacture of gelatinous substances and the apparatus to be used therein;" and also stated the specification, the disclaimer, and the assignment:—Held, upon an issue as to the specification of the said invention being enrolled, that no objection could be taken that the apparatus specified was not new. *Wallington v. Dale*, 23 Law J. Rep. (n.s.) Exch. 49; 7 Exch. Rep. 888.

Held, also, that the disclaimer by the grantee after the assignment was valid as soon as it was entered of record. *Ibid*.

Held, also, that the filing of a copy of the disclaimer was a sufficient compliance with the provisions of the 5 & 6 Will. 4. c. 83. s. 1. *Ibid*.

In an action by the assignee of a patent for its infringement, the declaration alleged that, after the assignment, the grantee of the patent, pursuant to the statute 5 & 6 Will. 4. c. 83. entered with the clerk of the patents a disclaimer of part of the title of the invention. Plea, that, before the making of the disclaimer, the grantee assigned the patent to the plaintiff, and at the time of making the disclaimer was not a person who could not lawfully enter such disclaimer; without this, that, pursuant to the statute, he entered the disclaimer, *modo et forma*:—Held, that, under this traverse, the only issue raised was, whether, in point of fact, a disclaimer was entered by the grantee. *Wallington v. Dale*, 6 Exch. Rep. 284.

(C) EXTENSION OF LETTERS PATENT.

An importer of a foreign invention, by which the public is benefited, is entitled to be put on the same footing as an original inventor, when applying for a prolongation for such foreign importation. *In re Berry's Patent*, 7 Moore, P.C. 133.

In a case, therefore, where the invention was of considerable commercial value, and the importers had embarked a large capital upon machinery in trying to introduce it to general use, and incurred considerable loss in so doing, the Judicial Committee recommended an extension of the letters patent for six years. *Ibid*.

To entitle an equitable assignee to appear with the

legal assignees of a patent, on a petition for a prolongation of the letters patent, the name of such equitable assignee must appear with the other petitioners, in the advertisements, required by section 4. of the statute 5 & 6 Will. 4. c. 83, and rule 2, made in pursuance thereof. *In re Noble's Patent*, 7 Moore, P.C. 191.

The importer of an invention from abroad is an inventor within the meaning of the statute 5 & 6 Will. 4. c. 83, and entitled to apply for an extension of the term. *In re Claridge's Patent*, 7 Moore, P.C. 394.

But the Judicial Committee will look with jealousy into the merits of the invention imported. *Ibid.*

Application for an extension by the trustees of a joint-stock company (the assignees of the patentee) refused; the invention imported having been in common use in France, and no great risk or expenditure incurred by the patentee or his assignees in introducing it to the public. *Ibid.*

Application, under the statute 14 & 15 Vict. c. 99, s. 6, by parties who opposed an extension of letters patent, for production and inspection of the petitioners' accounts previous to the hearing of the petition refused, with costs. *In re Bridson's Patent*, 7 Moore, P.C. 499.

Costs given to all the opposers upon petitioner's abandoning petition before hearing. *Ibid.*

Where the petition is abandoned, it is not necessary that the opposers should serve the petitioners with notice of their intended application. *Ibid.*

On a petition for prolongation of letters patent, a day was fixed for hearing. Objections were lodged against an extension. Before the hearing the petitioners abandoned the prosecution of the petition. In such circumstances, costs of opposition allowed to opposer. *In re Hornby's Patent*, 7 Moore, P.C. 503.

The Judicial Committee will not permit a party to be heard in opposition to an application for a prolongation of the term of letters patent unless a *caveat* has been entered in his name. *In re Lowe's Patent*, 8 Moore, P.C. 1.

Any one of the public has a right to enter a *caveat* and to be heard in opposition at the hearing. *Ibid.*

The circumstance of there being *lis pendens*, respecting the validity of the letters patent, is no objection to the grant of an extension of the original letters patent. *In re Heath's Patent*, 8 Moore, P.C. 217.

Term of letters patent extended for seven years on the ground of the meritorious nature of the invention, and the extensive litigation the patentee had been put to in protecting his patent rights which had prevented any remuneration. *Ibid.*

Form of Order in Council, pursuant to the statute, 15 & 16 Vict. c. 83. s. 40, directing the Lord Chancellor to make and seal new letters patent, upon the report of the Judicial Committee recommending an extension of the term, under the provisions of the statutes 5 & 6 Vict. s. 83. and 7 & 8 Vict. c. 69. *Ibid.*

No accounts were kept by the deceased patentee of the expenditure or receipts on account of his patent. Upon its appearing that his estate was of little value (his effects being sworn for administration under 100*l.*) the petitioner, the administratrix of the patentee, on the allegation that there had been no profits, but considerable loss, to such estate, was examined to prove that fact. *Ibid.*

Where letters patent (for improvements in machinery, tools, or apparatus for cutting, planing, turning, drilling, and rolling metals) embraced several subjects, one only of which, namely, the rolling of metals, had been worked out, and that part of the patent was affected by subsequent patented improvements by the same patentee, and could not be effectually used without such subsequent improvements, the Judicial Committee, before recommending an extension of the term of the first patent, put the petitioner upon terms of disclaiming all the parts of the original patent not worked out, and restricted the prolongation to the unexpired term of the subsequent patents. *In re Bodmer's Patent*, 8 Moore, P.C. 282.

The provisions of section 25. of the statute 15 & 16 Vict. c. 83, enacting that letters patent obtained in the United Kingdom for patented foreign inventions are not to continue in force after the expiration of the foreign patent, apply only to patents granted in the United Kingdom subsequent to the passing of that statute. *Ibid.*

(D) REPEALING LETTERS PATENT.

Semble—that on a trial upon a *sci. fa.* to repeal a patent, the *onus probandi* is on the prosecutor, and that he must shew that the patent is void on some one of the grounds contained in the suggestions, and that if the jury think that the case is left in doubt, they ought to find for the defendant. Under the statute, the effect of a *caveat* lodged at the chambers of the Attorney General is merely to entitle the party lodging it to notice. *Regina v. Cutler*, 3 Car. & K. 215.

Application for liberty to sue on a bond given to the clerk of the Petty Bag for securing costs to the defendant in *scire facias* to repeal a patent. *Regina v. Mill*, 14 Beav. 312.

Pending a proceeding in *sci. fa.* to repeal a patent, the patentee disclaimed a part, under the 5 & 6 Will. 4. c. 83. The prosecutor still proceeded, and ultimately failed:—Held, that he ought to pay the costs subsequent to the disclaimer. *Ibid.*

After a judgment in *scire facias* in the Court of Queen's Bench annulling letters patent, and directing that they should be restored to the Court of Chancery to be cancelled, the Lord Chancellor has no jurisdiction to stay the execution of the judgment—his duty in cancelling the enrolment being only ministerial. *Regina v. the Eastern Archipelago Co.*, 4 De Gex, M. & G. 199.

Where a petition is presented in the Petty Bag in Chancery to the Lord Chancellor, the clerk of the Petty Bag is the proper officer to draw up the order pronounced on such petition. *Ibid.*

A writ of *scire facias* having issued out of Chancery to repeal certain letters patent, the patentee presented a petition to the Common Law side of the Court, alleging, that the writ contained improper recitals and suggestions, which, if used as a defence in an action at law for the infringement of a patent, would be inadmissible, and praying that the writ might be quashed, or reformed, by striking out the objectionable matter: the Lord Chancellor declined to exercise the jurisdiction reserved to him by the 46th section of the Act 12 & 13 Vict. c. 109, on the ground that, by the 39th section of that act, jurisdiction, in such cases, was conferred on the Judges of the

superior courts of common law, and that they could more satisfactorily dispose of the question of pleading involved in the case. *Regina v. Hancock*, 5 De Gex, M. & G. 332.

(E) ASSIGNMENT AND LICENCE TO USE.

[See *Tielens v. Hooper*, title COVENANT, (C). *Bower v. Hodges*, title COVENANT, (F) (c); and *Hills v. Laming*, title DED, (C) (e).]

The plaintiffs, the assignees of a patent, granted a licence to the defendant to use the patent upon the terms of his paying an annual rent of 2,000*l.*, to be made up at the end of each year; and reserved to themselves the power of determining the licence in the event of default being made in payment of this rent. The defendant failed in paying the rent; but the plaintiffs, notwithstanding, for several years allowed the defendant to use the patent, and received from him a less annual sum than that stipulated. At length, however, they determined the licence, having subsequently to the expiration of the previous year, received from the defendant payments on the footing of the reduced rent:—Held, that, by so doing, the plaintiffs had elected not to treat the previous breach as a forfeiture of the licence, and that consequently they were not entitled to an injunction restraining the defendant from using the patent. *Warwick v. Hooper*, 3 Mac. & G. 60.

(F) INFRINGEMENT.

(a) What amounts to.

[See *The Electric Telegraph Co. v. Brett*, ante, (B) (a).]

In the specification of his patent for improvements in the manufacture of iron and steel, the plaintiff declared the nature of his invention to be, "the use of carburet of manganese in any process whereby iron is converted into cast steel;" and he specified the manner of his invention to be, by putting portions of blistered steel into a crucible together with three per cent. weight of carburet of manganese, which latter substance is formed by a combination of oxide of manganese and carbon under great heat. Previous to the plaintiff's patent, oxide of manganese had been tried, but unsuccessfully, to be used in the making of cast steel, for when put into the pots with the steel it combined with the carbon in the substance of the pots and spoiled them; but neither carburet of manganese nor its component elements together had been so used. After the plaintiff had obtained his patent he made very superior cast steel by the process described, first making the carburet of manganese by subjecting the oxide and carbonaceous matter together to a great heat in a separate crucible, and then putting it into the crucible containing the blistered steel in a state of fusion. The defendant afterwards made cast steel by putting the oxide and the carbonaceous matter and the pieces of blistered steel together at the same time into the same pot, and thus made the same superior cast steel at a less expense, making one pot and one heating serve the whole process. It was shewn that the oxide and carbonaceous matter combined and formed carburet of manganese at a lower degree of heat than was requisite to melt the steel, and that the carburet when so formed afterwards combined with the steel. On the question whether the de-

fendant had, by so making cast steel, infringed the plaintiff's patent,—Held, by the majority of the Court, that there was evidence of an infringement, inasmuch as the plaintiff's patent was not limited to the particular mode of using the carburet described in his specification, and that the defendant, by the process adopted by him, had either used carburet of manganese or a known chemical equivalent for that substance (namely, its elements) in the manufacture of cast steel. But held, by the minority, that there was no infringement, as, though the defendant had used an equivalent for the carburet (namely, its known component parts), it was not, at the time when the patent was granted, known to scientific persons that the component parts of the carburet were equivalent to the carburet itself, applied according to the specification for producing the desired result; and they thought that the defendant's process was an improvement on the plaintiff's patent, and not an infringement of it. *Heath v. Unwin* (in error), 22 Law J. Rep. (N.S.) C.P. 7; 12 Com. B. Rep. 522.

A patent was taken out, the title of which was (after a disclaimer of part) for "improvements in the manufacture of candles." The specification stated the invention to relate to "a mode of manufacturing candles by the application of two or more plaited wicks in each candle," and set out at length the mode of so placing the wicks that in burning the ends always turned outwards. In an action for infringement, the defendants pleaded not guilty. At the trial a candle was produced which had been made at the defendants' manufactory, in which the wicks turned outwards in burning, but no evidence was offered of the mode in which it was made:—Held, that there was no evidence of infringement, the patent being for the mode of manufacturing such a candle, and not for the candle itself. *Palmer v. Wagstaffe*, 23 Law J. Rep. (N.S.) Exch. 217; 9 Exch. Rep. 494.

The specification of a patent for improvements in wheels described the invention as consisting of a mode of forming a wheel of one solid piece of wrought iron, by means of welding pieces of wrought iron together so as to form the rim, spoke and nave into one compact mass. Defendants used a wheel made by welding pieces of wrought iron together so as to form a single compact piece of wrought iron: the mode of forming the nave was the same as that in the specification; the mode of forming the rim was different:—Held that, it appearing that the mode of forming the nave was a material, new and useful part of the invention, the use of it by defendants was an infringement of the patent, although, in the specification, after describing the whole structure, the invention was stated to consist in the circumstance of the centre boss, or nave, arms and rim, of the wheel being wholly composed of wrought iron welded into one solid mass "in manner hereinbefore described." *Smith v. the London and North-Western Rail. Co.*, 2 E. & B. 69.

Where A and B are tenants in common of a patent assigned to them, if B dies, actions for infringements committed in B's lifetime survive to A, who is entitled at law to recover the whole damages. *Ibid.*

(b) Injunction and Account.

Under the 82nd section of the Common Law Procedure Act, 1854, this Court will grant only a rule

nisi in the first instance for an injunction against a defendant in an action for infringing a patent; and on cause being shewn, it will give such directions as would be given by a Court of equity. *Gittins v. Symes*, 24 Law J. Rep. (N.S.) C.P. 48; 15 Com. B. Rep. 362.

The right to an account in respect of articles manufactured and used, in violation of a patent, is ancillary to the right to an injunction; and, therefore, where the case for the injunction fails, an account will not be decreed. *Smith v. the London and South-Western Rail. Co.*, 23 Law J. Rep. (N.S.) Chanc. 562; Kay, 408.

The owners of a patent, which expired in 1849, being aware of infringements of their patent by A B and by C D, after a lengthened negotiation, brought an action against A B in 1852. The validity of the patent was disputed, but the action resulted in a verdict in favour of the patentees. No notice had previously been given to C D; but, upon this verdict being given, application was made to C D for an account as to the articles made and used by him prior to the expiration of the patent. This being refused, a bill was filed against C D for discovery, for an account, and also for an injunction as to the articles made during the existence of the patent; but the bill was dismissed, with costs, on the ground of delay. *Ibid.*

Where a patent had been in force for twelve years, and had been the subject of four suits against different persons, all of which terminated favourably to the patentee, and in two of which verdicts had been given in favour of the validity of the patent,—Held, that, in a fifth case, the patentee was entitled to an injunction pending the trial of the legal right, although a fresh fact was brought forward tending to impeach the novelty of the invention. A patentee does not acquiesce in the infringement of his patent by omitting to proceed by *fiat facias* to set aside a subsequent patent extending to part of his invention, unless such subsequent patent is put in practice. *Newall v. Wilson*, 2 De Gex, M. & G. 282.

An allegation as to the defendant's inability to be amenable in damages,—Held, not irrelevant upon a motion for an injunction against the infringement of a patent. *Ibid.*

Where the patentee of an invention has obtained a verdict against the defendant for infringing the patent, the Court will compel the defendant to render to the plaintiff an account of all articles made by him in imitation of the patented articles of the plaintiff, and to pay to the plaintiff a sum equal to the price of those which he had sold, and a further sum equal to the value of so many of such articles as the defendant has remaining in stock. *Holland v. Fox*, 23 Law J. Rep. (N.S.) Q.B. 211; 3 E. & B. 977.

Under the Patent Law Amendment Act, 15 & 16 Vict. c. 83, where an action has been brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not be granted before final judgment. Neither does the act give power to order an inspection of the defendant's books containing entries relating to such sales. But, upon reasonable evidence of the existence of a valid patent, and of its having been infringed by the defendant, and of the defendant's making a profit by such infringement, the defendant will be ordered to keep an account of all sales to be

made of the article alleged to be an infringement of the plaintiff's patent, and of the profits thereon, until the further order of the Court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment should be in favour of the defendant, to pay to the defendant the expense of keeping such account. *Vidi v. Smith*, 23 Law J. Rep. (N.S.) Q.B. 342; 3 E. & B. 969.

The 42nd section of the 15 & 16 Vict. c. 83, enables the Court in which any action for the infringement of a patent is pending, "to make such order for an injunction, inspection and account," as may to such Court seem fit:—Held, that this vests in the Courts of common law the powers before exercised exclusively by Courts of equity, and enables them to grant either by interlocutory order an account of all patent articles sold during the suit, or, after verdict for the plaintiff and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action and after notice that an account would be required. *Holland v. Fox*, 23 Law J. Rep. (N.S.) Q.B. 357; 3 E. & B. 977.

But the Court has no power, where damages, nominal or substantial, have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the suit, the damages assessed by the jury being considered as the compensation for the loss of such profits. *Ibid.*

(c) Action for.

(1) Pleas.

In an action for the infringement of a patent, *non concessit* and a traverse of the specification may both be pleaded. *Platt v. Elce*, 22 Law J. Rep. (N.S.) Exch. 192; 8 Exch. Rep. 364.

On an application for leave to plead several matters by way of traverse, an affidavit by the defendant's attorney, that he is advised and believes that the defendant has just ground to traverse the several matters proposed to be traversed by the proposed pleas, is sufficient. *Ibid.*

In an action for infringement of a patent, the Court disallowed the following plea: that the plaintiff, having petitioned for letters patent, represented to the Solicitor General, to whom the matter was referred, that the invention consisted of matters mentioned in a paper writing exhibited to the Solicitor General (setting it forth), who, confiding therein, reported that the letters patent might be granted; that, after the grant of the letters patent, the plaintiff enrolled his specification in certain terms and falsely described his invention therein; and that so much of the invention as was stated in the specification was not part of the invention in the paper writing and letters patent mentioned, and was not part of the invention for which the letters patent were granted. *Hancock v. Noyes*, 23 Law J. Rep. (N.S.) Exch. 110; 9 Exch. Rep. 888.

The plaintiffs, who were the owners of a patent for obtaining oil from bituminous coal, charged the defendants with an infringement of their patent. The bill stated the patent and the specification, and also referred to various publications, and other means by which it had obtained notoriety, in the whole of which J Y, one of the plaintiffs, was represented as the inventor; and after alleging that such would ap-

pear if the defendants answered the bill, the plaintiffs sought to obtain a discovery, not only of the plaintiffs' trade, but also of the processes they used in their manufactory. To this bill the defendants put in a plea, that J Y was not the first or true inventor, and except as to the discovery, they answered such parts of the bill as were not covered by the plea:—Held, upon this plea, that the facts which could not be laid before a jury as evidence in an action at law, brought by the plaintiffs, under an order of this Court, for an infringement of their patent, were covered by the answer, but that if other defences had been set up, the defendants might have been compelled to answer the other parts of the bill; and the plea was allowed, but leave was given to amend the order under which the action was brought, that the issue at law might be confined to the sole defence raised by this plea. *Young v. White*, 23 Law J. Rep. (N.S.) Chanc. 190; 17 Beav. 532.

(2) Particulars of Breaches and Objections.

In an action for infringement of Talbot's patent for "improvements in obtaining pictures or representations of objects," the Court refused to compel the plaintiff in his particulars of breaches to specify particularly the persons and occasions, or the particular parts of the specification alleged to have been infringed,—although the declaration merely averred an infringement in general terms. *Talbot v. La Roche*, 15 Com. B. Rep. 310.

The defendant's particulars of objection in support of his pleas in an action for the infringement of a patent for the manufacture of candles, after alleging that the invention was not new, stated that it had been used by the plaintiff and certain other persons who were named, "and by candle-makers generally in London and the vicinity thereof":—Held, that this was a sufficient compliance with the statute 15 & 16 Vict. c. 83. s. 41, which requires such particulars to state the place or places at or in which the invention is alleged to have been used. *Palmer v. Wagstaffe*, 22 Law J. Rep. (N.S.) Exch. 295; 8 Exch. Rep. 840.

Upon special paper days a counsel cannot bring on a contested motion when called upon to move for his argument. *Ibid*.

Particulars of objections delivered under the 15 & 16 Vict. c. 83. s. 41. by a defendant in an action for an infringement of a patent must state the place at or in which the invention is alleged to have been used or published prior to the date of the letters patent, and no evidence of such prior user or publication will be admitted if the particulars of objection are defective on this point. *Palmer v. Cooper*, 22 Law J. Rep. (N.S.) Exch. 82; 9 Exch. Rep. 231.

Where the plaintiff in an action for the infringement of a patent is nonsuited, the defendant is not entitled on taxation to any costs in respect of particulars of objections delivered with the pleas in pursuance of section 41. of the Patent Law Amendment Act, 1852, (15 & 16 Vict. c. 83), unless such particulars are certified by the Judge to have been proved under section 43. *Honiball v. Bloomer*, 24 Law J. Rep. (N.S.) Exch. 11; 9 Exch. Rep. 231.

(3) Inspection of Machinery.

An application to inspect the defendant's machinery may be made by the plaintiff under the new

Patent Act, 15 & 16 Vict. c. 83. s. 42, before the delivery of the declaration in an action for infringement of the plaintiffs' patent; but such inspection will not be granted as of course or without the party applying for it shewing that the inspection is material for the purposes of the cause. *Amies v. Kelsey*, 22 Law J. Rep. (N.S.) Q.B. 84; 1 Bail C.C. 123.

In an action for the infringement of a patent, the Court will not grant an order, under the 15 & 16 Vict. c. 83. s. 42, for inspection of a machine upon an affidavit "that the machine used by the defendant is the same for which the plaintiff has obtained a patent." *Shaw v. the Bank of England*, 22 Law J. Rep. (N.S.) Exch. 26.

The plaintiff, having brought an action against the defendants for an alleged infringement of a patent for the use of certain machinery, was, in company of two scientific witnesses, allowed an inspection of the machinery complained of as an infringement. That action was afterwards discontinued, and a fresh action brought after the passing of the 15 & 16 Vict. c. 83, and the plaintiff applied, under section 42, for a second inspection. The Court refused to make the order, on the ground that there had already been an inspection. *Shaw v. the Bank of England*, 22 Law J. Rep. (N.S.) Exch. 210.

PAUPER.

[See titles COSTS—PRACTICE.]

PAVING.

[See titles METROPOLITAN PAVING ACT—WAY.]

PAWNBROKER.

[By stat. 17 & 18 Vict. c. 90, abolishing the usury laws, pawnbrokers' rate of interest remains the same.]

A pawnbroker who fills up the ticket which he gives to the person pawning, according to the information received from him either at the time of the article being pawned or on previous occasions, complies with the provisions of the 39 & 40 Geo. 3. c. 99. s. 6, unless he knows such information to be false. *Attenborough v. London*, 22 Law J. Rep. (N.S.) Exch. 251; 8 Exch. Rep. 661.

Semble—that where property is pledged to which the pledgor has no title, and which he has no right to pledge, the pledgee is bound to return it to the true owner; his undertaking, in the absence of a special contract to the contrary, being that he will return it to the pledgor, provided it turns out not to be the property of another. *Cheeseman v. Eccell*, or *Axall*, 20 Law J. Rep. (N.S.) Exch. 209; 6 Exch. Rep. 341.

To carry on pawnbroking business without disclosing the partners is a contravention of the 39 & 40 Geo. 3. c. 99. *Fraser v. Hill*, 1 Macq. H.L. Cas. 392.

No pawnbroking contract stipulating to conceal the name of any partner can be valid. *Ibid*.

But if the contract were legal in its inception,

the mode of carrying it on would not render it illegal. Therefore an equivocal exception which might mean either that the contract was illegal in its inception or that the mode of carrying it on had rendered it illegal.—Held, a bad exception. *Ibid.*

PAYMENT.

[See title ACCORD AND SATISFACTION.]

- (A) WHAT AMOUNTS TO.
- (B) PLEA OF PAYMENT.
 - (a) *When necessary.*
 - (b) *Distributive Plea.*
 - (c) *Proof of.*
- (C) OF MONEY INTO COURT.

(A) WHAT AMOUNTS TO.

[See *Turney v. Dodwell*, title LIMITATIONS, STATUTE OF, *ante*, p. 453.]

A broker who had received money for the shippage of goods on account of the owners of the ship, offered to pay it to the captain, who was also managing owner, by a cheque. This the captain declined, preferring that the broker should open a credit for him at a bank in New Brunswick in favour of H, which the broker did. The bank accordingly paid H 250*l.*, for which H gave a bill drawn by him in favour of the bank upon the broker, who accepted and paid it when due. The broker having sued the co-owners for the balance of his account,—Held, that this was a good payment of 250*l.* by the broker and binding the co-owners. *Anderson v. Hillies*, 21 Law J. Rep. (N.S.) C.P. 150; 12 Com. B. Rep. 499.

To an action of debt on simple contract, the defendant pleaded, that after the accruing of the debts and causes of action, and before suit, the plaintiff drew a bill on one A B, who accepted the bill, and delivered it to the plaintiff for and on account of the said debts and causes of action, and that the plaintiff received it from A B on such account; that the plaintiff, before suit, indorsed the bill to C D, who was still the holder and entitled to sue A B thereon:—Held, a good answer to the action. *Belshaw v. Bush*, 22 Law J. Rep. (N.S.) C.P. 24; 11 Com. B. Rep. 191.

Wankford v. Wankford, *Ayloffe v. Scrimpsire* and *Stracey v. the Bank of England* considered and explained. *Ibid.*

In an action for work done, the defendants pleaded that the work was done under an agreement made by the plaintiff with the defendants to build a church on certain terms; that the plaintiff stopped the works until another agreement was entered into with T P for completing the work; that T P paid the consideration money under the second agreement, and that the plaintiff accepted the second agreement, and the performance thereof by T P in full satisfaction and discharge of the agreement between the plaintiff and the defendants:—Held, that this plea was bad in substance, because it did not shew that the agreement and payment made by T P were made on behalf of the defendants, or that they adopted them; the case thereby being distinguishable from *Belshaw v. Bush*. *James v. Isaacs*, 22 Law J. Rep. (N.S.) C.P. 73; 12 Com. B. Rep. 791.

The treasurer of a corporation paid to their former clerk (the defendant) his year's salary, both parties believing him authorized to make the payment. In fact, he had no such authority, and the corporation afterwards repudiated the payment, and discharged the defendant from his situation. The defendant kept the money, treating it as having been paid on behalf of the corporation. The plaintiff having, as the present clerk to the corporation, brought this action to recover a sum of money paid to the defendant on account of the corporation, and the defendant having pleaded as a set-off the sum so paid to him for his salary, the plaintiff relied on the payment of the salary as an answer:—Held, that the payment was an answer to the set-off, the corporation being entitled to ratify the act of their treasurer at the time of trial. *Simpson v. Eggington*, 24 Law J. Rep. (N.S.) Exch. 312; 10 Exch. Rep. 845.

(B) PLEA OF PAYMENT.

(a) *When necessary.*

[See Reg. Gen. Trin. term, 16 Vict., rr. 13, 14, 22 Law J. Rep. (N.S.) ii; 1 E. & B. App. lxxxii.]

A declaration in debt claimed 44*l.* The only plea was payment and acceptance of 15*l.* in satisfaction of the debt. After issue joined on a traverse to the plea, a verdict was found for the defendant:—Held, that the plaintiff was not entitled to judgment *non obstante veredicto*, because, although the general rule of law is, that payment of a smaller sum cannot be pleaded in satisfaction of a larger, yet, since the Reg. Gen. Trin. term, 1 Vict., which relieves the defendant from pleading payment when a plaintiff by his particulars gives credit for a payment, the Court will after verdict presume, unless the contrary be proved, that the plaintiff may have delivered particulars, giving credit for payments and so reducing the balance sought to be recovered to an amount less than that covered by the sum stated in the plea. *Turner v. Collins*, 20 Law J. Rep. (N.S.) Q.B. 259.

(b) *Distributive Plea.*

[See stat. 15 & 16 Vict. c. 76. s. 75.]

Where the plaintiff at the trial proved a debt of 11*l.* 18*s.* 1*d.*, and the defendant established a defence under one plea as to 18*s.*, under a set-off as to 7*l.* 8*s.*, and also a payment of 4*l.* after the commencement of the suit, thus affording an answer to the whole of the plaintiff's demand,—Held, that the payment having been made after the commencement of the suit, the plaintiff was entitled to a verdict with nominal damages, on the plea of set-off. *Spradbery v. Gillam*, 20 Law J. Rep. (N.S.) Exch. 237; 6 Exch. Rep. 422.

(c) *Proof of.*

A joint and several promissory note had been given by the defendant and K to the plaintiffs. K agreed with L and the plaintiffs that the plaintiffs should take L's promissory note in satisfaction of the defendant's liability on his joint and several note. The plaintiffs, having taken L's note on that understanding, received payment of it from R, authorized by L to pay it:—Held, that in an action on the first note, the above facts might be given in evidence under a plea alleging payment by the defendant.

Thorne v. Smith, 20 Law J. Rep. (N.S.) C.P. 71; 2 L. M. & P. P.C. 43.

On a settlement of accounts between the plaintiff and the defendant, the latter over-paid the plaintiff 1*l.* 1*1s.* 5*d.*, which they then agreed should go in discharge of the plaintiff's ensuing account. The plaintiff having afterwards done work for the defendant, sued him in debt on the common counts for the amount:—Held, that the defendant had a good defence as to 1*l.* 1*1s.* 5*d.* under the general issue. *Smith v. Winter*, 21 Law J. Rep. (N.S.) C.P. 158; 12 Com. B. Rep. 487.

A, being indebted to B in 25*l.*, on an over-due bill, gave B 9*l.* and a fresh bill for the balance of the 25*l.* and interest on renewal, and asked B to take the money and the new bill in lieu of the old one. B refused to do so, and returned the fresh bill to A, but kept the 9*l.* though A demanded it back:—Held, per *Pollock, C.B.* and *Platt, B.*, that this was evidence to support a plea of payment of 9*l.*; per *Parke, B.* and *Martin, B.*, that it proved a set-off only, and not a payment, for that payment *post diem* requires the assent of both parties, and this payment was clogged with a condition which B refused to comply with. *Thomas v. Cross*, 21 Law J. Rep. (N.S.) Exch. 251; 7 Exch. Rep. 723.

By the rules of a 50*l.* money club, each member was to pay a weekly sum for each of his shares, and to take his share by sale as the sum of 50*l.* was paid in by the members, upon giving security to be approved of by the committee. Interest was to be paid from immediately after the sale. B being a member of such club for a 40*l.* share (which was subject to similar rules as the 50*l.* shares) became a purchaser of a 40*l.* share, and together with the defendant and another person gave a joint promissory note to the treasurer of the club for 40*l.* payable on demand with interest. The weekly payments were duly made for some time by A and his sureties, but on their being discontinued an action was brought upon the note for the full amount:—Held, that the weekly payments were not evidence under a plea of payment. *Jones v. Gretton*, 22 Law J. Rep. (N.S.) Exch. 247; 8 Exch. Rep. 773.

(C) OF MONEY INTO COURT.

[See stat. 15 & 16 Vict. c. 76. ss. 70, 71, 72, 73, and titles BOND—DETINUE.]

Debt for work and labour. Pleas, except as to 10*l.* parcel, &c. never indebted; secondly, as to 10*l.* other parcel, &c. payment; thirdly, as to 10*l.* excepted, payment into court of 10*l.* in full satisfaction of the said sum of 10*l.* and damages by reason of its non-payment. Replications, joining issue on the first plea; traversing the payment alleged in the second plea; and to the third plea, that the plaintiff accepted and took out of court the amount paid in, in satisfaction of the causes of action in that plea alleged, and prayed judgment for his costs in that respect. A verdict was found for the plaintiff on the plea of never indebted, for 10*l.* beyond the sum paid into court, and for the defendant on the second plea:—Held, that the plaintiff was entitled, under Reg. Gen. Trin. term, 1 Vict., to have allowed him, on taxation, all his costs of suit in respect of the cause of action to which the plea of payment into court had been pleaded, including the costs of the replication to that plea. *Rum-*

below v. Whalley, 20 Law J. Rep. (N.S.) Q.B. 262; 16 Q.B. Rep. 397.

Payment into court in tort has the same effect as payment into court in actions of *indebitatus assumpsit*, namely, that of admitting a cause of action, with damages, amounting to the sum paid into court. *Story v. Finnis*, 20 Law J. Rep. (N.S.) Exch. 144; 6 Exch. Rep. 123.

Payment into court in tort has the same effect as in actions of *indebitatus assumpsit*, namely, that of admitting a cause of action with damages amounting to the sum paid into court; but it has not the effect of admitting the cause of action stated in the declaration. *Story v. Finnis* supported; *Leyland v. Tancred* overruled. *Schreger v. Carden*, 21 Law J. Rep. (N.S.) C.P. 135; 11 Com. B. Rep. 851.

To an action of trover for the conversion of three cows and two calves, the defendant pleaded that the conversion of the cattle in the declaration mentioned, and for which the action was brought, was the sale of the cattle by the defendant, after he had, as surveyor of highways, seized and impounded them according to the statute. The plea then alleged payment of 10*l.* into court, and no damages *ultra*:—Held, on demurrer, that the plea was bad, not being warranted by the Reg. Gen. Hil. term, 4 Will. 4. s. 17. *Key v. Thimbleby*, 20 Law J. Rep. (N.S.) Exch. 292; 6 Exch. Rep. 692.

Where the declaration in tort is general and unspecific, the payment of money into court admits a cause of action, but not the cause of action sued for; and the plaintiff must give evidence of the cause of action sued for before he can have larger damages than the amount paid into court. If the declaration is specific, so that nothing can be due to the plaintiff from the defendant, unless the defendant admits the particular claim made by the declaration, payment of money into court admits the cause of action sued for, and so stated in the declaration. *Perren v. the Monmouthshire Rail. and Canal Co.*, 22 Law J. Rep. (N.S.) C.P. 162; 11 Com. B. Rep. 855.

The declaration stated a contract by the defendants to carry the plaintiff from N to E, and a negligent breach of duty in the performance of that contract, and damage to the plaintiff. Plea, payment of 25*l.* into court. Replication, damages *ultra*:—Held, that the payment into court admitted the contract and the breach of duty; and that as the damages were single, and depended solely on the breach of duty admitted, the plaintiff was not bound to prove negligence in order to entitle him to recover more than 25*l.* *Ibid.*

Plea in the general form given by the Common Law Procedure Act of payment into court of 2*l.*, and that the same was enough to satisfy the claim of the plaintiff. Replication, that the defendant did what was complained of under circumstances which did not enable him to pay money into court in the action, and that there was not any statute under or by virtue of which the defendant was authorized or entitled so to do:—Held, upon demurrer, that although the action was one in which the defendant could only be entitled to pay money into court under the special provisions of a statute, still that the plea in the above general form was good, and the replication, therefore, bad. *Thompson v. Sheppard*, 24 Law J. Rep. (N.S.) Q.B. 5; 4 E. & B. 53.

PERJURY AND FALSE DECLARATIONS.

[See OATH.]

- (A) THE OFFENCE OF PERJURY.
- (B) INDICTMENT FOR.
- (C) COSTS OF PROSECUTOR.
- (D) EVIDENCE.
- (E) FALSE DECLARATIONS.

(A) THE OFFENCE OF PERJURY.

An arbitrator, appointed by an order of a county court, under the 77th section of the statute 9 & 10 Vict. c. 95, has no authority to administer an oath, and consequently false swearing by a party sworn before him in the course of a reference is not perjury. *Regina v. Hallett*, 20 Law J. Rep. (N.S.) M.C. 197; 2 Den. C.C. 237.

On the trial of an ejectment, with a view to prove probate of J's will, P falsely and wilfully swore that he had examined an entry on the copy of the will, which he produced, with the entry in the Act Book of the Ecclesiastical Court of L. The entry did not purport to be a copy of the Act of Court granting probate, but was merely a memorandum of proceedings in the Ecclesiastical Court of L, copied from a book called the Act Book. The Judge was willing to receive the document in evidence, but ultimately it was withdrawn. It was a material question on the trial, whether J died before a particular person:—Held, as the probate of J's will would have been evidence material to the issue, and the document was offered as proof of the probate, and P's statements were made with a view to procure the admission of the document in evidence, that P's false evidence was sufficiently material to render him indictable for perjury, although the document was not legally admissible as proof of the probate. *Regina v. Phillpotts*, 21 Law J. Rep. (N.S.) M.C. 18; 3 Car. & K. 135.

On the hearing of an application for a bastardy order before Justices, a witness gave false evidence on oath material to the inquiry. A similar application against the same party for the same matter had been previously heard, and dismissed on the merits:—Held, that whether the first dismissal of the application was conclusive or not, by way of defence, the Justices, on the second inquiry, had jurisdiction to try the case, and that, therefore, the false swearing was perjury. *Regina v. Cook*, and *Regina v. Hickling*, 21 Law J. Rep. (N.S.) M.C. 136.

In an action in the county court by an executrix, for goods sold, she falsely swore, on cross-examination, that she had never been tried at the Old Bailey, and had never been in custody at the Thames Police Station:—Held, on the trial of an indictment for perjury, that this evidence was material. *Regina v. Lavey*, 3 Car. & K. 26.

Semble—That whether the evidence be material or not, is a question to be left to the jury. *Ibid.*

(B) INDICTMENT FOR.

An indictment for perjury alleged, that on the trial of a certain indictment it was material to inquire whether the prisoner "ever got one Milo Williams to write a letter for her." It then averred that the prisoner on such trial swore "that she never got a

Mr. Milo Williams (he, the said Milo Williams, being then present in court during the said trial) to write a letter for her." It then proceeded, "whereas in truth and in fact the said M. A. Bennett did get the said Milo Williams to write a letter for her." It was proved that on the trial of the indictment referred to, the prisoner swore that she never got Mr. Milo Williams (who was pointed out to her in court) to write a letter for her; that a particular letter was then shewn to her, and the question put as to this letter, and that she repeated her denial:—Held, that the materiality of the matters assigned as perjury was sufficiently alleged; and that Mr. Milo Williams respecting whom the perjury was assigned, was sufficiently connected with the one Milo Williams mentioned in the preceding part of the indictment. *Regina v. Bennett*, 20 Law J. Rep. (N.S.) M.C. 217; 2 Den. C.C. 241.

An indictment for perjury alleged that in the W County Court of Middlesex, holden, &c. before J M &c., then and there being the Judge of the said court, a certain action on contract then pending in the said court between A L &c. and R H &c. came on to be tried, and was then and there in due form of law heard and tried by and before the said J M, then and there being the Judge of the said county court as aforesaid. Upon which said hearing and trial the said A L &c. tendered herself as a witness on her own behalf, and was then and there, &c. duly sworn, &c., before the said J M, then and there being Judge of the said court as aforesaid, and then and there having sufficient and competent authority to administer the said oath to the said A L in that behalf:—Held, that the indictment sufficiently shewed that the court was a county court constituted under the statute 9 & 10 Vict. c. 95. *Lavey v. Regina*, 21 Law J. Rep. (N.S.) M.C. 10; 17 Q.B. Rep. 496.

Held, also, that although it was not expressly alleged that the action pending in the county court, on the trial of which the oath was administered, was one over which that Court had cognizance, yet, that the jurisdiction of the Court over the action sufficiently appeared from the allegation that the action was pending in the court and came on to be tried, and that the Judge had sufficient and competent authority to administer the oath. *Ibid.*

An indictment for perjury, which charges that the defendant "feloniously, corruptly, knowingly, wilfully and maliciously" swore, &c., omitting the word "falsely," but concluding "and so the defendant in manner and form aforesaid did commit wilful and corrupt perjury," is bad. *Regina v. Oxley*, 3 Car. & K. 317.

(C) COSTS OF PROSECUTOR.

Where a defendant was convicted on an indictment, for perjury in an affidavit, removed by himself by *certiorari* into the Court of Queen's Bench, the prosecutors were held entitled to costs under the statute 5 & 6 Wm. & M. c. 11. as "parties grieved or injured," although the false swearing failed of its effect and the prosecutors were only interested as executors in the suit in which the false affidavit was made. *Regina v. Major*, 21 Law J. Rep. (N.S.) M.C. 221; 1 Dears. C.C. 13.

(D) EVIDENCE.

On the trial of an indictment against the prisoner for perjury in falsely swearing that only one quar-

ter's rent was due from him to his landlord in June 1851, the prosecutor, the landlord, swore that five quarters' rent were due at that time. The prosecutor's son also swore that in August 1850 the defendant admitted to him that three or four quarters' rent were then due:—Held, that the evidence of the prosecutor's son did not corroborate his father's evidence so as to justify the jury in convicting the prisoner of perjury, as what the son deposed to was equally consistent with the truth of the prisoner's statement as with that of the prosecutor. *Regina v. Boulter*, 21 Law J. Rep. (N.S.) M.C. 57; 3 Car. & K. 236.

An indictment for perjury, at the Central Criminal Court, charged the prisoner with having committed the perjury on the trial of one D, on a previous indictment for a misdemeanour in the same court:—Held, that the minutes and entries of the trial of D made by the officer of the court, and produced by him on the trial of the indictment for perjury, were good evidence to prove that D had been so tried as alleged, and that it was not necessary to produce any record or certificate of the trial of D. *Regina v. Newman*, 21 Law J. Rep. (N.S.) M.C. 75; 2 Den. C.C. 390.

(E) FALSE DECLARATIONS.

To support an indictment on the statute 6 & 7 Will. 4. c. 86. s. 41, for making a false statement touching the particulars required to be registered for the purpose of their being inserted in a register of marriage, it is essential that the false statement should have been made wilfully and intentionally, and not by mistake only. *Regina v. Dunboyne*, 3 Car. & K. 1.

Whether prosecution for this offence need not be commenced within three years, *quære*. Ibid.

PLEADING, AT LAW.

(A) IN GENERAL.

- (a) *Entitling*.
- (b) *Immaterial Statements*.
- (c) *Certainty*.
- (d) *Conditions Precedent*.
- (e) *Profert and Oyer*.
- (f) *Colour*.
- (g) *Videlicet*.

(B) DECLARATIONS.

- (a) *Commencement and Conclusion*.
- (b) *Common Forms*.
- (c) *Joinder of Counts*.
- (d) *Exceptions and Conditions*.
- (e) *In Inferior Courts*.

(C) PLEAS AND SUBSEQUENT PLEADINGS.

- (a) *Pleas amounting to the General Issue*.
- (b) *General Issue by Statute*.
- (c) *De Injurid*.
- (d) *Traverses*.
 - (1) *General*.
 - (2) *Special*.
- (e) *Nul Tiel Record*.

(D) EQUITABLE DEFENCES.

(A) IN GENERAL.

- (a) *Entitling*.

[See Stat. 15 & 16 Vict. c. 76. s. 54.]

Digest, 1850—1855.

(b) *Immaterial Statements*.

[See Stat. 15 & 16 Vict. c. 76. s. 49.]

(c) *Certainty*.

A declaration against the sheriff for treble damages, under 29 Eliz. c. 4, stated in detail that five several writs of *fi. fa.* against the plaintiff were delivered to the sheriff, setting out the amount of the indorsements, and it was then averred that the sheriff afterwards, under the said several writs respectively, seized the plaintiff's goods to the value of the said writs. It then alleged that the sheriff took for executing the said writs a large sum, to wit, 52*l.* 12*s.* 3*d.*, the same being more than he was entitled to by 35*l.* 18*s.* 6*d.*, contrary to the form of the statute, whereby an action accrued to the plaintiff for 107*l.* 16*s.* 6*d.*, treble the amount of the damages. To this there was a special demurrer, for not setting out with particularity the amounts taken, and in respect of what fees the excess arose, and that it was not averred that the extortion took place within one year before the commencement of the suit:—*Semble*—that the declaration did not sufficiently shew whether there was one or more seizures, but that this objection was not sufficiently taken by the demurrer, and that in other respects the declaration was good. *Berton v. Lawrence*, 20 Law J. Rep. (N.S.) Exch. 46; 5 Exch. Rep. 816.

To a declaration for differences on the sale of railway shares, the defendant pleaded generally that the contract was by gaming (under 8 & 9 Vict. c. 109. s. 18). On demurrer, the plea was held bad for vicious generality. *Grizewood v. Blane*, 21 Law J. Rep. (N.S.) C.P. 46; 11 Com. B. Rep. 538.

To an action on a bond, the defendant pleaded that after the making of the writing obligatory, an agreement was made by and between the plaintiff and the defendant, and divers other persons, and sealed with the seal of the plaintiff, and that it was agreed, by the said agreement, that the said agreement might be pleaded by the defendant in bar to all demands and proceedings with respect to the alleged claim:—Held, that the plea ought to have set out so much of the deed as operated as a release, and to have expressly averred that the deed did so operate, and that the above plea was, therefore, bad. *Wilson v. Braddyll*, 23 Law J. Rep. (N.S.) Exch. 227; 9 Exch. Rep. 718.

A declaration stated that the plaintiff entered into the service of the defendant for a term of three years, under an agreement that he, the plaintiff, would during that time use his best endeavours to promote the interests of the defendant, and would attend to and carry out all reasonable requests:—Held, in an action for wrongful dismissal before the end of the term that a plea that the plaintiff did not whilst in the defendant's employ use his best endeavours to promote the interests of the defendant according to the agreement, wherefore he was dismissed, disclosed a good defence. *Arding v. Lomas*, 24 Law J. Rep. (N.S.) Exch. 80; 10 Exch. Rep. 734.

(d) *Conditions Precedent*.

[See stat. 15 & 16 Vict. c. 76. s. 57.]

A building contract between A and B contained a proviso that the payments thereby agreed to be

made by B should only be due provided the certificate of the surveyor of B for the time being should first be obtained. A having sued in *indebitatus assumpsit* for the balance alleged to be due,—Held, that under the general issue, the absence of the certificate was a good answer to the action, and that the plaintiff was not at liberty to shew that it was withheld fraudulently and in collusion with the defendant. *Milner v. Field*, 20 Law J. Rep. (N.S.) Exch. 68; 5 Exch. Rep. 829.

In an action by the vendor against the purchaser of an estate for the non-payment of the residue of the purchase-money, the declaration stated, that on, &c., in consideration of 90*l.* then paid to the plaintiff by the defendant, and the further sum of 820*l.* to be paid to the plaintiff on the 1st of November then next, the plaintiff agreed to sell and the defendant agreed to buy a certain messuage, &c., and to pay the plaintiff the residue of the said purchase-money on the 1st of November then next; and that thereupon a conveyance of the said premises and the freehold and inheritance thereof should be made to the defendant by all proper parties at the expense of the plaintiff, provided that the plaintiff should not be liable to pay the expenses of any attorney whom the defendant should employ to investigate the title; and the plaintiff agreed to deduce a good marketable title to the premises, but the defendant was to be satisfied with the usual conveyance of the freehold of the premises from the lords of the manor, &c. That it was further agreed upon between the plaintiff and the defendant that, if the completion of the purchase should from any cause on the part of the plaintiff be delayed beyond the said 1st of November, the defendant should pay interest on the unpaid portion of the purchase-money, at the rate of 10*s.* per cent., and if the delay should be caused by the defendant, at the rate of 5*l.* per cent., from the 1st of November until the day of payment, the defendant being entitled to the rents and profits and to the possession of the said premises on and from the said 1st of November. The declaration contained a general averment that the plaintiff had performed all things on his part, &c. The defendant pleaded, first, that the plaintiff was not ready and willing to convey the premises; secondly, that the plaintiff did not deduce a good marketable title; and thirdly, that the plaintiff did not tender any deed for conveying the premises to the defendant; and these pleas each concluded with a verification:—*Seemle*—that, according to the construction of the agreement, the defendant was not bound to pay the residue of the purchase-money until a good title to the premises was made out by the plaintiff, and he was ready to convey to the defendant; but, held, that as the declaration contained a general averment of performance by the plaintiff of his part of the agreement, and the defendant had pleaded over, the declaration was good; and, that the pleas were bad on special demurrer for concluding with a verification. *Manby v. Cremonini*, 21 Law J. Rep. (N.S.) Exch. 288; 6 Exch. Rep. 808.

In a declaration for the non-delivery of goods purchased, an averment of performance by the plaintiff of all conditions precedent, and that all things have been done and happened to entitle the plaintiff to have the goods delivered is sufficient without an averment of his readiness and willingness

to pay. *Bentley v. Dawes*, 23 Law J. Rep. (N.S.) Exch. 220; 10 Exch. Rep. 734.

(e) *Profert and Oyer.*

[See 15 & 16 Vict. c. 76. ss. 55, 56.]

Where a party under section 56. of the 15 & 16 Vict. c. 76. sets out any omitted part of a document pleaded by his opponent, the latter is not called upon to make any answer to it. *Regina v. the Sadlers Co.*, 22 Law J. Rep. (N.S.) Q.B. 451; 1 Bail C.C. 183.

Since the abolition of *profert* and *oyer* by the Common Law Procedure Act, the Court may, on proper cause being shewn, interfere, under its common law jurisdiction, in an action brought by a plaintiff, as executor, to order a stay of proceedings till probate be taken out and notice thereof given to the defendant. *Webb v. Atkins*, 23 Law J. Rep. (N.S.) C.P. 96; 14 Com. B. Rep. 401.

Action on an award: plea setting out the award and concluding with a demurrer to the declaration:—Held, that by section 56. of the 15 & 16 Vict. c. 76. the award was part of the plea and not of the declaration, so as to enable the defendant to demur; and judgment was given for the plaintiff. *Sim v. Edmonds*, 23 Law J. Rep. (N.S.) C.P. 229; 15 Com. B. Rep. 240.

Seemle—that the defendant ought to have set the award out in his plea with or without a prayer of judgment, so as to enable the plaintiff either to traverse and raise any question of fact as to its being the award declared on, or to demur and raise any question of law as to its construction. *Ibid.*

(f) *Colour.*

[No longer necessary in pleading; see 15 & 16 Vict. c. 76. s. 64.]

(g) *Videlicet.*

When a contract is alleged in pleading to have been for “a certain” time or amount, it is sufficient to prove that some specific time or amount was agreed upon, and it is not necessary to prove the precise time or amount laid under a *videlicet*. *Harris v. Phillips*, 20 Law J. Rep. (N.S.) C.P. 120; 10 Com. B. Rep. 650; 2 L. M. & P. P.C. 164.

The declaration stated that the plaintiff promised to hire horses from the defendant, and employ them for a certain space of time, to wit, for the space of one year, and to pay the plaintiff for the use thereof certain hire and reward, to wit, 50*l.* a year for each of the horses, payable quarterly:—Held, that the allegations after the *videlicet* were immaterial; that although it was proved that the hiring was for a week, and from week to week, at the hire of 50*l.* a year for each horse, payable weekly, there was no fatal variance; that the words “hire and reward” include time as well as amount, and therefore that the words “payable quarterly” were covered by the *videlicet* as well as the sum. *Ibid.*

(B) DECLARATIONS.

(a) *Commencement and Conclusion.*

[Forms for, see stat. 15 & 16 Vict. c. 76. ss. 59, 60.]

(b) *Common Forms.*

[See 15 & 16 Vict. c. 76. schedule.]

A declaration alleged that "the defendants were indebted to the plaintiff for freight," for the conveyance of goods, &c.:—Held, bad in substance, it not appearing that the debt was a money debt, or that it was payable before the commencement of the action, but an amendment was allowed. *Place v. Potts*, 22 Law J. Rep. (N.S.) Exch. 269; 8 Exch. Rep. 705.

An action of debt is not maintainable upon an agreement that the defendant would carry certain goods for the plaintiff, in consideration that the defendant would carry a like quantity for the defendant. *Bracegirdle v. Hincks*, 23 Law J. Rep. (N.S.) Exch. 128; 9 Exch. Rep. 361.

A declaration stating that the plaintiff sues the defendant for money found to be due from the defendant to the plaintiff upon accounts stated between them, is a sufficient compliance with the form given in the schedule to the Common Law Procedure Act. *Fagg v. Mudd*, or *Nudd*, 23 Law J. Rep. (N.S.) Q.B. 289; 3 E. & B. 650.

A declaration alleged that the plaintiff sued the defendant "for freight for the conveyance by the plaintiff for the defendant, at his request, of goods in ships," &c.:—Held, sufficient after pleading over. *Wilkinson v. Sharland*, 24 Law J. Rep. (N.S.) Exch. 116; 10 Exch. Rep. 724.

The forms given by the 15 & 16 Vict. c. 76. sched. B, should be followed when applicable. *Ibid.*

(c) *Joinder of Counts.*

[See s'at. 15 & 16 Vict. c. 76. s. 41; and Reg. Gen. Trinity term, 1853, 22 Law J. Rep. (N.S.) xii.; 1 E. & B. App. lxxviii.]

(d) *Exceptions and Conditions.*

In an action by the freighters against the ship-owner for breach of a charter-party of affreightment, the declaration stated that it was agreed that the vessel should sail to S H and there load coals and proceed to L and deliver the cargo, a certain amount of freight being payable per ton (*the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation of whatever nature and kind during the said voyage always excepted*). That the charter-party should be in force for six voyages, and that they should not be made later than the last day of February 1853. Averment, that the plaintiffs did all things necessary to entitle them to have the six voyages performed, and had always been ready and willing to do all things required, yet the vessel did not make the six voyages, and that the defendant did not permit the vessel for the fourth time, or for any time except three times after the making of the charter, to proceed to S H and load coals. Plea, that after the making of the charter-party and before the breach, the last day of February had expired:—Held, on demurrer, first, that the plea was bad; secondly, that the declaration was good, it not being necessary for the plaintiffs to negative the fact of the defendant being within any of the exceptions in the charter-party, it being the duty of the defendant, if he relied upon such exception, to plead it. *Wheeler v. Bawdige*, 23 Law J. Rep. (N.S.) Exch. 221; 9 Exch. Rep. 668.

To a declaration upon a written agreement, by which the plaintiff agreed to purchase of the defendant his unexpired term in a farm, and all the crops, &c., alleging that the defendant had not delivered up possession, the sixth plea stated that the defendant in his lease covenanted with the lessor not to assign without his consent; that the defendant, being desirous of parting with the farm, applied to the agent of the lessor, who stated that if he could find a successor eligible as tenant in the landlord's opinion, after they had had an opportunity of inquiring and a reference, there would be no obstacle; that the agreement was made for the purpose of J M becoming occupier of the farm, and the defendant was induced by the plaintiff and the said J M to enter into the said agreement on the faith and belief that the plaintiff knew, and the plaintiff, to induce the defendant to enter into it, represented, that J M was a person of respectability, and eligible, &c., and could give references; whereas J M was not a person of respectability, and could not give references, &c., as the plaintiff well knew:—Held, that the sixth plea was a good, though informal, plea of fraud; and that the representation was material to the agreement, and not collateral—distinguishing *Feret v. Hill*. *Canham v. Barry*, 24 Law J. Rep. (N.S.) C.P. 100; 15 Com. B. Rep. 597.

(e) *In Inferior Courts.*

The Common Law Procedure Act applies to all pleadings pleaded in the superior courts, whether the action was originally commenced there or not. *Messiter v. Rose*, 22 Law J. Rep. (N.S.) C.P. 78; 13 Com. B. Rep. 162.

A declaration stated that the defendant agreed to serve the plaintiff, and not to leave his service without notice. Breach, that he left without notice. Plea, that the plaintiff insulted the defendant, and therefore the defendant gave notice that he should leave forthwith, and that he did leave. The plaintiff, without leave of the Court or a Judge, replied, taking issue on the plea, and further said that the notice in the declaration was a reasonable notice, and that the notice in the plea was not. The defendant thereupon signed judgment under section 86. The Court, without deciding that the judgment was regular, made absolute a rule for setting it aside on terms. *Ibid.*

(C) *PLEAS AND SUBSEQUENT PLEADINGS.*(a) *Pleas amounting to the general Issue.*

In an action on the *indebitatus* counts, the defendant pleaded that the debt was due for certain hops bargained and sold, that the plaintiff produced a sample at the bargain and sale, and promised to deliver the hops equal in quality and description to the sample, and that the hops were not equal in quality and description, wherefore the defendant refused to accept them, and broke his promise:—On special demurrer, the plea was held bad, as amounting to the general issue. *Dawson v. Collis*, 20 Law J. Rep. (N.S.) C.P. 116; 10 Com. B. Rep. 523; 2 L. M. & P. C. 14.

Seemle—that on a sale of specific goods, with a warranty that they correspond to a sample, the vendee cannot refuse to receive them on account of their not corresponding, without an express condition to that effect; but that he is left to bring his cross-

action, or to avail himself of the breach of warranty in reduction of damages in an action for the price. [Commenting on *Street v. Blay*, 2 B. & Ad. 456.] *Ibid*.

The declaration claimed 1,000*l.* for goods sold and delivered, goods bargained and sold, and on an account stated. The plea, pleaded as to 191*l.*, parcel, &c., averred that the debt to that amount was for goods bargained and sold. *Quære*—whether the plea would not have been bad, on special demurrer, for attempting to limit the plaintiff in his proof as to the sum of 191*l.* *Ibid*.

A declaration stated, that the plaintiffs were the promoters of a railway company, and the defendants members of a managing committee of a provisionally registered railway company, and that the defendants were indebted to the plaintiffs in 3,000*l.* for certain plans, sections and books of reference, sold and delivered by the plaintiffs to the defendants, and by them used, and also for work and materials. Plea, that at, &c. each of the said companies was a joint-stock company within the meaning of the Joint-Stock Companies Registration Act (the 7 & 8 Vict. c. 110), and not being a banking company; that it consisted of more than twenty-five members; and that a contract was made between the plaintiffs, as such promoters of the first company, on behalf of the same company, and the promoters, of whom the defendants then were two, of the said secondly-mentioned company, whereby the plaintiffs agreed that they, the plaintiffs, and the said first-mentioned company should perform certain services for the said secondly-mentioned company, which said services and the said payment of which were not necessarily required for the establishing of the said company, or either of them; that the work was done by the plaintiffs in their character of promoters, and an account stated also in the same character; and that neither of the companies was completely registered as required by the said act of parliament, or incorporated by statute or charter, or authorized by statute or letters patent to sue and be sued in the name of any officer or person; and that the said plans, sections and books of reference at the time of the making of the said contract, and at the time of the said sale, &c., and using of the said plans, sections and books of reference were stores not necessarily required for the establishing of the said company; of all which premises the plaintiffs had notice at the time of the said making of the said contract and promise, and at the time of the said doing the said work and providing the said materials, and so selling and delivering, depositing, appropriating and using the said plans, sections and books of reference, and so paying the said money, &c.:—Held, that as the contract for services and work was forbidden by the act, and was therefore illegal, the plea was not bad on special demurrer as amounting to non assumpsit; and that it was good on general demurrer, as it was a good answer to the action. *Bull v. Chapman*, 22 Law J. Rep. (N.S.) Exch. 257; 8 Exch. Rep. 444.

(b) *General Issue by Statute.*

[See *Thomas v. Stephenson*, title WEIGHTS AND MEASURES.]

The clerk of a county court, against whom an action of trespass is brought, may give special matter in evidence under a plea of “not guilty by

statute,” by virtue of the 13 & 14 Vict. c. 61. s. 19. *Dews v. Ryley*, 20 Law J. Rep. (N.S.) C.P. 264; 11 Com. B. Rep. 434; 2 L. M. & P. P.C. 544.

Case against the keeper of the Queen's Prison for not having the body of a debtor before the Exchequer pursuant to a writ of *habeas corpus ad satisfaciendum*. Plea, not guilty by statute. The defendant had in his custody a debtor, detained at the suit of the plaintiff on a *ca. sa.* from the Palace Court. The debtor subsequently petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110. s. 35. On the 7th of January the vesting order was made. On the 27th of March the plaintiff sued out a *habeas corpus ad satisfaciendum*, returnable on the 15th of April, to charge the defendant in execution. On the 8th of April the Insolvent Court ordered the debtor to be discharged forthwith as to debts due on the 7th of January, excepting a debt due from the plaintiff, and as to that that he should be discharged as soon as he should have been in custody at the suit of the plaintiff for three months to be computed from the time of the vesting order. The warrant, dated the 9th of April, directed the discharge of the debtor in conformity with the terms of the vesting order, and on that day the prisoner was discharged. The defendant, on the 15th of April, returned to the writ of *habeas* that the debtor was discharged by a warrant of the Insolvent Court:—Held, that the defendant was entitled to give the act and the special matter in evidence under the plea of not guilty by statute, pursuant to the 1 & 2 Vict. c. 110. s. 110. *Harvey v. Hudson*, 20 Law J. Rep. (N.S.) Exch. 11; 5 Exch. Rep. 845.

Quære—if the defence was open to the defendant under the plea of not guilty. *Ibid*.

The Municipal Corporations Act, 5 & 6 Will. 4. c. 76, by section 76, provides that constables appointed for a borough shall, not only within the borough, but also within the county in which such borough is situate, have all such powers and privileges and be liable to all such duties as any constable duly appointed now has, or hereafter may have, within his constableness by virtue of the common law or of any statute made or to be made; and by section 133, in all actions against any person for anything done in pursuance of that act, the defendant may plead the general issue, and give the special matter in evidence thereunder. The defendant, who was a borough constable appointed under the 5 & 6 Will. 4. c. 76, was sued in replevin for an act done in discharge of his duty as a constable under that act, beyond the limits of the borough, but within the county in which the borough was situate:—Held, that he was entitled, under the general issue of *non cepit*, to give the special matter of defence in evidence. *Mellor v. Leather*, 22 Law J. Rep. (N.S.) M.C. 76; 1 E. & B. 619.

The Court allowed the defendant to amend a plea of “not guilty by statute,” by inserting in the margin statutes necessary to justify the trespass complained of, after verdict for the defendant and a rule *nisi* to set it aside. *Edwards v. Hodges*, 24 Law J. Rep. (N.S.) M.C. 81; 15 Com. B. Rep. 477.

(c) *De Injuriâ.*

[See *Worsley v. the South Devon Rail. Co.*, title LANDS CLAUSES ACT, (D) (b) (1).]

In trespass for breaking and entering the plaintiff's house and taking his goods, defendant pleaded a justification under a *fi. fa.* and warrant of execution against the goods of one G H, which warrant was delivered to the defendant, a bailiff, to be executed, and that under the authority of the same the defendant entered, &c. The plaintiff replied *de injuria*, admitting the writ, the making of the warrant, and the delivery thereof to the bailiff.—Held, that the existence of a warrant was admitted by the replication, and that the defendant was not bound to prove it. *Hewitt v. Macquire*, 21 Law J. Rep. (N.S.) Exch. 30; 7 Exch. Rep. 80.

Trespass for breaking and entering the plaintiff's house and seizing his goods. Plea, that one Thomas held a house as tenant to P, that the rent was in arrear, that the said goods being the goods of Thomas were fraudulently and clandestinely carried off by him from his house to prevent a distress, and were with the plaintiff's consent placed in the plaintiff's house, whereupon the defendant as bailiff of P seized the goods as a distress. Replication, that the goods were not the goods of Thomas, nor were they fraudulently and clandestinely carried off by him, &c.:—Held, on special demurrer for duplicity, that the replication was good. *Thomas v. Watkins*, 21 Law J. Rep. (N.S.) Exch. 215; 7 Exch. Rep. 630.

(d) *Traverses.*

(1) *General.*

The Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76. ss. 77, 79), allowing a plaintiff to traverse the whole of a defendant's plea by a general denial, only enables him to traverse generally what he might have traversed in part before; and where a plaintiff, before the Common Law Procedure Act, must have new assigned, he must do so still. *Glover v. Dixon*, 23 Law J. Rep. (N.S.) Exch. 12; 9 Exch. Rep. 158.

To a declaration for trespass the defendant pleaded a justification under a prescriptive right to enter a close and dig sand, alleging that the trespasses were committed in the exercise of that right, and the plaintiff joined issue on that plea:—Held, that the issue was proved by evidence of the right, although at the time of the trespass complained of the defendant did not exercise the right; and that the plaintiff ought to have new assigned. *Ibid.*

(2) *Special.*

The first count of a declaration averred that the plaintiffs C and S, being tenants to H of certain chambers, at a certain rent, payable quarterly, undertook them to the defendant, who undertook to pay the said rent to H, and agreed that if he did not do so, he would indemnify the plaintiffs in respect thereof, and that the defendant did not pay the rent to H, nor indemnify the plaintiffs. Pleas.—Sixth, surrender by operation of law; seventh, that the plaintiff C, on behalf of himself and the plaintiff S, agreed with the defendant that he should give up possession of the chambers, and that he did give up possession before the rent became payable; eighth, that C, with the sanction and authority of his co-plaintiff, evicted the defendant; eleventh, (to counts for use and occupation, and on an account stated,) discharge of the defendant under the Insolvent Debtors Act. Replication to the sixth plea, a special traverse, alleging that the defendant quitted possession of his

own wrong; and that, according to the terms of an agreement, the plaintiffs recovered possession of the chambers, to the intent that they might let them for the benefit of the defendant, and not otherwise, *absque hoc* they were duly surrendered:—Held bad, on demurrer, because the inducement was inconsistent with the traverse. *Smith v. Lovell*, 20 Law J. Rep. (N.S.) C.P. 37; 10 Com. B. Rep. 6.

Replication to the seventh plea, traversing the agreement by the plaintiff C on behalf of himself and S, and his performance of the agreement; and replication to the eighth plea, traversing the eviction by C, with the sanction and authority of S:—Held bad, on general demurrer, as both being too large, from putting in issue the fact that C had authority from B. *Ibid.*

In a special traverse, both the inducement and the traverse should be sufficient. The test whether the traverse be sufficient or not is, whether the former pleading would be sufficient if the allegation traversed were struck out of it. *Foster v. Crabb*, 21 Law J. Rep. (N.S.) C.P. 209; 12 Com. B. Rep. 379.

In detinue for a deed, the defendant pleaded that S, one of two co-trustees, under the deed, for the plaintiff, the *cestui que trust*, got possession of the deed; that S delivered it to the defendant, to be redelivered to him on request, and that the defendant detains the deed on behalf of S, and by his authority. The plaintiff replied, that G, and not S, was possessed of the deed, and delivered it to the defendant at the request and by the authority of the plaintiff, and that the defendant holds the deed by virtue of such request and authority, *absque hoc* that S delivered the deed to the defendant, *modo et formâ*:—Held, that the replication was good. *Ibid.*

(e) *Nul Tiel Record.*

The declaration in an action for slander alleged the plaintiff to be a trader, and that the words were spoken of him as a trader. The words were "He cheated me" (meaning that the plaintiff in the way of his trade was dishonest). "He is a thief and robbed me of 100*l.*" (meaning that the plaintiff in the way of his trade had contracted a debt with the defendant, and in a dishonest manner avoided paying part of it). There were other similar words similarly explained in other counts. There was then an averment of special damage. Plea, judgment recovered for the same grievances. Replication *nul tiel record*. On the trial by the record, a record of a previous action for slander by the plaintiff against the defendant was produced, in which the words were, "that thief is a villain, a scoundrel and a rascal, and I can prove him a thief any moment." In that action there was no inducement that the words were spoken of the plaintiff as a trader, and no averment of special damage:—Held, that the record produced did not support the plea that the grievances for which the judgment had been recovered were the same. *Wadsworth v. Beniley*, 23 Law J. Rep. (N.S.) Q.B. 3; 1 Bail C.C. 203.

Where on an issue on a plea of *nul tiel record* there appeared a variance between the sum recovered, as stated in the declaration and on the record, on motion for judgment the Court allowed the declaration to be amended, by inserting the amount as it appeared by the record. *Hunter v. Emmanuel*, 24 Law J. Rep. (N.S.) C.P. 16; 15 Com. B. Rep. 290.

(D) EQUITABLE DEFENCES.

The 83rd section of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125), which permits equitable defences in "all causes," applies only to causes where there are pleadings, and therefore does not apply to the action of ejectment, in which all pleadings are abolished by the 163th and 178th sections of the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76). *Neave v. Avery*, 24 Law J. Rep. (N.S.) C.P. 207; 16 Com. B. Rep. 328.

By the 178th section of that act, the issue in ejectment is to be made up by the plaintiff without pleadings; and therefore, where the plaintiff, instead of making up the issue, demurred to an equitable plea which the defendant had pleaded, the Court struck the demurrer out of the paper, leaving the plaintiff to apply for leave to strike out the plea and make up the issue. *Ibid*.

It is not necessary, in order to give the Court power to grant a defendant leave to plead an equitable defence along with other pleas, (under the Common Law Procedure Act, 1854, s. 83.) that the defendant should be entitled to unconditional relief in equity—contrary to *The Mines Royal Societies v. Maynay*. *Chilton v. Carrington*, 24 Law J. Rep. (N.S.) C.P. 153; 16 Com. B. Rep. 206.

In an action of detinue for a lease, the Court allowed the defendants, along with pleas traversing the detention and the property, to plead a plea stating that a previous action had been brought by one P for the detention of the same lease, and judgment for damages recovered, and that 150*l.*, as security for which the lease had been deposited, had not been paid, and a further plea, professing to be a "defence on equitable grounds," under the 83rd section of the Common Law Procedure Act, which alleged that the lease was deposited as security for the payment of 150*l.* by way of equitable mortgage, that the money was still due, and that the defendant had, after the commencement of the former action, tendered and offered to deliver up the lease on the payment of the money, and had tendered the costs of the action up to that time. *Ibid*.

The effect of giving the common law courts jurisdiction to receive defences on equitable grounds is to enable parties to set up only what would be absolute defences in equity. *Phelps v. Prothero*, 24 Law J. Rep. (N.S.) C.P. 255; 16 Com. B. Rep. 370.

In an action of trover the following plea was allowed to be pleaded, with other pleas, upon an affidavit of its truth: "That the plaintiff was the owner of certain chemical works; that the goods for which the action was brought were stock in trade and materials on the premises; that the defendant agreed to purchase the said chemical works from the plaintiff, and that the goods in question were included in the goods sold; that certain brokers were employed by the plaintiff and the defendant to make the contract; that they made it by bought and sold notes, and that by mistake of the brokers they so made the notes that they include the goods in question; that possession of the chemical works, with the goods in question, have been delivered to the defendant, and that the purchase has been completed, and the purchase-money paid; and that the plaintiff is unjustly availing himself of what was a mistake in the drawing of the bought and sold notes so as before mentioned made

by the brokers." *Steele v. Haddock*, 24 Law J. Rep. (N.S.) Exch. 78; 10 Exch. Rep. 643.

The plaintiffs having brought an action against the defendant, who was their tenant of a mill, for breaches of covenant in a lease as to paying rent and repairing, the defendant proposed to plead the following plea as an equitable defence: that it was agreed between the plaintiffs and the defendant that the defendant should surrender by yielding up to the plaintiffs the premises in his occupation; and permitting the plaintiffs to receive the rent, and the tenants of the other portions to attorn, and that the defendant should pay the sum of 250*l.* and give up a quantity of machinery to the plaintiffs, in consideration of the tenancy being put an end to and in discharge of all claims under the said lease. That the defendant accordingly paid such sum of money and delivered up the lease, and withdrew from possession of the premises occupied by him, and permitted the plaintiffs to receive the rents of the tenants who were willing to attorn, and that the defendant relinquished also the machinery, and had done all conditions precedent, and had been ready and willing to do all other things necessary on his part for putting an end to the tenancy and by way of satisfaction as aforesaid; and that this action was brought in fraud and breach of the said agreement, and it was entirely the fault of the plaintiffs that such surrender was not completed.—Held, that such plea did not constitute an equitable defence, within the 17 & 18 Vict. c. 125. ss. 83, 86, (the Common Law Procedure Act, 1854,) as a Court of equity would not either compel performance of the agreement between the parties or restrain the plaintiffs from executing their judgment without at the same time compelling the defendant to execute a surrender in writing, pursuant to the Statute of Frauds; and this Court had no power to compel the defendant to execute such surrender. *The Mines Royal Society v. Maynay*, 20 Law J. Rep. (N.S.) Exch. 7; 10 Exch. Rep. 489.

The power of the Court to act under the above sections is confined to cases where they are empowered to grant an injunction absolute and without terms. *Ibid*.

PLEADING, IN EQUITY.

- (A) BILL.
 - (a) *Statements and Charges in.*
 - (b) *Multifariousness.*
 - (c) *Of Revivor.*
- (B) DEMURRER.
- (C) ANSWER.
- (D) PLEA.

(A) BILL.

- (a) *Statements and Charges in.*

A plaintiff in an administration suit upon a reference for taking the accounts cannot include an inquiry as to wilful neglect and default, unless there is a specific charge to that effect in the bill. The general charge of neglect and default is not sufficient. *Sawyer v. Mills*, 20 Law J. Rep. (N.S.) Chanc. 80.

The purpose of a bill of discovery is not altered

by words added to the prayer asking "that such other orders might be made as the nature of the case might require;" and a motion to dismiss the bill for want of prosecution was refused, but, in consequence of the addition to the prayer, without costs. *The South-Eastern Rail. Co. v. the Submarine Telegraph Co.*, 23 Law J. Rep. (N.S.) Chanc. 183; 18 Beav. 429.

(b) *Multifariousness.*

A bill is not multifarious because it includes matters which are incidentally included in another suit, in which it does not appear they could be satisfactorily determined, and which have become involved with other matters in the suit by reason of the dealings of the parties interested in them and other property. *Rump v. Greenhill*, 24 Law J. Rep. (N.S.) Chanc. 90; 20 Beav. 512.

The joining parties in a suit who are interested only in the shares of particular parties in the suit will not make such suit multifarious; and a demurrer to the bill in such a suit was overruled. *Ibid.*

The existence of an administration suit commenced by summons will not prevent the institution of a suit by bill, if questions necessary to be determined before administration cannot be duly raised or determined in such suit. *Ibid.*

The Court refused to make a decree in a suit for specific performance of several contracts for the purchase of lands by some on behalf of themselves and all others of the purchasers, although the lands were held by the vendors under the same title, and the contracts were made under the same circumstances, and their completion was prevented by the same accident, namely, the death of one of the two vendors, who had a joint power of appointment, but several purchasers and sub-purchasers under such distinct contracts having joined as co-plaintiffs in the same suit, and the parties interested in the estate not objecting for multifariousness, the Court decreed the specific performance of the different contracts in one suit. *Hargreaves v. Wright*, 10 Hare, App. lvi.

(c) *Of Revivor.*

A B being entitled to a share of the produce of a testatrix's real and personal estate, instituted a suit for its recovery and obtained a decree. C D afterwards filed a bill of revivor and supplement, stating that A B was domiciled at Stuttgart, and that by a decree of the Court there he had been appointed "*curator bonorum*," and directed to get in the property for A B's creditors. The bill prayed a revivor and liberty to prosecute the original suit for payment and additional relief. A general demurrer was allowed, on the ground that the relief thus prayed could only be obtained by original bill. *Stickle v. Winter*, 20 Beav. 550.

(B) DEMURRER.

A covenanted with trustees to pay an annuity for the benefit of a woman. The trustees brought an action upon the covenant against A, the deed being good upon the face of it. A pleaded that the consideration for the covenant was future illicit cohabitation between himself and the woman, and he then filed his bill against the trustees for discovery in aid of the plea. Upon demurrer to the bill by the trustees, held, reversing the order below, that A was

entitled to the discovery, notwithstanding he was *particeps criminis*. *Benyon v. Nettlefold*, 20 Law J. Rep. (N.S.) Chanc. 186; 3 Mac. & G. 94; reversing 18 Law J. Rep. (N.S.) Chanc. 445.

A plaintiff, whose case wholly fails, will not be allowed to perfect it by the gift or waiver of one defendant against another. *Hollingsworth v. Shakeshaft*, 21 Law J. Rep. (N.S.) Chanc. 722; 14 Beav. 492.

If the case made by the bill is clear, a defendant who brought the cause to a hearing instead of demurring, was refused all costs though he succeeded. *Ibid.*

A bill in equity will not lie for a simple case of debtor and creditor account of monies received and paid by one party on account of another, notwithstanding the bill alleges that the debtor sold property of such plaintiff, and received the proceeds on his account. *Phillips v. Phillips*, 22 Law J. Rep. (N.S.) Chanc. 141; 9 Hare, 471.

The plaintiff, W A, a domiciled Scotchman, through his stock-brokers in England, had various transactions for the feigned purchase and sale of shares and stock in railway and other companies; it was never intended that they should be completed by delivery of the stock, being merely time-bargains, a gambling for differences between the prices at which the shares or stock were nominally purchased and sold. The brokers obtained from W A a deposit of certain shares as security for any balance which might be due to them, and also stipulated for a bond or Judge's order both in England and Scotland as a further security. The defendants rendered an account, and then sold the deposited shares, but as the proceeds did not discharge the balance due to them, they brought an action against him in the Sheriff's Court in Scotland for the balance, and arrested his goods there, and a commission was issued for the purpose of taking evidence in England. W A then filed his bill in England, asking discovery and for an account, and for an injunction to restrain the defendants from proceeding with the action in Scotland, at the same time offering to pay what was due, and submitting all his property in Scotland, subject to the arrestments, to the jurisdiction of this Court. Upon a general demurrer to the bill,—Held, that the illegality of the transaction could not be then considered; that it was no ground for stopping the proceedings in a foreign court; that, from the allegation that evidence of the transactions could not, by the law of Scotland, be received in the Sheriff's Court from the plaintiff and the defendants, there was ground to suppose that complete justice could not be done there. The demurrer was therefore, overruled, and the costs were made costs in the cause. *Ainslie v. Sims*, 23 Law J. Rep. (N.S.) Chanc. 161.

Parties interested, not being the legal personal representatives of a testator, will not be allowed to sue persons possessed of assets of the testator, unless they satisfy the Court that such assets would probably be lost if such suit had not been instituted. *Stainton v. the Carron Company*, 23 Law J. Rep. (N.S.) Chanc. 299; 18 Beav. 146.

What acts will justify the institution of a suit by parties having no legal right to sue. *Ibid.*

A shareholder of a trading company, who was also one of its managers, appointed three persons executors and trustees of his will, two of whom were also

managers of the company. The testator, at his decease, had an account with the company, which was unsettled, and in respect of which disputes arose. Pending proceedings instituted by the executors, two of the residuary legatees filed their bill against the company and the executors for the settlement of all claims, and to obtain a transfer of the property of the testator from the company. Upon demurrer to the bill by the company, and by one of the executors and trustees who had not proved the testator's will,—Held, that in order to maintain the suit, special circumstances must be shown by the bill, as the plaintiffs had no legal right to sue; and sufficient grounds for sustaining such a bill not having been shown, both the demurrers were allowed. *Ibid.*

A party paid to an auctioneer, the agent for a proposed vendor, 50*l.* "as a deposit and part payment of 1,000*l.*" for the purchase of hereditaments, and received a receipt for the same, containing the words "the terms to be expressed in an agreement to be signed as soon as prepared." He had previously approved of the draft of the contract. At the time of taking the receipt, he agreed to sign the contract on the following morning. This he ultimately refused to do, and, by his solicitor, demanded back the 50*l.* The proposed vendor filed a bill for specific performance, to which a demurrer was put in setting up the Statute of Frauds as a defence, no agreement having been signed:—Held, overruling a decision of one of the Vice Chancellors, that the demurrer was a good defence to the bill. *Wood v. Midgley*, 23 Law J. Rep. (N.S.) Chanc. 553; 5 De Gex, M. & G. 41; 2 Sm. & G. 115.

Held, also, but in accordance with the Vice Chancellor's view, that the demurrer stating "that it appears by the bill that neither the agreement which is alleged by the bill and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this defendant, nor any other person lawfully authorized within the meaning of the statute," &c., was not a speaking demurrer. *Ibid.*

Held, also, that the Statute of Frauds may be set up by demurrer as well as by plea. *Ibid.*

Bill filed by two shareholders in a projected company, on behalf of themselves and the other persons who had contributed, against the directors, charging fraud and misrepresentation in getting up the company, and claiming repayment of the deposits. One of the defendants demurred, on the ground that he had not become a director until after the transactions of which the bill complained, and also that the two plaintiffs could not properly join together in suing, the fraud complained of by them being separate and distinct:—Held, that the demurring defendant, though not an original director, had participated in and assisted to carry out the alleged fraud, and that there was no improper joinder of the plaintiffs, they having a common interest against the defendants. *Beeching v. Lloyd*, 24 Law J. Rep. (N.S.) Chanc. 679; 3 Drew. 227.

The plaintiff demised a number of small leasehold houses to the defendant, who having committed a forfeiture, the plaintiff re-entered and determined the lease. The defendant thereupon distrained on the tenants and prevented the plaintiff taking possession and repairing, and the plaintiff apprehended a forfeiture. The defendant had also, being

insolvent, received the rents; and, in consequence of his conduct, the property had become greatly depreciated, and some of the houses had been abandoned by the tenants. The bill prayed an account of the rents, an injunction to restrain the defendant from receiving the rents and distraining, and that the right might be determined under the Court. A general demurrer was allowed. *Aldis v. Fraser*, 15 Beav. 215.

A bill was filed by A and his wife alleging title in respect of the wife's estate tail. The defendant demurred for want of equity. While the demurrer was standing for argument the wife died, and then A filed a supplemental bill, alleging a disentailing deed before the date of the original bill under which A claimed in fee:—Held, that in this state of things the demurrer could not be heard; that such an alteration of the record was not properly the subject of either supplemental or of original bill in the nature of a supplemental bill, or of a bill of revivor, nor properly of amendment, but the original bill ought to have been left to take its course and a new bill filed stating the real title. *Wright v. Vernon*, 1 Drew. 68.

The case made by the bill was this: it alleged title under several instruments to certain real estates settled thereby, one of such deeds creating a term to raise a sum of money not yet raised. It alleged possession or receipt of the rents in some of the defendants, and that they had possession of some of the deeds, and that they had given notice to tenants not to pay rent to the plaintiff, and threatened to distrain; it alleged that the trustee of the term refused to assign it to the plaintiff. It prayed, among other things, a declaration that, under certain of the instruments, the plaintiff was entitled to the estates, and that on payment of the money to be raised by the term by him he was entitled to a surrender or assignment of the term:—Held, that there was an equity for that relief, if for no more, and the bill was not, therefore, demurrable. *Saunders v. Richardson*, 2 Drew. 128.

A filed a bill against B and the public officer of a banking company, seeking to make certain shares which B held in the bank available to the payment of a debt due to him from B. The bill alleged that, though the company had a prior charge on the shares for a debt due to them from B, yet that debt was amply secured by the shares of other persons in the bank, and by other securities held by the company; and it prayed that an account might be taken of what was due to the company in respect of their charge, and that directions might be given for the satisfaction thereof out of the last-mentioned shares, and out of or by means of the other securities held by the company, or for enabling A to pay to them the amount of their charge, and thereupon to have such other securities assigned to him, and that the securities might be marshalled so as to give the plaintiff the benefit of his charge. A demurrer because the persons who had pledged their shares, and given securities to the company for B's debt, were not made parties to the bill was allowed. *Macintyre v. Connell*, 1 Sim. N.S. 252.

A bill contained a charge with a view to discovering who certain persons who were interested in the relief were, but it did not allege that the plaintiffs did not know who they were, and therefore a demurrer because they were not made parties was allowed. *Ibid.*

A bill to set aside on the ground of fraudulent representations an order in an action at law made by consent staying the action, and directing the payment of a certain sum of money by the defendant to the plaintiff, and which sum the plaintiff afterwards accepted:—Held, to be demurrable, as it did not state that the plaintiff was ignorant of the alleged representation being fraudulent, not only at the time of the order, but at the time he received the money. *Dunn v. Cox*, 11 Hare, 61.

It appearing that a second action had been brought by the plaintiff, and had been stayed by the court of law in consequence of the consent order made in the first action, and that the plaintiff had taken regular proceedings at law to set aside the order staying the second action, but that order had been sustained, this Court refused to aid a suit in equity brought by the plaintiff by giving him leave to amend, upon allowing a demurrer to his bill to set aside the consent order on the ground of such alleged fraud. *Ibid*.

(C) ANSWER.

A, B & C carried on business in partnership as bankers. A died, having made B and D his executors, and S a residuary legatee. D was, after the death of A, admitted a partner in the business. A bill was filed by S against B and D for the administration of the estate of A. It stated that the executors had rendered imperfect accounts, particularly with reference to A's capital in the business at his death; that the business had, since A's death, been carried on with his capital, and that the residuary legatees were entitled to one-third of the profits. It contained interrogatories, whether the business had not been carried on with A's capital—what were the profits since the death of A—what was the present capital—and what capital had been drawn out since A's death. C, the other partner, was not a party to the bill:—Held, that in a suit so constituted, B and D were not bound to answer the above-mentioned interrogatories. *Simpson v. Chapman*, 20 Law J. Rep. (N.S.) Chanc. 88.

Bill filed by the *cestui que trust* under a marriage settlement against the trustee to compel him to pay a sum of money, which the husband had covenanted to settle, but which covenant the trustee had neglected to enforce previously to the bankruptcy of the husband, which took place some years after his marriage. The bill alleged that for many years the husband was in prosperous circumstances, and the covenant ought then to have been enforced. The trustee, by his answer, stated as a reason for his not having been able to enforce the covenant, that the husband, at the time of his marriage, was in very needy and embarrassed circumstances, and continued so until his bankruptcy. The answer then set forth several transactions, alleged to have been fraudulently contrived by the husband, and that he had in various other matters, both previously and subsequently to his marriage, resorted to fraudulent means to supply his wants and avert discovery of his true position. The Master had allowed exceptions to such passages of this answer as contained allegations of fraud against the husband on the ground that they were scandalous and impertinent:—Held, upon exceptions to the Master's report, that where the bill alleged solvency it was not irrelevant for the defendant to introduce a statement of fraudulent practices committed from

time to time to conceal the fact of insolvency. *Balguy v. Broadhurst*, 20 Law J. Rep. (N.S.) Chanc. 55.

The answer of a defendant contained these passages:—"The plaintiff is desirous of annoying and harassing the defendant to extort money from him." "The plaintiff is acting under the advice of ignorant but cunning persons, who are in expectation of extorting money from the defendant, in order to be relieved from being harassed by the vexatious and illegal conduct of the plaintiff." The plaintiff took exceptions to these passages for scandal. The exceptions were overruled. *Stanton v. Holmes*, 20 Law J. Rep. (N.S.) Chanc. 203.

A bill was filed by A against B & Co. stock-brokers, alleging that dealings and transactions were, in March 1848, contemplated between the parties, in respect of which money might become due from A to B & Co., and that A transferred to B & Co. railway shares as security for the balance, if any; and that various dealings and transactions had taken place between the parties; and praying for a re-transfer of the shares and an account. The bill contained numerous searching interrogatories as to the stock transactions and the ownership and transfer of the railway shares. B & Co., by their answer, set out the 7 Geo. 2. c. 8. s. 8, and averred that A, before the suit, had alleged that the transactions in question were illegal, and they declined to answer on the ground that such answer might tend to subject them to the penalties of the act:—Held, that the defendants were protected from discovery. *Short v. Mercier*, 20 Law J. Rep. (N.S.) Chanc. 289; 3 Mac. & G. 205; affirming 18 Law J. Rep. (N.S.) Chanc. 490.

Semble—if a defendant states circumstances which on the face of them are not only consistent with the peril he alleges, but which also render it extremely probable, he entitles himself to protection from discovery. *Ibid*.

Upon a bill charging the defendant with infringing the plaintiff's patent and asking for an account of his dealings and transactions, and seeking to make him answerable for the profits received by him in consequence of the infringement,—Held, that the defendant must answer the interrogatories, though he disputes the title of the plaintiff, and insists that the discovery will be an act of oppression upon him, and that there was little probability that the Court, at the hearing, would direct an account upon the facts if disclosed. *Swinborne v. Nelson*, 22 Law J. Rep. (N.S.) Chanc. 331; 16 Beav. 416.

Where there is no replication to the answer to a bill of revivor, is a plaintiff bound, if he relies on the original answer, to take it as absolutely true in all particulars? *Stanton v. Percival*, 5 H.L. Cas. 257.

Is an answer by committees binding upon the estate of the lunatic? It is binding on them in any other character. *Ibid*.

Is a replication necessary to an answer to a mere bill of revivor? *Ibid*.

A defendant who had not by his answer claimed the benefit of the Statute of Frauds, was not allowed to have it at the hearing. *Baskett v. Cofe*, 4 De Gex & Sm. 388.

Where discovery is sought in relation to matters in which the plaintiff has no interest, but as consequential or resulting from a character or title denied by the answer, and not otherwise appearing on the

record, the plaintiff has no equity entitling him to discovery. If, however, the plaintiff's interest in the discovery sought results from a character and title alleged in the bill, and if the bill properly avers that the discovery will establish that character and title, and also establish a case of fraud by the defendant affecting or destroying the plaintiff's remedies, the defendant cannot withhold the discovery by generally denying the character and title claimed by the plaintiff. *Stuivinton v. Chadwick*, 3 Mac. & G. 575: affirming 13 Beav. 320.

Although a litigant party has no right to a discovery of the evidence of his opponent's title, yet he has a right to a discovery of the evidence in support of his own title, and in proof of any fraud which has been committed to his injury; and the plaintiff's right to a discovery of material evidence in support of his own case and title is not repelled, because by exercising that equitable right the defendant may be compelled to disclose the evidence in support of his (the defendant's) case and title. *Ibid*.

The plaintiff and defendant respectively deduced their title from the heir-at-law of A, who died intestate in 1768, equitably entitled to certain premises, the legal estate of which was outstanding. In 1842 the defendant obtained *ex parte* a conveyance of the outstanding legal estate under Sir E. Sugden's acts. The plaintiff then filed his bill, alleging that the defendant had obtained the conveyance of the legal estate to himself, as the heir-at-law of A, by false and fraudulent evidence. The bill contained interrogatories addressed to the discovery of the alleged false and fraudulent evidence. The defendant having by his answer asserted his own title as heir-at-law of A, and having denied that of the plaintiff, refused to answer any of the interrogatories relating to the evidence on which he had obtained the conveyance, asserting that the discovery would disclose the evidence of his own title, and denying that the evidence was false or fraudulent, or that it would establish any of the allegations of the bill:—Held, that he was bound to make the discovery. *Ibid*.

Matter ought not at the commencement of a suit to be treated as impertinent, which may at the hearing be found relevant. *Reeves v. Baker*, 13 Beav. 436.

A trustee called on the defendant to set forth whether for the reasons in the bill stated, or some other and what reasons, he was not able to execute the trusts, "or how otherwise." The defendant in his answer imputed to the plaintiff's solicitor needless delay in effecting a proposed compromise, his inducement being to favour another solicitor, his personal friend:—Held, that the statement was not scandalous. *Ibid*.

(D) PLEA.

[*Cust v. Southee*, 6 Law J. Dig. 564; 13 Beav. 435.]

At the hearing of a claim a defendant is at liberty to avail himself of the benefit of the Statute of Limitations without pleading it. *Sneed v. Sneed*, 20 Law J. Rep. (n.s.) Chanc. 620.

Upon a plea of outlawry, it was held, that an order of the Court of Bankruptcy directing the plaintiff to prepare and file his accounts by a certain day, and the certificate and proclamation of the Court, that he had failed to surrender himself on that day, did not amount to a formal judgment of outlawry such as

would support the plea.—Plea overruled. *Winthrop v. Elderton*, 21 Law J. Rep. (n.s.) Chanc. 145.

Bill by A against B. The bill stated that A and B carried on business in partnership at Calcutta and in England, and that A had commenced a suit against B in Calcutta, but that, from B having left the East Indies and come to reside in England, the suit could not properly be prosecuted. The bill prayed the usual partnership accounts. To this bill B put in a plea that a decree had been made by the Supreme Court at Calcutta, in the suit mentioned in the bill, whereby it was referred to the Master to take an account of the partnership transactions between A and B, and that the inquiries were still pending. The plea was overruled. *Ostell v. Lepage*, 21 Law J. Rep. (n.s.) Chanc. 501; 5 De Gex & Sm. 95.

A pending suit in a foreign or colonial court between A and B cannot be pleaded in bar to relief sought in a suit in Chancery in England between the same parties relative to the same matters. *Ibid*.

A bill was filed to administer a testator's estate by his six infant children. The executor of the testator, who was the defendant, died. A supplemental bill was filed by two of the plaintiffs who had come of age, alleging that they had taken out administration to the executor. The other plaintiffs also filed a supplemental bill alleging that administration had been granted to the two adult plaintiffs. The defendants to the latter bill put in a plea averring that letters of administration had not been granted at the time the bill was filed, though it was admitted they had since been obtained:—Held, that it was sufficient if administration was granted before the hearing of the cause, and that the plea was untenable. *Horner v. Horner*, 23 Law J. Rep. (n.s.) Chanc. 10.

A plea that the description given of the plaintiff in his bill is false will lie, but the plea must sufficiently aver that the description was false at the time of filing the bill. *Smith v. Smith*, 23 Law J. Rep. (n.s.) Chanc. 231; Kay, App. xxii.

A plaintiff, being entitled to several large sums of stock on the death of C C without issue, filed a bill, stating that C C had died without issue, but that the defendant insisted he was the son and only child of C C. The bill then stated facts from which it might be inferred that C C had never had a child, and that the defendant was not her son. By a plea the defendant averred he was the son of C C, but he omitted to answer the allegations which might have contradicted it:—Held, that the plea was bad; and that the defendant must answer facts which, if in evidence, might disprove the plea. It was therefore directed to stand for an answer, with liberty for the plaintiff to except. *Hunt v. Penrice*, 23 Law J. Rep. (n.s.) Chanc. 339; 17 Beav. 525.

A residuary legatee filed a bill against an alleged debtor to the estate of the testator seeking to make him account, and stating that the executors had refused to call upon him to account. A plea was put in, which denied any refusal on the part of the executors to call the alleged debtor to account, and it was supported by averments of no collusion and of facts to shew there could have been no refusal by the executors. It was held, that the plea satisfied the requisition to reduce the matter to a single issue; that there might be many facts to raise a single issue, but that no distinct issues were raised by these aver-

ments; that there was no case of delay or collusion against the executors, and that there were no circumstances to take this case out of the rule that the proper person to sue a debtor to a testator's estate is the executor. Plea allowed. *Saunders v. Druce*, 24 Law J. Rep. (N.S.) Chanc. 593; 3 Drew. 140.

To a bill for specific performance, a plea by a sole defendant of his bankruptcy subsequent to the bill filed was allowed. *Lane v. Smith*, 14 Beav. 49.

The plaintiff described himself as of "Gray's Inn, barrister-at-law, and of No. 2, Cloisters, Middle Temple." The defendant pleaded that the description was false, and that the plaintiff was not resident at No. 2, Cloisters, Middle Temple:—Held, that the plea was bad in form, not negating a residence at Gray's Inn; but *quære*, whether, even if correct in form, such a plea could be supported. *Bainbridge v. Orton*, 20 Beav. 28.

Bill for redemption by mortgagee of shares in a company transferred into the name of the mortgagor. Plea, that at the time of the bill filed, all the shares were by assignment vested in another person:—Held, the plaintiff had a title to sue, and the plea overruled. *Winterbottom v. Tayloe*, 2 Drew. 279.

PLEADING, IN CRIMINAL CASES.

The two prisoners were indicted for the murder of M P by violence. The third and most material count charged the murder to have been effected by blows inflicted by the prisoners on the 5th of November, the 1st of December, and the 1st of January, and on divers other days between the 5th of November and the 1st of January. On the trial evidence was given of assaults committed by the prisoners on the deceased, one on the 5th of November 1849, one about the end of November, and one about the 11th of December. The counsel for the prosecution, in his address to the jury, had opened these assaults as conducing to the death; but he added, that if he failed in proving that they had conduced to the death, they would furnish evidence of the *animus* of the prisoners. It was proved, by further evidence, that the death, which took place on the 4th of January, was caused exclusively by one particular blow inflicted shortly before the death; and as there was no evidence to shew that either of the prisoners had struck that blow, they were acquitted. Being subsequently indicted for having, on the 10th of November 1849, assaulted M P, the prisoners pleaded a plea which, setting forth the indictment for murder, averred that the indictment included divers assaults against M P, and that the prisoners were acquitted upon the said indictment, and that the assaults included in the felony and murder charged upon them in the said indictment, were the same as those charged in the present indictment. The Crown replied, "that the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment." On the second trial, it was proved that evidence had been given on the former trial of the above-mentioned assaults, and no evidence was given on the second trial of any other assaults than of those proved on the first trial. On the second trial, as on the first, it was proved that the death was caused by the particular blow, distinct from these

assaults. The Commissioner, before whom the second trial took place, told the jury that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find for the Crown. The jury, thereupon, returned a verdict of guilty. On a case reserved, stating the above facts, it was held, by a majority of the Judges (eight to six) that the prisoners could not, on the trial for murder, have been convicted of assault under the statute 7 Will. 4. & 1 Vict. c. 85. s. 11, as the assaults committed by them, although relied on by the Crown as conducing to the death, were proved by the evidence to have been unconnected with the homicide of the deceased; that, therefore, the general acquittal on the indictment for murder was no bar to a subsequent indictment for assault in respect of those very assaults. *Regina v. Bird*, 20 Law J. Rep. (N.S.) M.C. 70.

POISON.

[Administering drugs, see Stat. 14 & 15 Vict. c. 19. s. 3.]

POLICE OFFICER.

- (A) APPOINTMENT.
- (B) POWER AND DUTY.
- (C) SUPERANNUATION.

(A) APPOINTMENT.

Where a party was appointed by the Police Commissioners, under the 2 & 3 Vict. c. 47, a constable to keep the peace, on the written requisition of certain churchwardens, stating that additional persons were required for the purpose of executing distress warrants to recover rates,—Held, that the appointment of the party as constable for all purposes was good, and that the requisition of the churchwardens need not shew on the face of it the necessity for his appointment. *Allen v. Preece*, 24 Law J. Rep. (N.S.) Exch. 9; 10 Exch. Rep. 443.

(B) POWER AND DUTY.

The plaintiff sued the defendants, who were police constables, in a county court, for a tort, charging them with having arrested and imprisoned him on a false and unfounded charge of furious driving. On the trial, the plaintiff stated that the defendants had taken him into custody and detained him in a police-station on the charge of furious driving; that the charge was false and unfounded, but that he had been convicted of it by two Justices and paid the penalty. The defendants thereupon objected that the plaintiff was put out of court by his own statement, and then proved the conviction. The statute 2 & 3 Vict. c. 47. s. 54. authorizes police constables to take into custody persons committing the offence of furiously driving in a public highway in their view. The case did not shew that the plaintiff committed the offence of furious driving in the view of the defendants. The county court Judge directed the jury that the conviction was a conclusive answer to the plaintiff's claim. The Court of appeal held,

that the direction of the Judge below was wrong, and reversed the judgment. *Justice v. Gosling*, 21 Law J. Rep. (N.S.) C.P. 94; 12 Com. B. Rep. 39.

Trespass for false imprisonment. The defendant Barnes having obtained a warrant to search the plaintiff's house, and to apprehend him on a charge of felony, the warrant being headed "To the constable of D, in the county of W," delivered it to the defendant Barton, a county constable, appointed under the 2 & 3 Vict. c. 93, who executed it within the parish of D by apprehending the plaintiff. The action was not brought until the expiration of six months from the time of the act committed:—Held, first, that trespass was the proper form of action; secondly, that the parish constable of D, and not the defendant Barton, was the proper party to execute the warrant, but that Barton was protected, the action not having been brought against him within six months, pursuant to the 24 Geo. 2. c. 44. s. 8, and that the other defendant was liable. *Freegard, v. Tregard, v. Barnes*, 21 Law J. Rep. (N.S.) Exch. 320; 7 Exch. Rep. 827.

The Municipal Corporations Act, 5 & 6 Will. 4. c. 76, by section 76, provides that constables appointed for a borough shall, not only within the borough, but also within the county in which such borough is situate, have all such powers and privileges and be liable to all such duties as any constable duly appointed now has, or hereafter may have, within his constableness by virtue of the common law or of any statute made or to be made; and by section 133, in all actions against any person for anything done in pursuance of that act, the defendant may plead the general issue, and give the special matter in evidence thereunder. The defendant, who was a borough constable appointed under the 5 & 6 Will. 4. c. 76, was sued in replevin for an act done in discharge of his duty as a constable under that act, beyond the limits of the borough, but within the county in which the borough was situate:—Held, that he was entitled, under the general issue of *non cepit*, to give the special matter of defence in evidence. *Mellor v. Leather*, 22 Law J. Rep. (N.S.) M.C. 76; 1 E. & B. 619.

Replevin will lie where goods have been unlawfully taken, though not as a distress; and, therefore, where H and B were sued in replevin for taking a horse under a claim of property by A, who alleged that the horse had been stolen from him, and B had acted in the transaction only as a constable,—Held, that the action was maintainable. *Ibid.*

The prisoner assaulted a police constable, who went away, and after two hours' time returned with assistance:—Held, that the constable was not justified in apprehending the prisoner for the assault after that interval. *Regina v. Walker*, 23 Law J. Rep. (N.S.) M.C. 123.

(C) SUPERANNUATION.

The 11 & 12 Vict. c. 14. s. 2, authorizes the establishment of a "police superannuation fund" in boroughs, which is to be applied in paying superannuation or retiring allowances" to police constables, as follows: if a constable has served fifteen years he is entitled "to retire on a superannuation allowance" equal to half his pay; but if he is then able and willing to continue to serve "he shall then receive" his full pay "and one-third also and no

more of the above-named allowance from the superannuation fund." By section 3, "no police constable shall be entitled to superannuation who is under fifty years of age," unless reported unfit for service:—Held, that a police constable who had served fifteen years and continued in the force, but who was under fifty years of age, was not entitled to receive the reduced allowance under section 2. *Hobson v. the Mayor, &c. of Kingston-upon-Hull*, 24 Law J. Rep. (N.S.) Q.B. 251.

POOR.

[For Pauper Lunatic, see title LUNATIC.]

(A) POOR LAW COMMISSIONERS—POWERS AND ORDERS OF.

(B) GUARDIANS.

- (a) *Contracts by.*
- (b) *Authority to Solicitor to sue.*
- (c) *Clerk to.*
- (d) *Expenses of Re-investment, under 5 & 6 Will. 4. c. 69.*

(C) AUDITORS.

(D) OVERSEERS AND COLLECTORS.

(E) RELIEF.

(F) SETTLEMENT.

- (a) *By Birth and Parentage.*
 - (1) *Bastards.*
 - (2) *Children under Sixteen.*
 - (3) *Irish and Scotch Children.*
- (b) *By renting a Tenement or paying Rates and Taxes.*
- (c) *By Estate.*
- (d) *By serving an Office.*
- (e) *By Apprenticeship.*
- (f) *Five Years' Residence.*
- (g) *Relief.*
- (h) *Effect of prior Order of Removal.*

(G) ORDER OF REMOVAL.

- (a) *Illegal Removal by Parish Officers.*
- (b) *Appeal against the Order.*
 - (1) *When it lies.*
 - (2) *At what Sessions.*
 - (3) *Notice of Appeal.*
 - (4) *Grounds of Appeal.*
 - (5) *Notice of Abandonment.*
- (c) *Evidence.*
- (d) *Costs.*

(A) POOR LAW COMMISSIONERS—POWERS AND ORDERS OF.

[See 14 & 15 Vict. c. 105 (continued by 15 & 16 Vict. c. 14, and 16 & 17 Vict. c. 77), and 18 & 19 Vict. c. 47, as to charging the maintenance of the poor in unions upon the common fund.]

The 4 & 5 Will. 4. c. 76. s. 46, which allows the Poor Law Commissioners to direct the guardians of a parish to appoint such officers as they shall think necessary, and also to direct the mode of appointment and "determine the continuance in office and dismissal of such officers," applies as well to those parishes which are as to those which are not regulated by local acts. *Regina v. the Poor Law Commissioners, in re the Vestrymen and Governors of*

the Poor of St. James's, Westminster, 20 Law J. Rep. (N.S.) M.C. 236; 17 Q.B. Rep. 445.

By the 2 & 3 Geo. 3. c. lviii. s. 21. (local) the vestrymen of the parish of St. J W were required to nominate twenty-one persons who should become the directors of the poor, and who were to make rules and regulations for the maintaining of the poor, and which were to be subsequently confirmed by the vestry. In pursuance of this section, in 1763, the vestry nominated twenty-one persons directors, by whom certain rules were made, which, among other things, appointed that the officers should be elected annually at Easter. These rules were duly confirmed, and have never since been repealed. By an order, bearing date the 17th of July 1850, and addressed to the vestrymen of the said parish, the Poor Law Board directed, among other things, by the 67th article, that *the directors*, whenever a vacancy occurred, should appoint fit persons to fill certain offices, and the 83rd article that every officer appointed to or holding any office under the order should continue to hold the same until he die, resign, or be removed by the Poor Law Board, or be proved to be insane to the satisfaction of the Board:—Held, that these articles did not exceed the powers conferred by the 4 & 5 Will. 4. c. 76. s. 46. on the Poor Law Board, and that the order was, therefore, valid. *Ibid.*

The Poor Law Board duly made and served certain rules and regulations for the government of the workhouse of a parish. Before the making of such rules and regulations, the directors of the poor of the parish, under a local act, had appointed a chaplain to the workhouse for the term of one year, which had not expired when such rules were made, who had entered upon the discharge of his duties. The 67th article of the rules and regulations gave the directors power, when necessary, or a vacancy should occur, to appoint certain officers, the chaplain being one. The 68th article ordered that the officers so appointed to or holding any of the said offices, as well as all persons temporarily discharging the duties of such offices, shall respectively perform such duties as may be required of them by the rules and regulations of the Poor Law Board in force at the time, together with all such other duties, &c. as the directors may lawfully require them to perform: provided always, that every regulation applying to any officer holding his office under this order shall apply to any officer of the like denomination appointed by the directors, although such officer may have been appointed before this order shall have come into force." The 83rd article provided that "every officer appointed to or holding any office under this order" other than the medical officer, should continue to hold the same until his death or resignation, or removal by the Poor Law Board, or he were proved to be insane. After the expiration of the year for which the chaplain had been appointed, the guardians refused to allow him further to discharge his duties:—Held, upon demurrer to the return to a mandamus to admit the chaplain to perform his duties, that the proviso to the 68th article did not apply to the tenure of office of the officers mentioned in the previous part of the article, and therefore that the 83rd article was not a regulation within the meaning of that proviso, and consequently that the admission of the chaplain could not be enforced. *Regina v. the Governors, &c. of the*

Poor of St. James's, Westminster, 21 Law J. Rep. (N.S.) M.C. 97; 17 Q.B. Rep. 474.

Guardians of a poor-law district, acting under a local statute which empowered them, or any five or more of them, to appoint officers, appointed a master of the workhouse for a year, and, on its expiration, re-appointed him for another year. During that year the Poor Law Commissioners made an order, under stat. 4 & 5 Will. 4. c. 76, requiring the guardians from time to time, on the occurrence of any vacancy, to appoint certain officers (among whom was a master of the workhouse) by a majority of the guardians present. Afterwards, and before the master's last-mentioned year of office had expired, the guardians passed a resolution that their officers were officers during pleasure, and that no annual election should take place. This resolution was not sanctioned by the Commissioners under stat. 4 & 5 Vict. c. 76. s. 22; and after the expiration of the year of office they ordered the guardians to appoint a master of the workhouse, which was not done:—Held, on motion for a mandamus, that the first-mentioned order of the Commissioners was within their general jurisdiction under stat. 4 & 5 Will. 4. c. 76; that the resolution of the guardians, unsanctioned by the Commissioners, could not be alleged in answer; and that there was, at the end of the second year of office, a vacancy which ought to have been filled up as the Commissioners had directed. *Regina v. Oxford (Guardians)*, 17 Q.B. Rep. 457, note.

An order of the Poor Law Commissioners may (like an order of Justices) be quashed in part on *certiorari*, if the parts be sufficiently divisible. *Regina v. Robinson*, 17 Q.B. Rep. 466.

On motion for a *certiorari* to remove an order of the Commissioners containing several distinct articles, the Court granted the writ, pronouncing an opinion that two of the articles were illegal. The Commissioners made an order rescinding these, and gave notice of it to the parochial body which had obtained the *certiorari*. The order was then brought up under the writ:—Held, that, in this state of the proceedings, it was not necessary to quash the rescinded parts of the order, but that the Court might quash, or refuse to quash, the whole residue or any part of it:—Held, also, that an article of the above order, directing that every officer appointed to or holding any office under the said order (which related to the government and care of the poor in a poor-law district) should continue to hold office till death, resignation, or removal by the Poor Law Board, was not beyond the authority conferred by stat. 5 & 6 Will. 4. c. 76. s. 46, although applied to a parish in which, by a prior local act, the governors of the poor had the power of dismissing the officers. But, held, that the above clause did not operate to keep a party in office without re-election, who had been appointed by the directors of the poor (authorized by their local act) and not under the order. Although by an earlier article it was provided that "every regulation" applying to any officer holding office under this order, should apply to any officer of the like denomination appointed by the directors, though appointed before the order should have come into force: the term "regulation" being construed as referring to a clause immediately preceding, which required that the officers appointed by the directors should respectively perform such duties (described in other parts of the order) as might be required of them

by the rules and regulations of the Poor Law Board in force at the time. *Ibid.*

Quære—whether, in such an order, the Commissioners could, under stat. 5 & 6 Will. 4. c. 76, change the term of an officer appointed before the making of the order from an annual holding to a holding for life. *Ibid.*

The Poor Law Commissioners, by a general order directed to unions, amongst which was the union including the parish of W, directed "that whenever the day appointed in this order, for the performance of any act relating to or connected with the election of guardians shall be a Sunday or Good Friday, such act shall be performed on the day next following, and each subsequent proceeding shall be postponed one day;" and that every nomination for the office of guardian should be in writing, and should be sent, after the 14th of March and before the 26th of March, to the clerk or person appointed to receive nominations; and such clerk or person "shall, on the receipt thereof, mark thereon the date of its receipt, and also a number according to the order of its receipt; provided that no nomination sent before the 15th or after the said 26th day of March shall be valid;" and that, if the number of persons nominated should not exceed the number to be elected, the clerk should certify such persons as elected; otherwise the election to take place from those nominated. The parish W was to elect three guardians. Three persons were duly nominated. The 26th of March fell on a Sunday; and, on that day, a paper nominating a fourth person, M, was delivered to the clerk of the union. The clerk, considering this last nomination a nullity, certified the other three as elected guardians. Complaint being made to the Poor Law Board, they, under stat. 5 & 6 Vict. c. 57. s. 8, inquired into the case, and by an order declared the election of the three void. Motion being (within the time limited in that section) made for a *certiorari* to remove the last-mentioned order:—Held, first, that the legality of the order might, on such motion, be inquired into as to matters shewn by affidavit, though not apparent on the face of the order; but, secondly, that the order was right, the nomination of M being valid. *Westbury-upon-Severn Union Case*, 4 E. & B. 314.

(B) GUARDIANS.

(a) *Contracts by.*

[See *Armstrong v. Bowdidge*, title CONTRACT, (A).]

If the guardians of a poor law union, at a board properly constituted and authorized to enter into contracts, give orders to a tradesman to supply and put up water-closets in the union workhouse, and he puts them up, and the guardians approve and accept them, they cannot afterwards defend themselves, in an action against them for the price, by shewing that there was no contract under seal, as the purposes for which the guardians were made a corporation require that they should provide such articles. *Clarke v. the Guardians of the Cuckfield Union*, 21 Law J. Rep. (N.S.) Q.B. 349; 1 Bail C.C. 81.

The guardians of a union, in pursuance of an order of the Poor Law Commissioners (under the 4 & 5 Will. 4. c. 76. s. 46. and the 7 & 8 Vict. c. 101. s. 62) directing them to appoint collectors of the poor-rates, and also directing that such collectors

should be paid by a certain poundage, appointed the plaintiff collector of the rates of several parishes at a poundage, in conformity with the terms of the order. The appointment was recorded in the minute-book of the meeting, and the entry read to the plaintiff, who performed the duties of collector, paying to the treasurer the money received on account of each parish, and receiving his poundage from the respective overseers, with the exception of the parish of W:—Held, that an action was not maintainable by the plaintiff against the board of guardians for the unpaid poundage. *Smart v. the Guardians of the West Ham Union*, 24 Law J. Rep. (N.S.) Exch. 201; 10 Exch. Rep. 867.

(b) *Authority to Solicitor to sue.*

The guardians of a poor law union issued a summons against the defendant as administrator of John I S, and also as executor of Jane S, widow of John, to recover 17*l.*, expended by the parish for the support of John I S and Jane, and their children. The defendant was the administrator of John I S, but was not nor had he acted as executor of the widow. No minute was produced by the attorney of the plaintiffs (a corporation), authorizing him to act on their behalf, pursuant to 5 & 6 Vict. c. 57. s. 17. Judgment was given for the plaintiffs:—*Semble*, that the decision was erroneous; but held no ground for a prohibition. *The Guardians of the Lexden Union v. Southgate*, 23 Law J. Rep. (N.S.) Exch. 316; 10 Exch. Rep. 201.

(c) *Clerk to.*

The office of clerk to the board of guardians of an union appointed under the provisions of 4 & 5 Will. 4. c. 76. s. 46. is an office created by statute and of a public nature, in respect of which a *quo warranto* will lie. *Regina v. the Guardians of St. Martin-in-the-Fields*, 20 Law J. Rep. (N.S.) Q.B. 423; 17 Q.B. Rep. 149.

Where, therefore, such an office is full, a mandamus is not a proper mode of trying the validity of the election. *Ibid.*

By an order of the Poor Law Commissioners regulating the proceedings of guardians of the poor in the parish of M, the election of officers was to be by a majority of the guardians present at a meeting of the board. By stat. 12 & 13 Vict. c. 103. s. 19, in case of an equality of votes upon any question at a meeting of guardians of any union or parish, the chairman has a "second or casting vote." At an election of clerk to the guardians of M twenty-two guardians attended. On their assembling, the chairman said he should not vote for any candidate, but merely preside at the meeting as chairman. He did so, and took the votes, of which there were eleven for one candidate and ten for another. The former was declared elected, and entered upon the office. On motion for a *quo warranto*,—Held, that the chairman could not be considered as having, for the purpose of the election, withdrawn; and that such election was void, as not having been determined by a majority of the guardians present. *Regina v. Griffiths*, 17 Q.B. Rep. 164.

(d) *Expenses of Re-investment under 5 & 6 Will. 4. c. 69.*

Under the act for facilitating the conveyance of

workhouses (5 & 6 Will. 4. c. 69), which enables the poor law guardians to purchase, but not compulsorily, lands of persons under disability, and empowers the Court to order the expenses attending the purchase, payment into court, or application for re-investment to be paid by the poor-law guardians, but makes no further provision for payment of the expenses of the investigation of title on a re-investment.—Held, that such expenses are, on the interpretation of the whole act, payable by the poor law guardians. *In re Lady Byron's Settlement*, 4 De Gex, M. & G. 694.

(C) AUDITORS.

By a local and personal act (6 Geo. 4. c. clxxv.) provision was made for electing governors and directors for the relief of the poor and for the watching and lighting of a district, consisting of one parish and part of another; and the governors and directors were empowered to elect auditors for the purpose of auditing the accounts of the district. The governors and directors were empowered to make rules for the application of monies to be raised under the act; to bring or defend actions affecting the property vested in them under the act, or relating to the due execution of the act; and to meet and ascertain the amount necessary to be assessed for the purposes of the act, which amount the inhabitants were to raise by rate. The governors and directors were also empowered to appoint a clerk, and to make such allowance to him and their other officers as they should think proper. Auditors were also to be elected by the inhabitants, who were to meet half-yearly, at least, and were empowered to appeal against any part of the accounts of which they should disapprove. After the passing of this act, the Poor Law Commissioners included the district within one of several unions comprised in the N W M District, for which last district they appointed an auditor under stat. 7 & 8 Vict. c. 101. s. 32. The last-mentioned auditor disallowed part of a bill of costs paid by the governors and directors to their clerk, and surcharged three of the governors and directors with the amount disallowed.—Held, that he had power so to disallow and surcharge, notwithstanding the provisions of the local act. *Regina v. Tyrwhitt*, 2 E. & B. 77.

(D) OVERSEERS AND COLLECTORS.

[See title BOND.]

A special overseer appointed under the 7 Will. 4. & 1 Vict. c. 81. s. 3. to make, levy, or collect borough-rates in a parish lying partly within and partly without a borough, is not an annual officer, nor is he such an officer as could be appointed under the 5 & 6 Will. 4. c. 76. s. 58. *The Mayor, &c. of Birmingham v. Wright*, 20 Law J. Rep. (n.s.) Q.B. 214; 16 Q.B. Rep. 63.

By an order of the Poor Law Commissioners of the 1st of August 1837, under the 4 & 5 Will. 4. c. 76, the guardians of the poor law union of G were authorized to appoint collectors of poor-rates for the parishes within the union, and to appoint the same person to perform the duties of an assistant overseer. Under this order, the guardians appointed H a collector of rates for the parish of G, and he entered upon and performed the duties of the office. By an order of the 8th of June 1838, the Commis-

sioners authorized the guardians, within one month, to appoint a collector for the parish of G, and in case of death, resignation, or removal, to make a new appointment, and with a like authority as to the duties of an assistant overseer. The guardians did not make an appointment under this order, and H continued to act as collector of the parish of G. By orders of the 27th of November and the 27th of December 1838, the Commissioners authorized, within a given date, the appointment by the guardians of an assistant overseer for the parishes within the union, with a like power of appointment in case of death, &c. The guardians did not appoint within the time allowed by these orders; but on the 31st of May 1842 they appointed F collector and assistant overseer of the parish of G, who entered upon and discharged the duties of the office down to December 1849. On the 20th of November 1849, the guardians appointed H assistant overseer and collector for the said parish, a minute of such appointment being entered in their minute book. This appointment, unlike the previous ones, was reported to the Commissioners, who, on the 15th of December, approved of it, at the yearly salary of 120*l.*, and H entered upon and discharged the duties of the office. On the 26th of November 1849, the inhabitants of the parish of G, in vestry, duly elected R to be assistant overseer of the said parish, under the 59 Geo. 3. c. 2. s. 7, at the yearly salary of 120*l.*, and he entered upon and discharged the duties of the office. Subsequently the overseers of the said parish paid to R, and the guardians paid to H, a quarter's salary each. At a subsequent audit of the accounts of the guardians and the overseers, the auditor disallowed the item of expenditure on account of H's salary, and allowed that on account of R's salary. On the 28th of October 1850, the Commissioners, at the instance of the guardians, decided that the auditor was wrong, and under their order, the auditor, at a subsequent audit, allowed the sum before disallowed to the guardians, and disallowed the sum before allowed to the overseers.—Held, on a rule obtained under the 7 & 8 Vict. c. 101. s. 35, to quash such allowance and disallowance, first, that the Commissioners had jurisdiction under the 7 & 8 Vict. c. 101. s. 36. to make the order of the 28th of October, and that until set aside, on removal by *certiorari*, that order was to be obeyed under the 4 & 5 Will. 4. c. 76. s. 105, and the auditor therefore bound to make the allowance directed by it. Secondly, that by the operation of the 7 & 8 Vict. c. 101. s. 61, the appointment by the guardians of H, either as collector or assistant overseer, or both, under an existing unrescinded prospective order of the poor law board, took away the power of the inhabitants in vestry to appoint R assistant overseer under the 59 Geo. 3. c. 12, and therefore that the quarter's salary to R was properly disallowed. *Regina v. Greene*, 21 Law J. Rep. (n.s.) M.C. 137; 17 Q.B. Rep. 793.

The overseers of a parish assessed a railway company at 2,000*l.*, the amount agreed upon at a vestry meeting summoned by their predecessors in office. Against this rate the company appealed. The overseers, without calling a vestry and taking their opinion, proceeded to litigate the appeal. The Quarter Sessions reduced the rateable value from 2,000*l.* to 300*l.*, subject to a case for the opinion of

the Queen's Bench. The case was not proceeded with; it being ultimately agreed among the parties that the company should be assessed at 450*l.* The poor law auditor refused to allow the item of 73*l.*, the costs of contesting the appeal, in the overseers' accounts, on the grounds, first, that, prior to incurring such expenses, the overseers should have taken the opinion of the inhabitants in vestry assembled; secondly, that after the decision of the Quarter Sessions they should have consulted the vestry as to the propriety of proceeding with the case reserved. After the audit a vestry meeting was summoned, and the expenses in question were sanctioned by the inhabitants:—Held, that the previous sanction of the vestry was not necessary to authorize the overseers in proceeding with the appeal; and that, it not being alleged that they had acted *malâ fide* or improvidently, either in contesting the appeal or abandoning the case subsequently reserved, the disallowance was wrong. *Regina v. Street*, 22 Law J. Rep. (N.S.) M.C. 29; 18 Q.B. Rep. 682.

(E) RELIEF.

[See 18 & 19 Vict. c. 34, as to relief for purposes of education.]

(F) SETTLEMENT.

(a) *By Birth and Parentage.*

(1) *Bastards.*

The 71st section of the 4 & 5 Will. 4. c. 76, which provides that a child born a bastard after the passing of the act "shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right," &c., does not take away the birth settlement which a child born a bastard had before the act passed, and such child may, after it has attained the age of sixteen, be removed to the parish of its birth, although the mother, before it had attained that age, had acquired a settlement in a different parish. *St. Andrew's, Worcester, v. Bodenham*, 22 Law J. Rep. (N.S.) M.C. 39; 1 E. & B. 65.

(2) *Children under Sixteen.*

Relief given to a parent on account of his children is relief received by the children within the proviso of the 9 & 10 Vict. c. 66. s. 1. *Regina v. Shavington-cum-Gresty*, 20 Law J. Rep. (N.S.) M.C. 194; 17 Q.B. Rep. 48.

The paupers, who were under the age of sixteen and unemancipated, had resided in the township of M for eight years. For the first five years they resided with their mother, who was a widow, and in receipt of relief for her own and their support; for the last three they had themselves received relief:—Held, that they were removable from M. *Ibid.*

A pauper lunatic had resided with her parents as part of their family in the respondent parish for more than five years next before the 20th of October 1847, when she, being fifteen years of age, became chargeable (her parents not then being chargeable), and was removed to the workhouse, and remained there until July 1852, when she was removed to a lunatic asylum, and subsequently an order for settlement and maintenance was made on the appellant parish. At that time she was under twenty-one, unemancipated and unmarried, and had

no other settlement than that derived from her father. In 1849, her father ceased to reside in the respondent parish:—Held, that at the time when the pauper was removed to the asylum she was not irremovable under the 9 & 10 Vict. c. 66; and, therefore, that the order of maintenance was properly made upon the parish of settlement instead of on the common fund of the union, under the 12 & 13 Vict. c. 103. *Regina v. St. Anne, Blackfriars*, 22 Law J. Rep. (N.S.) M.C. 137; 2 E. & B. 441.

(3) *Irish and Scotch Children.*

A married woman, whose husband was a Scotchman and had acquired no settlement in England, had, during the absence of her husband, who had sailed on a voyage to Calcutta without leaving sufficient means of support for his family, become chargeable to the parish in which she was residing. The wife had acquired a maiden settlement in England:—Held, that this was such an absence on the part of the husband as amounted to a desertion of his wife, and that she might, therefore, be removed to the place of her maiden settlement. *Regina v. the Inhabitants of St. Marylebone*, 20 Law J. Rep. (N.S.) M.C. 61; 16 Q.B. Rep. 352.

An Irishman who had gained no settlement in England had resided with his family in the respondent parish for more than five years up to November 1849, when he deserted them, and went to America. His wife and children continued to reside in the respondent parish until December 1849, when they became chargeable, and were removed by an order to the appellant parish, where the wife had a maiden settlement:—Held, first, that the wife and children were removable from the respondent parish; and, secondly, that they were properly removed to the wife's maiden settlement. *Regina v. the Overseers of Much Hoole*, 21 Law J. Rep. (N.S.) M.C. 1; 17 Q.B. Rep. 548.

The pauper was removed by an order from B to the place of her birth settlement in England. She was the daughter of Irish parents, neither of whom had ever gained any settlement in England. Her father had lived for thirty-four years in the parish of A, and the pauper had resided with him as a member of his family until about four years before the order, when she left his house without his consent and went to live in parish B with a man, by whom she had some children, as his wife, and she continued to reside there with him until his death, when she was relieved by that parish, being at the time of her removal under twenty-one years of age:—Held, that she was properly removed to the place of her birth settlement, her father not being, under the circumstances, removable with his family to Ireland, under 8 & 9 Vict. c. 117. s. 2. *Regina v. the Inhabitants of St. Giles Without, Cripplegate*, 21 Law J. Rep. (N.S.) M.C. 26; 17 Q.B. Rep. 636.

(b) *By renting a Tenement, or paying Rates and Taxes.*

William Atkinson occupied a separate and distinct dwelling-house and farm in the parish of H, which were let to him and his father, Thomas Atkinson, as joint tenants, the rent and value of the land itself being sufficient to confer a settlement on both. The father resided on another farm at a distance, but he *bond fide* paid the rent of the farm occupied

by his son. In the rate-books of H "Mr. Atkinson" appeared as the name of the occupier of the house and farm in respect of two rates, and in a third rate the name of "Thomas Atkinson" appeared. The overseers had demanded and received payment of these rates from the father:—Held, that the Sessions were justified in finding, first, that there was a sufficient occupation and payment of rent, as well as a sufficient assessment to and payment of rates, to confer on William Atkinson a settlement in H under the 1 Will. 4. c. 18. and 4 & 5 Will. 4. c. 76; and, secondly, that he had sufficiently been charged with, and paid his share of the public taxes, to gain a settlement in H under the 3 & 4 Will. & M. c. 11. *Regina v. the Inhabitants of Hushwaite*, 21 Law J. Rep. (n.s.) M.C. 189; 1 E. & B. 501.

The general rule of law that the fraction of a day is not to be regarded, applies to the computation of a year for the purpose of conferring a settlement by renting a tenement under the 1 Will. 4. c. 18. *Regina v. St. Mary, Warwick*, 22 Law J. Rep. (n.s.) M.C. 109; 1 E. & B. 816.

C entered upon the occupation of premises about twelve o'clock on the 30th of September 1850, and in the evening of the same day signed an agreement, stating that the terms on which he had taken the premises from that day were, amongst others, that "the tenancy is for one year, commencing on the 30th of September instant." He continued in the occupation of the premises until the 29th of September 1851, and about four o'clock on that day, under a previous arrangement to that effect, gave up complete possession to an incoming tenant:—Held, that there had been an occupation by C "for one whole year at the least," so as to confer a settlement under the 1 Will. 4. c. 18. *Ibid*.

Upon an appeal raising the question whether there was a settlement by payment of rates, the pauper's wife proved that the rates had been paid. The appellants called the pauper himself, who said he had no recollection of paying any rates, and, if they were paid, they must have been paid for him by his wife's father, as he had not himself the means of doing so. The Sessions, on this evidence, found that the rates were paid by the pauper's father-in-law for the pauper, but without any authority from him, and confirmed the order:—Held, that the Sessions were wrong. *Rex v. Bridgewater overruled*. *Regina v. the Inhabitants of Bengeworth*, 23 Law J. Rep. (n.s.) M.C. 124; 3 E. & B. 637.

(c) By Estate.

The father of a pauper had gained a settlement in the township of B on the 6th of April 1837, by renting a tenement. He had also been the owner of a freehold estate in the township of C for some years before and down to 1838, and it was admitted that on the 27th of April 1837 he had resided and slept for more than forty days upon his estate in C since the purchase of it, several days' residence between the 6th and 27th of April 1837 being included in the computation of such forty days. An order for removal of the pauper to C as the place of his derivative settlement was obtained on the 28th of November 1849:—Held, that the residence in C had the effect of superseding the settlement gained in B, and of establishing a subsequent settlement in C to which the pauper might properly be removed. *Regina v.*

the Inhabitants of Knaresborough, 20 Law J. Rep. (n.s.) M.C. 147; 16 Q.B. Rep. 446.

A person put into possession of and residing in one room of a hospital founded by charitable bequest, and under the management of trustees, and only liable, under the rules established by the trustees, to be deprived of the benefits of the hospital for misconduct or absence, does not thereby acquire an estate conferring a settlement. *Regina v. St. Mary Castlegate*, 21 Law J. Rep. (n.s.) M.C. 106.

The 4 & 5 Will. 4. c. 76. s. 68, which enacts that no person shall retain any settlement by estate in a parish for a longer term than he shall inhabit within ten miles thereof, operates to extinguish the right of the wife and children of such a person, who were unemancipated at the time of his leaving it, to be removed to that parish. *Regina v. the Inhabitants of Llansaintfrigid Glyn Conway*, 23 Law J. Rep. (n.s.) M.C. 5; 2 E. & B. 803.

A testator, by his will, directed that a freehold estate should be sold within six months after his wife's death and equally divided between his children. He appointed executors, and directed that their reasonable expenses should be paid. The pauper, who was one of the co-heiresses of the testator, resided on the devised property for more than forty days after the death of the wife, and until it was sold under the provisions of the will, when she received her share of the purchase-money:—Held, that she had such a legal title coupled with an equitable interest as conferred a settlement by estate. *Regina v. the Inhabitants of Burgate*, 23 Law J. Rep. (n.s.) M.C. 143; 3 E. & B. 323.

A, in 1793, occupied, at a rent of 1*l.* 1*s.* 6*d.*, certain land, on which he subsequently erected a dwelling-house and other buildings, but did not expend 30*l.* In 1804 a lease for ninety-nine years was granted to him by the owner of the fee, in consideration of his paying the rent and performing the covenants, and "in consideration of his having erected a dwelling-house and half of a barn to be for the joint benefit of the other part of the land demised to J S," the rent reserved by the lease being 1*l.* 1*s.* 6*d.* The property was not of the annual value of 10*l.*:—Held, that this was the purchase of the term for a pecuniary consideration less than 30*l.*, and, therefore, conferred no settlement after actual residence, by virtue of the 9 Geo. 1. c. 7. s. 5. *The Churchwardens and Overseers of Wendron v. the Churchwardens and Overseers of Stithians*, 24 Law J. Rep. (n.s.) M.C. 1; 4 E. & B. 147.

The settlement relied upon in support of an order for the removal of the widow of J L was the birth settlement of J L in the appellant township. One of the grounds of appeal against the said order of removal stated "that in or about the year 1830 the pauper, being possessed of a cottage or dwelling-house, situate and being in the respondent township, for a certain term of years then unexpired, or as tenant thereof from year to year under a yearly or other renting, intermarried with the said J L;" and that the said J L thereby became and was possessed of the said cottage, or of an estate or interest therein, in right of his wife, and that after his marriage and whilst he was so possessed, &c. he resided and slept for forty days in the respondent township, and thereby gained a settlement." On the hearing of the appeal, the birth of J L in the appellant town-

ship was proved; but it also appeared that when the pauper married she had been and was then living as the tenant of a cottage in the respondent township, and that she and her husband lived there after the marriage for upwards of a year. The pauper was called as a witness on behalf of the respondent township, but she was not examined by either party as to the terms upon which she had held the cottage:—Held, that there was some evidence to warrant the Sessions in finding a settlement, by reason of a tenancy for a term of years, or from year to year, as alleged in the ground of appeal. *Regina v. the Township of Halifax*, 24 Law J. Rep. (N.S.) M.C. 65; 4 E. & B. 647.

Quære—whether if the tenancy of the wife had been merely a tenancy *at will*, it would have been available for the purpose of conferring a settlement by marriage. *Ibid*.

(d) *By serving an Office.*

A pauper had been appointed to the office of clerk of a district church, in the township of A, established under 58 Geo. 3. c. 45. and 59 Geo. 3. c. 134, by the curate of such district church, and continued to act in the said office for eight years, with the knowledge of the vicar of the parish of which the district formed a part, and without any attempt having been made to remove him:—Held, that by serving such office the pauper acquired a settlement in the township of A, under the statute 3 W. & M. c. 11. s. 6. *Regina v. the Inhabitants of the Township of Ossett*, 20 Law J. Rep. (N.S.) M.C. 205; 16 Q.B. Rep. 975.

(e) *By Apprenticeship.*

An order of Justices for the binding of a parish apprentice, made under the 56 Geo. 3. c. 139, must shew on the face of the order itself that the Justices acted at the time within their jurisdiction. Where, therefore, in the order two Justices of the county of Middlesex, by whom it was made, were described as Justices of the peace “of the said county,” and in the margin were the words “Middlesex, to wit,” and the order purported to be signed “at the Board-room of the Holborn Union Workhouse,”—Held, that the Court could not take judicial notice that the board-room was in the county of Middlesex; and that the order did not shew on the face of it that the Justices were acting within their jurisdiction, and being therefore bad, that no settlement by service under the apprenticeship was gained. *Regina v. the Parish of St. George, Bloomsbury*, 24 Law J. Rep. (N.S.) M.C. 49; 4 E. & B. 520.

The allowance of Justices to an indenture for binding a parish apprentice under the 43 Eliz. c. 2, is a judicial act, and it must appear on the face of the allowance that the Justices were at the time of granting it acting within their jurisdiction. *The Churchwardens and Overseers of the Parish of Sturton v. the Churchwardens and Overseers of the Parish of Ashburton*, 24 Law J. Rep. (N.S.) M.C. 53; 4 E. & B. 526.

The necessity for stating in the indenture that a child apprenticed to a chimney sweeper is above eight years of age, and that the consent of two Justices has been obtained, according to the 28 Geo. 3. c. 48, applies only to bindings of poor children by parish officers. A voluntary binding of himself by a

child as apprentice to a chimney sweeper is valid if in the ordinary form, provided the child is, in fact, above eight years of age. *Regina v. the Inhabitants of Epsom*, 24 Law J. Rep. (N.S.) M.C. 119; 4 E. & B. 1003.

(f) *Five Years' Residence.*

The 9 & 10 Vict. c. 66. extends only to render irremovable such paupers as have a known settlement to which they would be liable to be removed independently of the provisions of that act; and the 11 & 12 Vict. c. 110. s. 3. casts upon the common fund of the union the cost of relief of such paupers only. Therefore, where paupers who had resided for upwards of five years in a place which was formerly extra-parochial, but was in 1842 made a township by act of parliament and included in a union, and had acquired no settlement in that township or elsewhere, became chargeable thereto, the cost of their relief was not properly charged on the common fund of the union. *Regina v. Bennett*, 23 Law J. Rep. (N.S.) M.C. 39; 3 E. & B. 341.

The 11 & 12 Vict. c. 111. (substituted for the second proviso in the 9 & 10 Vict. c. 66. s. 1.) operates to render a wife or children irremovable only where the husband or father has acquired the status of irremovability under the provisions of the 9 & 10 Vict. c. 66. Therefore, where a private, serving in the Marines, was quartered in barracks at S for upwards of five years, in which parish his wife and children resided during that time and had become chargeable, they were not irremovable therefrom. *Regina v. the Inhabitants of East Stonehouse*, 23 Law J. Rep. (N.S.) M.C. 137; 3 E. & B. 597.

The pauper was the widow of A, and was ordered to be removed from the respondent parish within twelve calendar months after his death. A had served as a marine and a sailor, until within five years of the date of the order of removal. About a year before his death he quitted Her Majesty's service, and went to reside with his wife in the respondent parish for two months. He then hired himself on board a private packet carrying the mails, in which he died at sea:—Held, first, that the pauper was not irremovable by reason of having resided five years, under section 1. of the 9 & 10 Vict. c. 66. But, secondly, that she was residing in the respondent parish with her husband at the time of his death, and was, therefore, entitled not to be removed therefrom for twelve calendar months, under section 2. *Regina v. the Inhabitants of East Stonehouse*, 24 Law J. Rep. (N.S.) M.C. 121; 4 E. & B. 901.

In April 1843, an order was made for removal of a pauper from parish B to parish C, and was suspended the same day; and C was served with notice of the order of removal within ten days. On 26th August 1846, stat. 9 & 10 Vict. c. 66. came into operation. In September 1847, execution of the order was directed by another order of Justices; and, at the same time, they ordered payment by C to B, of the expenses of maintenance from April 1843 to September 1847; and the pauper was removed to C. He had resided in B five years next before the application for the order. Afterwards C appealed against both orders; and the Sessions confirmed both. On cases reserved for the Court of Queen's Bench, the order of removal was confirmed on the ground that the appeal was too late; but the order for

payment was quashed, on the ground that the case was not within stat. 35 Geo. 3. c. 101. s. 2, the pauper not being dead, nor, in consequence of stat. 9 & 10 Vict. c. 66. s. 1, legally removed:—Held, nevertheless (on motion under stat. 11 & 12 Vict. c. 44. s. 5.) that, after the decision of the Court, B was entitled to an order on C for the same expenses of maintenance, the settlement having now been finally adjudged to be in C, so as to bring the case within stat. 4 & 5 Will. 4. c. 76. s. 84. *Regina v. Wodehouse*, 15 Q.B. Rep. 1037.

The first provision in 9 & 10 Vict. c. 66. s. 1, that the several periods of time there specified shall, *for all purposes*, be excluded in the computation of the five years' residence necessary to confer irremovability, has the effect of excluding those specified periods in computing whether the pauper has resided altogether five years in the parish, and also whether he has resided there for five years next before the application for the warrant; and such periods of time are neither to tell in making up the five years nor to operate as a break in the residence, if altogether it has continued for five years. *Regina, on the prosecution of the Overseers of Rotherfield, v. the Overseers of Hartfield*, 21 Law J. Rep. (N.S.) M.C. 65; 17 Q.B. Rep. 746.

The expression in the proviso, "the time during which such person shall be a prisoner in a prison," includes all lawful imprisonments in any prison, whether in or out of the parish of residence, without distinction of felony, misdemeanour, or debt. *Regina v. Salford* overruled. *Ibid.*

An order for the removal of the wife and children of J E was obtained on the 21st of March 1851. Down to the 8th of January 1851 J E had continuously resided in the respondent parish for more than ten years. On that day he was apprehended on a charge of felony and committed to the county gaol, situate out of the respondent parish, where he remained till the 13th of March following, when he was tried and convicted of felony, and sentenced to two years' imprisonment in a house of correction out of the respondent parish, where he remained when the order of removal was made:—Held, that the period of his imprisonment was to be excluded from the computation of his residence in the respondent parish, and that the wife and children were not removable therefrom. *Ibid.*

The absence of a person from a parish in which he is residing, in consequence of an imprisonment out of the parish, is not of itself such an interruption of the residence as would prevent his becoming irremovable by five years' residence including the time of the imprisonment, if an intention to return at the expiration of the imprisonment exists throughout it. *Regina, on the prosecution of the Overseers of Leeds, v. the Overseers of Holbeck*, 20 Law J. Rep. (N.S.) M.C. 107; 16 Q.B. Rep. 404.

Therefore, where a pauper had resided for five years in the respondent parish, and during that time had been imprisoned in an adjoining parish for seven days under a conviction in default of paying a fine, and had afterwards returned to his residence, it was held, that he was irremovable under the 9 & 10 Vict. c. 66. s. 1. *Ibid.*

A married woman, who had resided in the parish of L for ten years, was removed by an order of

Justices. Two years before the order her husband left her and went to America. She had subsequently received letters from him, and was in daily expectation of receiving another with money for the purpose of defraying the expenses of herself and children over to America:—Held, that she was removable, as there was no evidence that the husband intended to return to L, and that there was therefore a disruption in his residence. *Regina v. the Inhabitants of Llanelly, Brecknockshire*, 20 Law J. Rep. (N.S.) M.C. 179; 17 Q.B. Rep. 40.

Where a valid order of removal has been *bond fide* executed by taking the pauper to the parish where he is settled, and there delivering him to the overseers, such a removal operates as an interruption of residence within the 9 & 10 Vict. c. 66, however short be the period during which the pauper was actually absent from the removing parish. *Regina v. Caldecote*, 20 Law J. Rep. (N.S.) M.C. 187; 17 Q.B. Rep. 52.

A pauper who had resided in the parish of S since 1835, was in 1845 removed to the parish of C under a valid order of Justices, which was unappealed against, by delivering him to the overseer of C, at his house in that parish. After this removal, but on the same day, an agreement was entered into between the officers of the two parishes, that the pauper should return to S, and be there maintained at the cost of C. The pauper accordingly returned on the same day to S, and slept there that night, and had ever since resided there. He was relieved by C until the passing of the 9 & 10 Vict. c. 66. In 1847 an order for his removal from S to C was made:—Held, that he was not irremovable. *Ibid.*

A pauper had resided in the respondent parish for upwards of five years next before the application for a warrant for his removal excluding a period during which he was an inmate of the workhouse in the said parish, and excluding also two periods of three weeks and two weeks during which he was imprisoned in a house of correction, situate out of the respondent parish, under committals for misbehaviour in the workhouse:—Held, that these periods were to be excluded from the computation for all purposes, and that the pauper was consequently irremovable by reason of residence for five years in the respondent parish, within the meaning of 9 & 10 Vict. c. 66. s. 1. *Regina v. the Inhabitants of St. Andrew, Holborn*, 21 Law J. Rep. (N.S.) M.C. 69; 17 Q.B. Rep. 746.

Temporary absence out of a parish where a pauper resides, for the purpose of fulfilling a contract, but with the intention of afterwards returning, is not a break of residence. *Regina v. the Parish of Bright-helmstone*, 24 Law J. Rep. (N.S.) M.C. 41; 4 E. & B. 236.

A pauper, having a lodging in the parish of B which she had furnished, had, for more than five years before the making of an order for her removal from B to parish A, resided in her lodgings, with the exception of periods of six and ten weeks, during which she was absent under contracts to serve as a monthly nurse. On the occasion of hiring herself, the pauper had the intention of returning to parish B, and at the end of her engagement did return to her lodgings, which she had continued to hold during her absence:—Held, that her absence from B, though under a contract, did not constitute a break in her

residence, and that she was therefore irremovable from B, under the 9 & 10 Vict. c. 66. s. 1. *Ibid.*

A pauper had lived five years in a parish not that of her settlement, when she became chargeable, and an order was made for her removal. At the commencement of the five years her husband resided with her in the parish; but he left her, during the five years, and went to live in America without *animus revertendi*. During the five years and before the order of removal, he died:—Held, that the pauper was not irremovable under stat. 9 & 10 Vict. c. 66. s. 1. or 11 & 12 Vict. c. 111. s. 1. *Regina v. Manchester*, 17 Q.B. Rep. 46.

(g) *Relief.*

Incurable blindness is sickness within the meaning of the 9 & 10 Vict. c. 66. s. 4. *Regina v. the Inhabitants of Bucknell*, 23 Law J. Rep. (N.S.) M.C. 129; 3 E. & B. 587.

Where, therefore, upon an appeal against an order of removal, which stated that the pauper had not "become chargeable in respect of relief made necessary by sickness or accident," it was proved that incurable blindness was the original and continuing cause of the pauper's chargeability, and the order of removal omitted to state that the Justices making the same were satisfied that the sickness would produce permanent disability as required by the 9 & 10 Vict. c. 66. s. 4:—Held, that the order was defective and bad. *Ibid.*

(b) *Effect of prior Order of Removal.*

A prior order of removal quashed on appeal upon the question of settlement is conclusive evidence between the same parties that the pauper was not then settled in the parish to which he was ordered to be removed, whether the subsequent inquiry be for the adjudication of the settlement and maintenance of a lunatic under the 8 & 9 Vict. c. 126. s. 58, or an ordinary case of removal of the pauper. *The Churchwardens and Overseers of Heston v. the Churchwardens and Overseers of St. Bride*, 22 Law J. Rep. (N.S.) M.C. 65; 1 E. & B. 583.

An order, removing J S from A to B, founded on a birth settlement in 1804, was made on the 7th of February 1852. The order was quashed on appeal upon the merits. In October 1852, J S being then confined in a lunatic asylum, an order adjudicating his settlement to be in B, and ordering B to pay the costs of his maintenance, was obtained by A, founded on a settlement acquired by J S in B in 1831:—Held, that the prior decision estopped A from obtaining the latter order. *Ibid.*

An order of removal, unappealed against or confirmed on appeal, is conclusive, not only as to the facts directly decided, but as to those facts also that are mentioned in the order, and are necessary steps to the decision of the settlement. *Regina v. the Township of Hartington Middle Quarter*, 24 Law J. Rep. (N.S.) M.C. 98; 4 E. & B. 901.

Upon an appeal against an order adjudging the settlement of Esther Gould, a lunatic pauper, who had been removed from the respondent township of L to an asylum, to be in the appellant township of H, the respondents proved a former valid order of removal made between the same townships, adjudging the settlement of John Gould, aged eleven years, and William Gould, aged five years (being at the

time unemancipated), "the lawful children of William Gould and Esther Gould" (the said lunatic pauper), to be in the appellant township of H. The removal of the said two children from the respondent township of L to the said appellant township took place, and there was no appeal against the said order. This was the only evidence relied upon by the respondents to prove a settlement of the said lunatic pauper in the appellant township, derived from her husband:—Held, that as the adjudication of settlement in both the orders necessarily depended upon the same two facts, namely, the settlement of W G the father, and his marriage with the lunatic pauper before the birth of their said two children, the former order unappealed against was conclusive as to those facts, and the appellants were estopped from proving that in truth neither the said husband of the pauper, nor the pauper herself, had ever gained a settlement in their township. *Ibid.*

(G) ORDER OF REMOVAL.

(a) *Illegal Removal by Parish Officers.*

A pauper (a widow) having resided with her husband for five years in the parish of M, and having applied for relief, was told by one of the parish officers of M that B was her parish; and with money then furnished her by him she went to B, and was there received into the workhouse, where she remained for three weeks. After leaving the workhouse she remained in the house of her mother, in B, for about three months, and received relief during that time, except for about three weeks. Subsequently she returned to M, and becoming chargeable, an order was obtained for her removal to B:—Held, that this Court would not infer an illegal intent on the part of the parish officers of M to make the pauper chargeable to B, within the 9 & 10 Vict. c. 66. s. 6; but that if the Sessions, upon rehearing the case, were to draw that conclusion, as they would be justified in doing from the facts stated (and as they afterwards did), then that the pauper's going to and remaining in B did not cause a break in the previous five years' residence in M, and consequently that she was irremovable to B, under section 1. of 9 & 10 Vict. c. 66. *Regina v. the Inhabitants of St. Marylebone*, 20 Law J. Rep. (N.S.) M.C. 173; 16 Q.B. Rep. 299.

Semble—that a widow's privilege of irremovability for twelve months after her husband's death, under sect. 2. of that act, is destroyed by an interruption in her residence during the year. *Ibid.*

(b) *Appeal against the Order.*

(1) *When it lies.*

Where an order of removal has been duly served, but no notice of chargeability or grounds of removal have been sent to the appellant parish, the want of service of these latter documents does not deprive the Quarter Sessions of jurisdiction to hear an appeal against the order of removal; but the omission to serve them may be made the matter of a ground of appeal. *Regina v. the Recorder of Shrewsbury*, 22 Law J. Rep. (N.S.) M.C. 2.

Under the 4 & 5 Will. 4. c. 76. s. 79. and the 11 & 12 Vict. c. 31. s. 9. there is no grievance against which an appeal lies until service of the notice of chargeability, accompanied by a copy of the order and the grounds of removal. The omis-

sion, therefore, to send such a notice of chargeability is not a ground of appeal, but prevents the Sessions having any jurisdiction to entertain an appeal.—*Regina v. Briham* overruled. *Regina v. the Recorder of Shrewsbury*, 22 Law J. Rep. (N.S.) M.C. 98; 1 E. & B. 711.

Since the 11 & 12 Vict. c. 31. s. 9. the service of notice of the chargeability, together with the other documents, is the only grievance against which a right of appeal exists. *Ibid.*

(2) *At what Sessions.*

Two Justices in and for the county of L, removed a pauper from a township situate within the borough of L in that county to a parish. The overseers of the parish, within twenty-one days after notice of the order, gave notice of appeal to the next Quarter Sessions for the county. They appealed to the Borough Sessions of L, but did not within the twenty-one days give any further notice of appeal: and their appeal was dismissed for want of such notice of appeal to the borough Sessions:—Held, first, that no appeal lay to the county Sessions, though the order appealed against was made by Justices for the county, who had, within the borough, concurrent jurisdiction with the borough Justices; secondly, that the notice was a sufficient notice of appeal, within stat. 11 & 12 Vict. c. 31. and that the erroneous statement that the appeal would be made to the county Sessions was merely surplusage. Rule absolute for a mandamus to hear the appeal. *Regina v. the Liverpool Recorder*, 15 Q.B. Rep. 1070.

A notice of appeal against an order adjudicating the settlement of a pauper lunatic, stated an intention of appealing to the next Sessions to be held for the borough of S. The appellants and respondents appeared at the borough Sessions in pursuance of this notice, when the latter objected that the appeal lay to the county Sessions, and not to those of the borough, upon which objection the Recorder dismissed the appeal. The appellants then entered and resited the appeal at the county Sessions, which were held the next day, and at the following county Sessions the Court refused to hear the appeal, on the ground that no valid notice of appeal had been given:—Held, that they had decided rightly, as the appellants having acted upon the notice as a notice of appeal to the borough Sessions, could not afterwards treat it as a notice of appeal to the county Sessions. *Regina v. the Justices of Salop*, 24 Law J. Rep. (N.S.) M.C. 14; 4 E. & B. 237; and *Regina v. the Justices of Buckinghamshire*, in a note to the above case.

But where a notice of appeal erroneously states an intention to appeal to a borough Sessions, and no steps are taken upon it by either party as a notice for those Sessions, the words relating to the place may be rejected as surplusage, and the notice treated as a notice of appeal to the county Sessions. *Ibid.*

(3) *Notice of Appeal.*

A notice of appeal against an order of Justices for the removal of a pauper may be signed and given by an attorney on behalf of the parish officers of the appellant parish. *Regina v. the Justices of Middlesex*, 20 Law J. Rep. (N.S.) M.C. 32: s. p. *Regina v. Carew*, *Ibid.* 44 note.

The term "notice of appeal" in section 9. of the

statute 11 & 12 Vict. c. 31, which provides that no appeal shall be allowed against an order of removal if notice of such appeal be not given as required by law within a certain specified time, does not in any way apply to the "statement of the grounds of appeal." *Regina v. the Recorder of Derby*, 20 Law J. Rep. (N.S.) M.C. 44.

The 11 & 12 Vict. c. 31. s. 9. enacts, that in case a copy of the depositions on which an order of removal is founded be applied for, a period of fourteen days "after the sending of such copy shall be allowed for the giving of such notice of appeal"; and by 14 & 15 Vict. c. 105. s. 10, notices of appeal may be sent by post or otherwise in like manner as orders of removal may be sent by law:—Held, that the notice of appeal must be supposed to be given at the time when, according to the regular and usual course of post, it ought to reach the respondents. *Regina v. the Inhabitants of Slawstone*, 21 Law J. Rep. (N.S.) M.C. 145; 18 Q.B. Rep. 388.

Where, therefore, copies of depositions were posted by the respondents' solicitors on the 3rd, and were received by the appellants on the 5th, and on the 17th a letter containing a notice of appeal was put into the post, which in the regular course of post ought to have reached the respondents on the 19th, but was not in fact delivered until the 20th,—Held, that the notice of appeal was in due time. *Ibid.*

(4) *Grounds of Appeal.*

A ground of removal served with the said order stated that the pauper had gained a settlement in the respondent parish "by one of the means stated in his examination, and that his settlement by one of such means or otherwise had been acknowledged by relief given," &c. The pauper's examination stated a settlement by birth, and by hiring and service, and also by relief given whilst resident out of the respondent parish. One ground of appeal against the order was, that if any relief had been given to the pauper it was given in error, and under a mistaken belief as to the place of settlement of the said pauper, and that the said pauper had never acquired a settlement, and was not settled in the appellant parish:—Held, that evidence of the birth settlement, though it might not properly be admissible under the above ground of removal, was admissible to disprove the allegation in the ground of appeal that the relief had been given by mistake. *Regina v. the Inhabitants of Bucknell*, 23 Law J. Rep. (N.S.) M.C. 129; 3 E. & B. 587.

Quære—whether under the above ground of appeal evidence was admissible of a settlement of the pauper's father by hiring and service in a third parish at the time of the pauper's birth, in order to shew that the relief had been given in error as to the pauper's birth settlement. *Ibid.*

(5) *Notice of Abandonment.*

If the respondent parish give notice to the appellant parish, under the statute 11 & 12 Vict. c. 31. s. 8. that they abandon their appeal against an order of removal, the Court of Quarter Sessions have no power to proceed with the appeal, though it has been resited on terms at a previous session; and if they make an order quashing the appeal, and giving costs to the appellants, such order is null, and cannot be removed into the Court of Queen's Bench for the

purpose of being enforced. *Killymaenllwydd v. St. Michael's, Pembroke*, 21 Law J. Rep. (N.S.) M.C. 79.

(c) *Evidence.*

[See *Regina v. Saffron Hill*, title EVIDENCE, (E) (c).]

It cannot be made a valid ground of appeal against an order for the maintenance of a lunatic pauper under the 8 & 9 Vict. c. 126. that the order adjudicating the place of the pauper's settlement was made on hearsay evidence only, the 3rd section of the 11 & 12 Vict. c. 31, which does away with all objections to the depositions taken when an order is made, applying equally to orders of removal and orders of maintenance. *Regina v. St. Peter in Barton-on-Humber*, 21 Law J. Rep. (N.S.) M.C. 23; 17 Q.B. Rep. 630.

Where a witness served with a *subpoena duces tecum* to produce a written document either does not attend, or does attend and refuses to produce the document (not on the ground of privilege), the party seeking to avail himself of the document cannot give secondary evidence of its contents: the remedy is to punish the witness for a contempt. *Regina v. the Inhabitants of Llanfaethly*, 23 Law J. Rep. (N.S.) M.C. 33; 2 E. & B. 940.

On the trial of an appeal against an order of removal, the appellants, in order to prove a settlement by rating in a third parish, served a *subpoena duces tecum* on the person in whose possession the rate-book was supposed to be, and also gave the respondents a notice to produce the rate-book. The witness did not attend, and the rate-book was not produced:—Held, that parol evidence of a rating in the third parish was not admissible. *Ibid.*

(d) *Costs.*

The 4 & 5 Will. 4. c. 76. s. 84. provides that the parish, to which any pauper whose settlement shall be in question at the time of granting relief shall be admitted, or finally adjudged to belong, shall pay the cost of the relief and maintenance of such pauper, which shall be recoverable in the same manner as penalties and forfeitures under that act; provided that no expenses of relief or maintenance shall be recoverable under a suspended order of removal, unless notice of such order and a copy of the same and of the examination upon which it was made shall have been given within ten days of such order being made to the overseers of the parish to whom such order is directed:—Held, that when an order of removal was suspended and not appealed against, and before its execution the pauper became irremovable under the 9 & 10 Vict. c. 66, in consequence of which no costs occasioned by the suspension could be given under 35 Geo. 3. c. 101, costs could be given under the above section. *In re the Overseers of Chedgrave*, 20 Law J. Rep. (N.S.) M.C. 23.

An order of removal was made and suspended in 1841. In October 1852, the pauper being dead, the suspension was taken off, and an order for the costs of maintenance during the whole period of the suspension (exceeding 20*l.*) was made, against which there was no appeal. In February 1853 an application was made for a distress warrant, which was resisted on the ground that it had been recently discovered that the pauper had resided for five years in

the removing parish, and that the costs of maintenance, subsequent to the passing of the 11 & 12 Vict. c. 110, were chargeable to the common fund of the union, and not to the parish of settlement. The Justice, on this ground, refused to issue the warrant:—Held, that he was bound to do so, as the objection should have been taken by appeal, when the amount of costs might have been reduced by the Sessions. *Ex parte Williams*, 22 Law J. Rep. (N.S.) M.C. 125; 2 E. & B. 84.

POWER.

(A) CONSTRUCTION OF POWERS IN GENERAL.

(B) EXECUTION OF, GENERALLY.

- (a) *Form of Execution and Attestation.*
- (b) *Order of informal Execution.*

(C) POWER OF APPOINTMENT.

- (a) *Construction of.*
- (b) *Execution of.*
- (c) *Revocation and Relinquishment of.*

(D) TO GRANT LEASES.

(E) OF SALE.

(A) CONSTRUCTION OF POWERS IN GENERAL.

If a party has an estate in lands and also a power of appointment for his own benefit, he cannot, after entering into a bond to the Crown, divest the right of the Crown to extend the lands for the bond debt by executing the power of appointment in favour of a *bond fide* purchaser without notice. *Ellis v. Regina* (in error), 20 Law J. Rep. (N.S.) Exch. 348; 6 Exch. Rep. 921.

By the settlement made on the marriage of A and B certain real estates were conveyed to trustees upon trust to pay the rents to A for life, and, after his death, to B for life, and, after the death of A and B, upon trust for such one or more of the children of the marriage as A and B should by deed jointly appoint; and, in case of the death of A in the lifetime of B, before any such appointment should be made, as B should by deed appoint. A and B jointly appointed two fourths of the estate to two of their children. A died. B appointed the other two fourths to two other of the children:—Held, that the appointments made by B alone were valid. *In the matter of Simpson's Settlement*, 20 Law J. Rep. (N.S.) Chanc. 415; 4 De Gex & Sm. 521.

By a settlement made on the marriage of A and B real estate was conveyed to trustees and their heirs upon trust for A for life, with remainder for B for life, and, after the death of the survivor, in trust to apply the rents in the maintenance of all and every the children of A and B, until such children should attain twenty-one, and when such children should attain twenty-one to convey the premises to such children in such manner as A and B jointly, or the survivor, should appoint, and, in default of appointment, to convey the premises to such children equally as tenants in common; and, if there should be but one such child who should attain twenty-one, to convey the premises to such child, his or her heirs and assigns:—Held, that the power of appointment was not an exclusive one, and, that in default of appointment, all the children took the property as tenants in common in fee, without reference to their attain-

ing twenty-one or surviving their parents. *Strutt v. Braithwaite*, 21 Law J. Rep. (N.S.) Chanc. 609; 5 De Gex & Sm. 369.

A widow, upon her marriage, settled her real and personal property on herself for life, and reserved to herself a power to appoint by will during the intended coverture, with remainder over on default:—Held, that an appointment by will, after the determination of the coverture, was invalid. *Holliday v. Overton*, 21 Law J. Rep. (N.S.) Chanc. 769; 14 Beav. 467.

By a marriage settlement, four different portions of property were limited in the following manner: first, the wife was given a general power of appointment over 3,000*l.* to take effect upon her own death; secondly, the wife had a special power of appointment over the residue of the stocks and funds, to be exercised in favour of a particular class of relations, and to take effect, not upon her own death, but upon the death of her husband; thirdly, the wife had a general power of appointment over the plate, furniture, &c., but not to take effect until her husband's death; fourthly, the wife had a general power to dispose of her jewels, trinkets, &c., to take effect upon her own death. The wife's will, which was dated before the Wills Act, and was properly executed in the form prescribed for the execution of the powers in the settlement, commenced, "I, S. M., do, by virtue of the power and authority reserved to me by my marriage settlement, hereby make, publish and declare this to be my last will and testament." The testatrix then referred specially to her power of appointing the 3,000*l.*, and disposed of it. The third and fourth portions of the property she disposed of without referring to her power. Lastly, she gave and bequeathed, directed and appointed all the rest, residue and remainder of her monies, and other her personal estate, of whatsoever description, amongst the class of relations pointed out by the settlement, but did not refer to the power. As to the first, third and fourth portions, no question was raised; but as to the second portion, being the residue, it was held, that the will was a good execution of the power. *Harvey v. Stracey*, 22 Law J. Rep. (N.S.) Chanc. 23; 1 Drew. 73.

By the settlement, the trustees were, after the death of the husband, in case of his surviving his wife, to stand possessed of the residue (above referred to as the second portion of the property) in trust for all and every or such one or more of the wife's relations in blood, at the time of her decease, within the eighth degree of consanguinity to her, in such shares and proportions, and with such future or executory or other trusts, being for the benefit of the said relations in blood of the wife within the degree aforesaid, as the wife should by will direct or appoint:—Held, that the power to be exercised as to the future or executory trusts for the said relations in blood within the prescribed degree, applied only to those relations living at the death of the wife. *Ibid.*

Held, also, that the appointment which was made by the wife was valid, notwithstanding that the persons who were to take as appointees, and the shares and interests which they were to take under the appointment, were made contingent upon a future event; and that, although the fund was appointed not entirely to objects of the power, but partly to objects of the power and partly to strangers, the appointment was nevertheless valid *pro tanto*, that is, it was valid

quoad those who were objects of the power, and invalid as to those persons who were not properly objects of the power. *Ibid.*

Under a general power in a settlement for the donee having a life interest in the income, to appoint the capital by will, with a trust, in default of appointment, for the donee's executors and administrators, the donee takes an absolute interest in the capital. *Page v. Soper*, 22 Law J. Rep. (N.S.) Chanc. 1044.

A, by his will, bequeathed his residuary personal estate to trustees, upon trust for his wife for life, and after her death the principal to be divided among all his children, including his child B, if then alive, in such manner and proportions as his wife should appoint, provided that the share assigned to B should not be smaller than the share assigned to any one of his other children; and in default of appointment, to be divided equally among all the children living at his wife's death, including B, if then alive; moreover, if any child should die before his wife, but leaving a child or children, such child or children should have the part or share of their late parent; and if all the children should die under age or without leaving children, then for the wife. The wife, by will, appointed the fund among such of the children, including B, as should be living at her death. B died in the wife's lifetime, leaving children:—Held, that the appointment was good; but that only the surviving children could take, and that B's children were excluded. *Neatherway v. Fry*, 23 Law J. Rep. (N.S.) Chanc. 222; Kay, 172.

By a settlement, a sum of stock was settled (after the death of A) upon such of A's children as he should appoint, and, for want of such appointment, and as to so much of the stock whereof there should not be any appointment, upon all his children equally. There was no hotchpot clause. A, having three children, by deed appointed one-third of the stock for S, one of such children. In the operative part of the deed, A declared that, in case of no complete appointment, the then appointment was intended to be made in lieu of all claims of S for any original share in the trust premises. A died without making any other appointment:—Held, that S was not excluded from, but was entitled to share with the other children in, the stock which was not appointed. *Foster v. Cawley*, 24 Law J. Rep. (N.S.) Chanc. 252; 3 Sm. & G. 96.

A testator gave a life interest in his residuary real and personal estate to his wife, and after her decease he directed the fund to be distributed to his relations in such shares as his wife should appoint:—Held, that the next-of-kin of the testator living at the death of the wife were the parties entitled, and that a distribution among them by the wife in unequal shares was a valid execution of the power. *Finch v. Hollingsworth*, 25 Law J. Rep. (N.S.) Chanc. 55; 21 Beav. 112.

A gift of all the residue, real and personal, to A, upon trust to divide it into two moieties, the income of one moiety to go to A for life; and the testator empowered his trustees to set apart out of this moiety 5,000*l.*, and to advance by way of loan or absolute gift the whole or any part of such sum to B, or all or any of his children, in such manner as to A or other the testator's trustees should seem meet; and when B and his children were all dead, then the said sum to be subject to the trusts of the other moiety of the

residue; and he appointed A sole executor, and inserted in his will a power of appointing new trustees:—Held, that the power was divisible, and was to be considered as two powers, one to be exercised by A, and the other by the succeeding trustees, in default of A's exercising his power; and that the former power was valid, whatever might be said of the latter. *Attenborough v. Attenborough*, 1 Kay & J. 296.

Held, also, that such power was not bad because it contemplated an appointment to objects some of whom were too remote; but that a valid appointment thereunder might be made to such of its objects as were within the proper limits. *Ibid*.

(B) EXECUTION OF, GENERALLY.

(a) *Form of Execution and Attestation.*

By a settlement certain real estate was conveyed to trustees upon trust for such persons as A should by deed, or by will, to be signed and published in the presence of and attested by two witnesses, appoint. A made her will. The attestation clause was "Signed and sealed in the presence of" (witnesses' names):—Held, that A's will was a due execution of the power. *Vincent v. the Bishop of Sodor and Man*, 20 Law J. Rep. (N.S.) Chanc. 433; 4 De Gex & S. 294.

Where a party was authorized by a power created since 1833, to appoint by deed or deeds, writing or writings, under hand and seal attested by two witnesses, and made a will devising and bequeathing the property, the subject-matter of the power, by a will dated subsequently to the statute 7 Will. 4. & 1 Vict. c. 26, and executed conformably with that act, a purchase depending for its title upon the question whether it was valid, was held not to be so free from doubt as that a purchaser was bound to take, and would be compelled, in a suit for specific performance, to accept it.—The reasoning in *Buckell v. Blenkhorn* (5 Hare, 131) dissented from. *Collard v. Sampson*, 22 Law J. Rep. (N.S.) Chanc. 729; 4 De Gex, M. & G. 224; 16 Beav. 543.

A power of appointment by deed or writing under the hand and seal of the donee is not well executed by a will without a seal, although such will be executed and attested in accordance with the requisitions of the 1 Vict. c. 26.—*Buckell v. Blenkhorn* (5 Hare, 131) not followed. *West v. Ray*, 23 Law J. Rep. (N.S.) Chanc. 447; Kay, 385.

(b) *Aider of informal Execution.*

If the intention to exercise a power be clearly shewn, a Court of equity will, in favour of a charity, give effect to an informal or defective execution of the power. Therefore where a power to dispose of personalty was directed to be exercised, amongst other modes, by the last will and testament, &c. of the donee, signed, sealed, published, and declared in the presence of two or more witnesses, and the donee, in exercise of the power, bequeathed part of the personalty to certain charities by an unattested will (executed before the passing of the Wills Act), signed and sealed by the donee, but not in the presence of witnesses, and not published or declared, it was held (affirming the decree of the Court below) to be a valid execution. *Innes v. Sayer*, 21 Law J. Rep. (N.S.) Chanc. 190; 3 Mac. & G. 606; affirming 18 Law J. Rep. (N.S.) Chanc. 271; 7 Hare, 377.

Held, also, that as the gifts were specific, the state

of the testatrix's property at the time of her will and the time of her death might be looked at. *Ibid*.

By deed of settlement, estates were conveyed to trustees and their heirs, to such uses as A and the plaintiff (his son) should jointly appoint; and in default, to A for life, remainder to plaintiff for life, remainders over in strict settlement. The S. W. Railway Company, under the powers of their act, required parts of the settled estates, which it was intended by the parties should be conveyed to the company, under the joint power of appointment. The price being in dispute, it was agreed between A, the plaintiff, and the company, that the company, on depositing a sum of money, should take possession, and "should proceed without delay to get the amount of compensation settled, either by arbitration or a jury, as A should choose." This sum was deposited, and the company took possession. The company afterwards paid out a portion of the compensation to A, upon the joint receipt of A and the plaintiff, which sum was therein stated as "upon account of the compensation money to be ultimately fixed, and to be paid by the company in respect of lands part of our estates." A died before the compensation was fixed or the lands conveyed:—Held, on appeal, affirming the decision below, that there was no binding contract in the joint lives of A and the plaintiff, which the Court could aid as a defective execution of the power. *Morgan v. Milman*, 22 Law J. Rep. (N.S.) Chanc. 897; 3 De Gex, M. & G. 24; 10 Hare, 279.

Whether the principle of aiding the defective execution of a power in favour of a purchaser for value, is applicable to a case where the purchaser is entitled to a conveyance at all events, and the power is sought to be aided, not in favour of the purchaser, but in favour of the tenant for life, as against those in remainder—*quære*.

Whether a parol contract, part performed, which would be binding as against a vendor seised in fee, is such a contract as the Court would aid as a defective execution of a power—*quære*. *Ibid*.

By a marriage settlement monies in the funds, monies lent on mortgage, and other property, were assigned to trustees, upon trust to pay and transfer the same unto such person, for such estates or interests, either absolutely or conditionally, and in such parts, shares and proportions, manner and form, and under and subject to such powers, provisoes, &c. either for the benefit of the issue of the intended marriage, or of any other persons whomsoever as the wife, notwithstanding her coverture, at any time or times, and from time to time, during the joint lives of herself and her husband, should, by and with the consent and approbation of her husband, testified in writing under his hand and seal, or as the wife alone, after the decease of the husband, in case she should survive him, should, by any deed or writing to be sealed and delivered by her in the presence of and attested by two or more witnesses, direct or appoint; and in default of such direction or appointment, and in the mean time and until such direction or appointment should be made and executed, and subject thereto, and as to so much of the said trust monies, &c. whereof no such direction or appointment should be made, upon trust to receive the annual proceeds due and to grow due for or in

respect of the same, and pay the same to such persons as the wife during her life, notwithstanding her coverture, and whether sole or covert, should from time to time, by any writing or writings under her hand, direct or appoint to receive the same, and in default of such direction or appointment, into the proper hands of the wife for her separate use. The monies in the funds were transferred to the husband by virtue of powers of attorney under the hand and seal of the wife, with the consent of the husband under his hand and seal, and attested by two witnesses; and the mortgage money was received and a receipt given by the husband and wife, and the premises reconveyed and the receipt and reconveyance also so attested:—Held, that the powers of attorney were not directions, but were merely authorities to the bankers by the wife to assign the stock to her husband, and only enabled the bankers to do for her what she might have done for herself without their intervention. That, as the directions must follow on the authorities before the authorities could be acted on, it still remained to make the appointment after the execution of the powers of attorney, and that the transfers made subsequently to such execution being unaccompanied by any of the formalities required by the settlement, could not have the effect of converting instruments of substitution into instruments of alienation, and could not operate as executions of the power of appointment. *Hughes v. Wells*, 9 Hare, 749.

That the wife had no power to dispose of the trust funds otherwise than by a perfect appointment. *Ibid*.

That in order to constitute a purchaser in whose favour a defective execution of a power will be aided in equity, there must be a consideration and an intention to purchase, either proved or to be presumed; and the maintenance of his household and establishment by the husband does not furnish such consideration to the wife. *Ibid*.

That if the transfer of a wife's legacy to herself by the husband be a consideration, it does not shew any intention to purchase. *Ibid*.

That if a wife thinks proper to keep up an establishment against the wishes of the husband, what is supplied for the establishment will be a consideration for payments out of her estate on that account. *Ibid*.

That the proceeds of the settled funds having been placed to the wife's account at her bankers, and applied principally to the current expenses of the establishment of her husband and herself, by the order and direction of the wife, the husband being the agent in their application—as to monies so applied there was a defective appointment, which ought to be aided by the Court. *Ibid*.

If the husband have not in any degree influenced the acts or conduct of the wife, there is no reason why (the wife having been constituted a *feme sole* by the settlement) her assets, including the trust funds, which have become her assets by the exercise of her power, should not be bound to the same extent as the assets of any other person, not under the disability of coverture, would be bound in the same circumstances. *Ibid*.

(C) POWER OF APPOINTMENT.

(a) Construction of.

M B, being seised in fee of certain premises and
Digest, 1850—1855.

also possessed of certain stock, by settlement prior to her marriage with J C, assigned the said stock in trust after marriage for her separate use or for such person or persons as she should by deed appoint, and conveyed her said real property in trust for herself until her marriage with J C, and then to her separate use during their joint lives, and after her decease to the use of her husband J C for life, and after his death “to the use of the child and children of the said M B by the said J C, or other person or persons, and for such estate and subject to such powers and provisos as the said M B should, notwithstanding her said intended coverture, by deed appoint:—Held, that the power of appointment could only be exercised in favour of the child or children of M B by J C, or other after-taken husband. *Doe v. Beech v. Nall*, 20 Law J. Rep. (N.S.) Exch. 161; 6 Exch. Rep. 102.

(b) Execution of.

M P, by her will, devised her manor of E to B C for life, with remainder to F C (his wife) for life, and from and after the decease of the survivor to all and every the children of the said B C and F C for such estates and interests, and in such parts, shares and proportions, &c. as B C and F C should jointly appoint, or as the survivor of them should in default of any such joint appointment, by deed or will appoint, and in default of any such appointment to the use of trustees for a term of 500 years, to commence from the decease of the survivor of B C and F C, and after the determination of the said term of 500 years to the plaintiff (the eldest son of B C and F C) for life, with remainder to his first and other sons in tail male. The trusts of the term of 500 years were declared to be for raising, if required, by B C and F C 10,000*l.* for their use, and further for raising portions of 1,000*l.* a piece for the younger children of B C and F C, to be paid at such times and in such proportions, &c. as the said B C and F C should jointly appoint, and in default of such joint appointment as the survivor of them should, by deed or will executed in the presence of and attested by three witnesses, appoint; and in default of any such appointment the said portion of 1,000*l.* to be paid to sons at twenty-one, and to daughters at twenty-one or marriage, if such times of payment should respectively happen after the death of B C and F C; but if in the lifetime of either of them then payment to be made within six months next after the decease of the survivor, unless the said B C and F C, or the survivor, should direct the same to be raised in his or her lifetime, in which case the term of 500 years was to commence from the time of such direction. F C died, leaving B C surviving, and without having joined with B C in requiring the trustees of the term of 500 years to raise the said sum of 10,000*l.*, or in exercising any power given to them jointly by the said will of M P. There was issue of B C and F C, besides the eldest son (the plaintiff), four children, all of whom attained twenty-one. After the death of F C, one of the daughters married, and B C, by a deed duly executed, exercised the power under the will of M P by appointing that her portion of 1,000*l.* should at his decease be raised out of the estates thereby devised, and should become a vested interest in her from the execution of the said deed. B C died in 1821, and by his

will, attested by three witnesses, but which contained no express reference to the power in the will of M P, devised as follows:—"I give to each of my younger sons such a sum of money as with the fortunes which they are entitled to under the settlement made on my marriage with their mother, and under the will of their late grandmother M P, will make up 8,000*l.*," and (after giving legacies) "all my real estate over which I have any disposing power, I give, devise and bequeath to my eldest son (the plaintiff), his heirs and assigns." At the date of his said will B C was tenant for life of certain property (other than the manor of E) under settlements executed on his marriage, and was also seised in fee simple of other estates adjoining thereto:—Held, that the will of B C was not an execution of the power of appointment given by the will of M P as to the portions of 1,000*l.*, and that consequently the term of 500 years still subsisted, and that the plaintiff was tenant for life of the manor of E, subject to that term. *Cooke v. Cunliffe*, 21 Law J. Rep. (n.s.) Q.B. 30; 17 Q.B. Rep. 245.

F H had a power to appoint a sum of 21,792*l.* consols, to her daughters after the decease of herself and her husband. Upon the marriage of G, one of her daughters, who was a minor, F H appointed a moiety of the fund to become the part of her daughter G, to be vested in her, or her husband in her right, to the end that on the decease of the tenants for life, it might be paid to her husband, his executors, administrators or assigns, to and for his and their own use and benefit. No appointment was made of the other moiety of the fund; and upon a bill filed by G and her husband claiming a moiety of the unappointed fund,—Held, that there was a valid appointment of one moiety of the fund; that the remaining moiety was unappointed, and was divisible between G and her sister. *Wombwell v. Hanrott*, 20 Law J. Rep. (n.s.) Chanc. 581; 14 Beav. 143.

A testatrix, having a general power of appointment, upon her death, over a sum of 2,000*l.*, after referring to the power, directed and appointed that the said sum should, after her death, be paid to her four daughters and her two sons, John and Joseph; and the testatrix appointed her son Joseph her executor, and constituted him her residuary legatee. Before the death of the testatrix, her son John died, whereby his sixth share lapsed:—Held, that such sixth share passed by the residuary clause in the will to Joseph, under the provisions of the Wills Act. *In re Spooner's Trust*, 21 Law J. Rep. (n.s.) Chanc. 151; 2 Sim. N.S. 129.

G P, a tenant for life of real estate, with remainder for all and every, or any one or more, to the exclusion of the other or others of his children as he should by deed or will appoint, made an appointment to trustees upon trust for his son G S P, his heirs, executors, administrators and assigns, and to be conveyed to him when and as he should attain the age of twenty-three years; and in case his son G S P should die before he should have attained the age of twenty-one years, to the use of the second, third, and fourth, and every other son of the testator successively in tail, with remainder to his daughters in tail, with remainder to his brother in fee. And after directing the payment of two annual sums of money during the minority of his son, he directed

his trustees to invest the clear residue of the rents and profits to accumulate until G S P, or such other sons as aforesaid, should attain the age of twenty-three, and on his or their first attaining that age, then upon trust to pay over all such securities and accumulations unto G S P, or to such other sons, his executors, administrators and assigns, for his and their absolute use and benefit:—Held, that the power of appointment was duly exercised; that G S P took an estate in fee upon the death of the testator liable to be divested in case of his death under twenty-one, and that the trust for accumulation was valid until G S P attained the age of twenty-three. *Peard v. Kekewich*, 21 Law J. Rep. (n.s.) Chanc. 456; 15 Beav. 166.

A lady upon the marriage of her son, H S B, settled several sums of stock for the benefit of him and his wife, and the issue of the marriage, and in case there should be one or more child or children, not being an only daughter, then the stocks were to become vested in such child or children respectively, or any one or more exclusively, to be transferred and assigned to him or them respectively, at such age or ages, and in such proportions as H S B should appoint by deed or will, with remainder in default of appointment for the benefit of the children of the marriage. H S B, upon the birth of a son, appointed the stocks unto his son C S B absolutely, and declared that the same should be a vested interest in him immediately after the execution of the deed, but he reserved to himself a power of revocation. His wife being again *enceinte*, H S B executed another deed, revoking the former deed, and appointing the whole of the stocks to his son C S B, and all and every other child or children of the marriage who should be living at his death or born afterwards, equally to be divided. H S B was at that time in very ill health, and he died shortly after, and after his death a daughter was born. C S B survived his father about five years, and upon his death letters of administration were taken out by his mother, who had married again; and upon a bill filed by her and her husband to have the trusts of the settlement and the deed of appointment carried into execution,—Held, that the power in the settlement was duly executed, and that the children alone were the objects of the appointment for whom benefits were provided. *Fearon v. Desbrisay*, 21 Law J. Rep. (n.s.) Chanc. 505; 14 Beav. 635.

A testator bequeathed certain property to A for life, with remainder to such persons as A should by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed and delivered in the presence of, and attested by two or more witnesses, appoint. A made a will, dated after the operation of the Wills Act:—Held, that the will was an execution of the power. *Turner v. Turner*, 21 Law J. Rep. (n.s.) Chanc. 843.

A, having a power of appointment over a sum of consols, some leasehold ground-rents, and some shares in an insurance company, made a will, by which she bequeathed all her real estate, money and securities for money to B, and all the rest, residue and remainder of her personal estate to C:—Held, that all the property subject to the power passed by the will, and that B was entitled to the consols, and C to the shares and ground-rents. *Ibid.*

A testatrix having an absolute power of appointing

a fund, appointed to her three children or their respective executors and administrators, in such manner as her husband should by his will direct and appoint. The husband by his will appointed shares to two of the children, to the exclusion of the third:—Held, that this was an invalid execution of the power, and the three children took the fund in equal shares, under the will of the original testatrix. *White v. Wilson*, 22 Law J. Rep. (N.S.) Chanc. 62; 1 Drew. 298.

Under a marriage settlement power was given to a father to appoint the trust estates among all or any of his children. The estates were converted into money, and the father obtained a large portion of the trust funds without giving any security for their repayment to the trustees. The father having one son and four daughters, executed the power in favour of the daughters to the exclusion of the son, and a few days afterwards the daughters transferred their appointed shares in the trust property to their father, who conveyed some real estates, of which he was seised, to them in exchange. The son, after the death of his father, filed a bill to set aside the appointment, and also the deeds effecting the exchange, on the ground of fraud, based upon a collusive agreement between the father and his daughters, by which the father, who was not able to replace the trust monies, obtained a discharge from the claims of the trustees:—Held, that no benefit had accrued to the father, and that the appointment was good. *Askham v. Barker*, 22 Law J. Rep. (N.S.) Chanc. 769; 17 Beav. 37.

A power enabling a married woman to dispose of settled property in the event of her dying in the lifetime of her husband, is satisfied by her surviving him, and becoming absolutely entitled to the property; and a will executed by her during their joint lives was held to be inoperative as an appointment. *Trimmet v. Fell*, 22 Law J. Rep. (N.S.) Chanc. 954; 16 Beav. 537.

A married woman executed a power of appointment in favour of the children of her husband by his first wife. After his death, in contemplation of a second marriage, she destroyed the deed and resettled the property, but subsequently a deed of arrangement was executed by her and her husband with the children of the first husband. The deed recited the preparation, execution and destruction of the first appointment. This was supported by a production of the draft, and the solicitor's bill for preparing the same:—Held, that these facts were sufficient evidence of such a deed having existed, and that the persons claiming under the deed of arrangement were entitled in preference to those in whose favour she had executed the power by her will. *Dyne v. Costobadie*, 23 Law J. Rep. (N.S.) Chanc. 66; 17 Beav. 140.

A husband, having a power of appointing 30,000*l.* among younger children, was living apart from his wife, who had the care and custody of the youngest of their three children. The husband being desirous of raising money by mortgage of the family estates, applied to the wife to postpone her pin-money and jointure to the proposed mortgage. The wife assented to this upon condition that the husband should appoint 5,000*l.* to the youngest child. This appointment of 5,000*l.* was made, and at the same time by deed, dated on the following day, the husband,

unknown to the wife, appointed the remainder (25,000*l.*) to the other of the younger children. A portion only of the money proposed to be raised was advanced, and this was partially applied in payment of the arrears of the wife's pin-money. Before the remainder of the money was raised the husband died:—Held, that the corrupt motive which might attach to the appointment of the 5,000*l.* did not affect the appointment of the 25,000*l.* *Rowley v. Rowley*, 23 Law J. Rep. (N.S.) Chanc. 275; Kay, 242.

By a marriage settlement certain funds were to be held upon trust after the wife's death for all or any, to the exclusion of the others, of the children of the marriage in such shares and proportions, manner and form, as the wife should by deed or will appoint. There were nine children of the marriage—five sons and four daughters. The husband died, having by his will given all his property to his wife for life, and after her decease to his children equally. The wife, in exercise of her power of appointment, appointed by deed the settlement funds among her four daughters upon condition that they should, on request in writing by her, her executors or administrators, release to their brothers the shares taken by them (the daughters) under the father's will, and in default she appointed the funds to her sons. After the mother's death her executors requested the daughters to make this release: three of them did so; the fourth, whose interest under the will and settlement had been settled on her marriage, did not do so, but upon the trustees of the settlement having paid the money into court, she and her trustees instituted a suit to have the condition in the appointment declared void:—Held, that the condition was valid, the limitation over being in favour of objects of the power; and that the institution of this suit was not a refusal to release, but that the Court would now on inquiry elect for the married daughter and the persons interested under her settlement which would be most advantageous for them to take. *Stroud v. Norman*, 23 Law J. Rep. (N.S.) Chanc. 443; Kay, 313.

Under a marriage settlement, property was to be held by the trustees, after the death of the wife, for all and every or such one or more of the children of the marriage, &c. as the wife should appoint, and in default of appointment, for the children equally; and the trustees were empowered during the minorities of the children to apply the income of their presumptive shares for their maintenance and education, although the father might be of ability to maintain them. In exercise of the power, the wife appointed the property among the children equally, and directed that during their minorities the income of their respective shares should be paid to the husband, to be applied by him for their maintenance:—Held, that the discretion of the trustees as to the application of the income during the minorities was not thereby taken away. *White v. Grane*, 23 Law J. Rep. (N.S.) Chanc. 863; 18 Beav. 571.

Deeds executed by the donee of a power for the purpose of indirectly giving a benefit to a party not an object of the power will be set aside, notwithstanding the transactions are so complicated and intermixed that the setting them aside affects the interests of parties who are objects of the power. *Agassiz v. Squire*, 23 Law J. Rep. (N.S.) Chanc. 985; 18 Beav. 431.

Personal estate (a first fund) was settled upon trust for such children and in such shares as A B should appoint by deed or will. Personal estate (a second fund) was bequeathed upon trust for such children and issue of children, and in such shares as A B should appoint by deed or will. By a deed-poll, executed with the formalities required by the will, A B appointed one-fifth of the second fund to one of her children, and declared that, in case she should not otherwise direct, the remainder of that fund should belong to her other three children and the children of a deceased child, and then she reserved to herself a power of revocation and new appointment. A B made her will, by which she gave, devised and bequeathed, and by virtue of the power given by the settlement, "or otherwise howsoever enabling her," appointed all the first fund or funds she "otherwise had power to appoint," in a particular manner. The Master of the Rolls decided that the will was an execution of the power contained in the settlement and of the power contained in the will, and also a revocation and new appointment under the power contained in the deed-poll; but, upon appeal,—Held, that the will did not operate as such revocation and new appointment. *Pomfret v. Perring*, 24 Law J. Rep. (N.S.) Chanc. 187; 5 De Gex, M. & G. 775; 18 Beav. 618.

A widow, under a power of appointing to her daughters, gave real and personal property to them equally as each should appoint, and in default to them absolutely. The daughters, though the will giving to the widow the power contained a direction that the fortune of each daughter should go to her children after her decease in such proportions as she should appoint, and in default among the children equally, settled their respective shares upon themselves and their respective husbands for life, with remainder to their children as they should appoint, and in default equally among the children, with cross-remainders between the daughters in the event of either having no child who should attain a vested interest:—Held, that the appointment made by the widow was void, except so far as it declared what shares the daughters were to take, and that the settlement executed by the daughters was also void. *Jebb v. Tuqwell*, 24 Law J. Rep. (N.S.) Chanc. 433; 20 Beav. 84: but see 25 Law J. Rep. (N.S.) Chanc. 109.

Held, also, upon the construction of the will, that the widow was not entitled to the enjoyment of the personal property in specie. *Ibid*.

A father having, under a marriage settlement, a power of appointment amongst his children of lands, which in default of appointment were settled upon all the children equally in tail, advanced to a daughter upon her marriage a sum of money which he declared was to be by her accepted and taken in lieu, bar and full satisfaction of all and every sum and sums of money, legal and beneficial estates and interests whatsoever to which she was then, or at any time thereafter might be entitled under or by virtue of the settlement:—Held, that this was not a purchase by the father of his daughter's share for his own benefit, but amounted merely to a satisfaction of the daughter's share, which thereupon went over to the other objects of the power as if the daughter had never been in existence. *Lee v. Head*, 24 Law J. Rep. (N.S.) Chanc. 569; 1 Kay & J. 620.

Folkes v. Western (9 Ves. 456), observed upon. *Ibid*.

A lady, tenant for life under a settlement dated in 1794, had a power of appointment over a fee by deed or will. By deed dated in 1830, she appointed the fee in pursuance of the power, but reserved a power of revocation and new appointment by deed. By deed dated in 1833 she, pursuant to the power of the deed of 1830, revoked, and newly appointed the fee, but reserved a power of revocation and new appointment by deed. By deed dated in 1835 she, pursuant to the deed of 1833, revoked, and newly appointed the fee, but again reserved a power of revocation and new appointment by deed. By a deed dated in 1836, she revoked the uses declared by the deed of 1835, but made no new appointment; and in 1848 she made her will, purporting to be made in execution of the power of the settlement of 1794, and thereby she devised the estates upon trusts for sale:—Held (overruling a decision of one of the Vice Chancellors), that the original power of 1794 was not exhausted by the deeds of 1830, 1833, 1835, and 1836, but was duly executed by the will of 1848, purporting to be made in pursuance of the original power. *Evans v. Saunders*; *Evans v. Evans*, 24 Law J. Rep. (N.S.) Chanc. 609; 22 Law J. Rep. (N.S.) Chanc. 471, 1024; 1 Drew. 415, 645.

Mrs. C had a power to appoint three sums of 10,000*l.* each: the first, under her father's will, amongst her children; the second, under her mother's will, to any person; and the third, also under her mother's will, amongst her children. In 1836 the second sum was appointed to her husband, and paid to him. In 1838 the legacy duty was paid on the third sum, which reduced it to 9,900*l.* In 1842 she purported to appoint the two sums of 10,000*l.* under her mother's will to her two daughters equally, and in 1843 she, by her will, appointed 9,900*l.* described as derived from her father to her daughter A B, and 10,000*l.*, also described as settled by her father and mother to the other daughter C D; and she confirmed the deeds of 1842, so far as they were valid and not inconsistent with her will, and declared that if she had exceeded her powers, her will should have effect under the doctrine of election. The Court having come to the conclusion that Mrs. C, when she made her will, believed she had the power of appointing 19,900*l.*, and appointed 9,900*l.* to A B and 10,000*l.* to C D,—Held, that the doctrine of *Page v. Leapingwell* applied; and that as the testatrix had then only the power of appointing the first sum of 10,000*l.*, it must be divided between the two legatees in the proportion of 99*l.* to 100*l.* *Laurie v. Clutton*, 15 Beav. 65.

In 1841 Lord Lake settled a real estate on himself for life, remainder as he should by will appoint, and in default on the plaintiffs. By his will he confirmed this deed and the provisions thereby made, and then made a general devise of all his real and personal estate upon trust to give full effect to the deed of 1841, and subject thereto to pay his debts and legacies, and hold the residue for the plaintiffs. He had no other real estates than those in the deed of 1841:—Held, by the Master of the Rolls, that the testator having by his will confirmed the deed, could not be deemed to have thereby executed the power, and therefore that the legacies were not charged on it, but the decision was reversed. *Lake v. Currie*, 15 Beav. 472.

The presumption is against double portions, and the burthen of proof lies on those who contend for two portions to shew that this presumption is rebutted. *Montague v. Montague*, 15 Beav. 565.

In 1842 a parent having a power to appoint two separate sums of 5,000*l.* and 10,000*l.* amongst his children, made his will, by which he appointed the 5,000*l.* to James, and the 10,000*l.* between Theodosia and Catherine. In 1844 he by deed appointed the 5,000*l.*, which he had before appointed by will to James, to Theodosia. In 1846 he by codicil confirmed his will, and he died in 1847. Theodosia claimed the two sums of 5,000*l.*; but James contended, first, that she was bound by election to give effect to the bequest of 5,000*l.* to him, or to relinquish the 5,000*l.* given to her by the will; and, secondly, that the appointment of 1844 was a satisfaction of the legacy of 5,000*l.*:—Held, that no case of election had arisen, but that the legacy to Theodosia was satisfied and the amount unappointed. *Ibid.*

A B having a testamentary power over real estate in favour of his children, devised all the real estates of or to which he was seised or entitled, "or of which he had power to dispose or to appoint by that his will," on trusts for his children, and for other uses exceeding his authority:—Held, that the will was an execution of the power. *Banks v. Banks*, 17 Beav. 352.

A tenant for life had a power to appoint to children. By a post-nuptial settlement, to which his married daughter and her husband were parties, he appointed the reversionary interest of stocks to the daughter and her husband and children:—Held, that the appointment to the husband and grandchildren was valid. *In re Gosset's Settlement*, 19 Beav. 529.

A testatrix gave her residue to A B, her executor, in trust for such of the children or grandchildren of X as he should think it most acceptable to, &c. The will was contested, and in answer to a letter from his proctor requesting, in the event of his releasing his interest, the names of the persons most interested, or one of them, in order that they might appoint a proctor, and make the affidavit of scripts, A B stated by name "the children whom it is desired may benefit," and that he presumed that, having thus determined, their father should make the affidavit:—Held, that this amounted to a valid appointment of the residue. *Bailey v. Hughes*, 19 Beav. 169.

A power to appoint personally amongst a class may, if no formality be required, be executed by merely naming the parties to be benefited.—*semble*. *Ibid.*

Where there is an absolute appointment to A, an object of the power, followed by a qualification limiting the interest of A to a life interest, with remainder to persons not objects of the power, the latter being void, A takes absolutely under the prior appointment. *Gerrard v. Butler*, 20 Beav. 541.

A testatrix having a power to appoint a fund to her children, appointed it in this form:—"Amongst my children A, B, C and D, the share of A to be upon the trusts of her marriage settlement, and to be paid to the trustees thereof. A was the only person in the marriage settlement within the power:—Held, that she took her share absolutely. *Ibid.*

A testator, by virtue of a power, appointed a fund to trustees for his four children, in four equal portions, and subject to the trusts thereafter contained respecting

his own residuary estate. Some of those trusts were to the children for life, with remainder to their children, and (as regarded the fund subject to the power) the appointment to grandchildren was void for remoteness:—Held, that the children took absolutely in the first instance, and that the subsequent attempt to limit the absolute gift being void, the children took the fund absolutely. *Stephens v. Gadsden*, 20 Beav. 463.

Under his marriage settlement A B had a power of appointing a fund amongst his children. By his will he appointed the fund equally amongst his eight children; but he afterwards postponed the payment of the capital, partly until the majority of the children, and partly until after the death or marriage of his last surviving unmarried daughter, the unmarried daughters being in the meanwhile entitled to the income. The appointment was held valid. *Wilson v. Wilson*, 21 Beav. 25.

A testator had a power of appointing 10,000*l.* amongst his children, and in default it was limited to them equally. By his will he gave his son an annuity, to become void if no appointment should be made of the 10,000*l.*, or if any appointment should be made whereby the son would be benefited. The testator only appointed 5,000*l.* in favour of his daughter, and the son took part of the residue in default of appointment:—Held, that the annuity had not ceased. *Arnott v. Tyrrell*, 21 Beav. 49.

A trust term was created for raising the sum of 10,000*l.* with interest from the death of the tenant for life for his younger children as he should appoint, and in default to them equally. He appointed the fund to his two younger children in unequal proportions, after the decease of himself and of his mother:—Held, that the intermediate interest between the deaths of the tenant for life and his mother was unappointed, and that it belonged to the two children equally, and did not pass as accessory to the capital appointed. *Watts v. Shrimpton*, 21 Beav. 97.

Estates A and B were so settled that the testator had no power to deal with A, but had a power of appointment over B. By his will, made after the 1 Vict. c. 26, he referred to the settlement and confirmed it, and then reciting that he had considerable freehold estates, and might become possessed of more, he devised all his real estates of which he might die possessed to certain persons as trustees for purposes totally different from those of the settlement: he had not at the date of his will or his death any other estates besides A and B:—Held, that the testator must be taken to have known that he had a power of appointment over estate B; that the confirmation of the settlement operated only upon the estate A; and that the devise was a good execution of the power. *Lake v. Currie*, 2 De Gex, M. & G. 536.

Observations on the operation of 1 Vict. c. 26. on devises in execution of powers. *Ibid.*

Under a power of appointment of a trust fund among children in the usual form, the share of a married daughter, who was unborn at the creation of the power, was limited to trustees upon trust for her separate use for life, without power of anticipation, and after her decease to her general appointees by deed or will, and in default to her executors or administrators:—Held, that such an appointment was not void as fettering the property beyond the legal limits, but that the restraint upon anticipation might be re-

jected, and the rest of the appointment sustained. *Fry v. Capper*, Kay, 163.

A married woman having a power of appointment under her marriage settlement of estates A and B, appointed by will in September 1838 estate A to her husband in fee, "and all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another person. By codicils to her will she revoked the appointment of estate A to her husband, and gave him the same estate for life, with remainder to trustees to sell and pay certain legacies, and pay residue to charities:—Held, that the devise of "all other the hereditaments," &c. by the will was not residuary but specific, and that the void gifts to the charities did not pass by it, but lapsed as unappointed. *In re Brown*, 1 Kay & J. 523.

A bequest of personal property to three trustees, A, B and C, "upon trust, to dispose of the same in whatever way A shall by any deed or deeds, instrument or instruments, or by his will, appoint, provided that no such deed, instrument or will shall be taken to be an execution of this power, unless the said deed, instrument or will be executed after my decease," and subject thereto upon trust for A for life:—Held, to be a power exercisable by any instrument in writing, whether a deed or not, if such instrument sufficiently referred to the power or to the property subject to it, or if it made a general gift, and the appointor had no property of his own to which it could refer. *Brodrick v. Brown*, 1 Kay & J. 323.

A written order directed to the trustees of the fund would be a good exercise of this power. *Ibid*.

If the donee of the power was also the sole trustee of the fund, a cheque upon a banker where the fund was lying would be a good appointment if he had no money of his own there. So also would a letter from him referring to the power or to the property, and accompanying a gift of money, which it stated to be in pursuance of the power or out of the property. *Ibid*.

Various examples of this last kind of appointment. *Ibid*.

In a case of a series of appointments of this kind, one letter stated only that the payment which it accompanied was made "in fulfilment of the known wishes" of the donor of the power:—Held, that this was an ambiguity that might be explained by reference to other documents, which shewed that the gift was intended to be in exercise of the power. *Ibid*.

A testatrix having a power of appointing a sum of 10,000*l*., secured by a term of 500 years, and having also a power of appointing the fee of the lands on which the money was secured, by her will devised her lands to A for life, with remainder to B in tail, and gave to A all the residue of her personal estate:—Held, that the 10,000*l*. passed under the residuary gift of the personal estate. *Clifford v. Clifford*, 9 Hare, 675.

Effect of a general release by a party entitled to a charge on real estate, secured by a term of years to the trustees of the term, the term itself not being assigned or merged. *Ibid*.

By a voluntary settlement in 1848 a settlor transferred a debt to a trustee, in trust for such persons and purposes as the settlor should by any deed or instrument in writing appoint, and in default to pay the income to the settlor for his life, and on his death

to distribute the amount amongst specified persons. He afterwards executed an appointment by deed of part of the fund, and confirmed the trusts of the settlement as to the remainder. By his will, made in 1852, the settlor gave certain legacies, and then gave "all his personal estate not otherwise effectually disposed of" to trustees:—Held, first, that the settlor had sufficiently expressed his intention not to affect the unappointed property comprised in the settlement of 1848, and, secondly, that even if no such intention appeared, the Wills Act, 7 Will. 4. & 1 Vict. c. 26. s. 27, applied only to cases where the power of appointment was equivalent to absolute property. *Moss v. Harter*, 2 Sm. & G. 458.

Semble—that the power of appointment contained in the deed did not authorize an appointment by will. *Ibid*.

It is not the duty of the Court to strain the words of a power of appointment, in order to bring them within the 27th section of the Wills Act, but to ascertain whether the power is in the widest and most general terms. *Ibid*.

Where there is a valid appointment to an object of the power, with additional words of appointment in favour of the appointee's children, by which in excess of the power those children are also made appointees so as to cut down the previous absolute interest:—Held, that the words in excess of the power are to be altogether rejected, and that the appointee who is an object of the power takes absolutely. *In re Lord Sondes' Will*, 2 Sm. & G. 416.

(c) Revocation and Extinguishment of.

By a marriage settlement certain estates were settled on Henry K and Mary K, husband and wife, for their respective lives, with remainder to the use of all or any of the children of the marriage, with such limitations as Henry K and Mary K should from time to time by any deed, with or without power of revocation and new appointment, limit and appoint, and in default of such limitation or appointment, or in case any such should be made which should not be a complete disposition of the premises, then as the survivor of them should by deed or will limit or appoint, and in default of such appointment, jointly or severally to limit the premises in such a manner as would give a title to a third party. By a deed, dated 1832, Henry K and Mary K limited the premises to the defendant. This deed contained a power of joint revocation of the uses therein limited, and a power of joint appointment of the whole or part of the premises to new uses, and with like powers of revocation and new appointment reserved to both, as they might think proper. By a deed of the 4th of February 1833, the two parties jointly revoked the uses contained in the deed of 1832, but made no new appointment. On the 19th of February 1833 Mary K died, and on the 4th of May 1833 Henry K, by will, limited and appointed the premises to the defendant in fee:—Held, that the revocation of the appointment revived the original power of joint appointment, and with it the power of appointment by the survivor in case of default; that the case stood as if the first joint appointment had never been made, in which case the subsequent non-exercise of that existing joint power of appointment was a default in the exercise of that joint power and gave the power

of appointment to the survivor, and that, therefore, the defendant was entitled to the premises. *Montagu v. Kater*, 22 Law J. Rep. (N.S.) Exch. 154; 8 Exch. Rep. 507.

Semble—that if the second deed had been simply revoked, the original revoked cases might have been revived. *Ibid*.

By a marriage settlement certain property was conveyed to trustees during the joint lives of the husband and wife, in trust to pay the rents and profits to the wife for life, for her separate use, and after her death to the husband for life, and after his decease to the use of such persons as the husband should by will appoint, and in default of such appointment to certain uses for the benefit of the children of the marriage, and in default of any such appointment and issue, there was a limitation to the next-of-kin of the husband. By a subsequent deed of 1828, which recited that there were no children of the marriage, the husband and wife released and appointed the property to trustees for sale, and covenanted to levy a fine for the purpose of extinguishing all powers and interest of the wife. It was also declared that the release and fine should operate to extinguish the husband's power of appointment by will, so far only as any such will made in execution of the power should not operate and enure to the use of the trustees, or in confirmation of the indenture of 1828. A fine was accordingly levied, and subsequently, contrary to the expectation of the parties, a child of the marriage was born. The husband then made a will and executed his power of appointment in favour of the trustees of the deed of 1828, and confirmed that deed in all respects. The trustees contracted to sell the estate; but as the only child of the marriage refused to join in the sale, a bill for specific performance was filed:—Held, that the power of appointment under the marriage settlement was extinguished by the deed of 1828, except for the special purpose of confirming that deed by will. *Walmsley v. Jowett*, 23 Law J. Rep. (N.S.) Chanc. 425.

(D) TO GRANT LEASES.

The latest lease preceding the creation of a leasing power is of greater weight as to the ancient and accustomed rent than any single earlier lease, and ought to govern where there is a balance of evidence. But if the ancient custom is uniform, and the single lease varying therefrom is granted just before the creation of the power, such exceptional lease cannot be taken as evidence of the custom. *Doe d. Bidulph v. Hole*, 20 Law J. Rep. (N.S.) Q.B. 57; 15 Q.B. Rep. 848.

By a will, dated in 1761, a power was given to the tenants for life to lease for three lives lands usually so letten, provided there were reserved the ancient and accustomed rents and heriots, or more, and usual and reasonable covenants. By a codicil, dated 1763, provisions for a younger child were made, and the will was in all other respects confirmed. By a lease in 1724 the rent reserved was 1*l.*, the heriots 3*l.*, and the fine paid 9*l.* By a subsequent lease of the same premises in 1762 the rent was 15*l.*, which was the rack-rent value, and there was no fine or heriot. By a lease of 1824 of the same premises, purporting to be made under the power, the rent and heriots reserved were the same

as in the lease of 1724:—Held, first, that it was a question for the jury, under these circumstances, whether of the two leases (of 1724 or of 1762) reserved the ancient and accustomed rent, so as to be the pattern for future leases; secondly, that the rule that a codicil confirming a will makes the will to have the date of the codicil, is subject to the limitation that the intention of the testator be not thereby defeated; and therefore, as the codicil in the present case, if it brought down the date of the will to 1763 for all purposes, would materially alter the power contained in the will, and so contravene the intention of the testator, the leasing power must be taken to speak from the date of the will, and not from that of the codicil. *Ibid*.

Tenant for life, punishable for waste, had power to lease for twenty-one years certain ancient pasture land, which she afterwards and before any lease had converted into garden allotments in a manner amounting to waste. The leasing power provided against "any fine, premium, or foregift being taken for the making thereof," and that "none of the lessees should be by any clause or words therein contained authorized to commit waste, or exempted from punishment for waste." In a lease, reciting this power, the tenant for life demised, on the 13th of December 1845, the premises for twenty-one years from the 1st of July last, reserving a rent payable half-yearly on the 1st of January and the 1st of July, the first payment to be made on the 1st of January 1846. The lease contained a covenant by the lessee not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system" introduced by the tenant for life:—Held, first, that such reservation of rent did not amount to a fine, premium, or foregift; secondly, that the exception in the covenant did not amount to a licence or authority to the lessee to commit waste by carrying out the allotment system; and that if any implication could be made so as to construe that exception as implying a permission to the lessee to do anything, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life so far as she had power to permit it, and not otherwise. *Doe d. Hopkinson v. Ferrand*, 20 Law J. Rep. (N.S.) C.P. 202.

Semble—such an exception introduced into a covenant not to commit waste, even if it amounted to an implied authority to commit waste, is not a "special licence had by writing of covenant," within the meaning of the Statute of Marlbridge, 52 Hen. 3. c. 23. *Ibid*.

A lease, granted under a power contained in a settlement, recited the title of the lessor, and shewed that he had only an equitable interest. A right of re-entry for a breach of the covenants in the lease was reserved to the lessor and his assigns:—Held, first, that the lessee was not estopped from disputing the title of the lessor so disclosed in the lease; and, secondly, that "assigns" meant assigns of the settlor; and that although the right of re-entry could not be well reserved to the lessor, yet that the owners of the reversion under the settlement for the time being were entitled to take advantage of it as "assigns." *Greenaway v. Hart*, 23 Law J. Rep. (N.S.) C.P. 115; 14 Com. B. Rep. 430.

By a settlement made on the marriage of S certain

real estate was conveyed by him to trustees to his use until marriage, and after marriage to the use of B and Y, their executors, administrators and assigns, for the term of 500 years, upon certain trusts, and after the expiration or sooner determination thereof, and in the mean time subject thereto, to the use of S, the settlor, for life, without impeachment of waste, with remainder to certain other uses. The settlement contained a proviso that it should be lawful for S during his life, from time to time, by deed, either referring or not referring to the power, to demise and lease the said real estate for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, and so that the lessee was not by any clause or words therein to be contained made dispunishable for waste, or exempted from punishment for committing waste. After the marriage, S, by deed, leased part of the premises to the defendants for twelve years. The lease did not refer to the power, and the rent was reserved to S, his heirs and assigns. The defendants thereby covenanted to repair a blacksmith's shop, and all glass and leadwork of the windows, and all doors, locks, keys, fences, bridges and works in such situation, manner and form as should be determined by the surveyor of S, and to yield up the premises in repair to S, his heirs or assigns, at the expiration of the lease. S covenanted with the defendants to maintain the messuages, buildings and a draining-mill in good and tenantable repair, except in respect of such repairs covenanted to be done by the defendants. S died before the expiration of the lease, and the term of 500 years being still subsisting, the surviving trustee, at the expiration of the lease, brought an action against the defendants for breaches of covenant to repair and cultivate:—Held, that such action was not maintainable, for the lease, although good by way of estoppel between the parties to it, was void as between the plaintiff and the defendants, not being in accordance with the power,—first, by reason of the rent being reserved to S, his heirs and assigns, instead of being incident to the immediate reversion; and, secondly, by reason of the covenant by S to repair rendering the defendants dispunishable for waste to that extent. *Yellowly v. Gower*, 24 Law J. Rep. (N.S.) Exch. 289; 1 Exch. Rep. 274.

(E) OF SALE.

Where a naked power is given to several, it cannot be exercised by the survivors; but if a power be annexed to an office, any persons filling the office may execute it. *Brassey v. Chalmers*, 16 Beav. 231.

Power to "my executors hereinafter mentioned with the approbation of my trustees for the time being" to sell real estate,—Held, by the Master of the Rolls upon the context not to authorize a sale by the survivor of the executors; but the Lords Justices dissented from this decision. *Ibid*.

PRACTICE, AT LAW.

(A) RULES AND ORDERS FOR REGULATING.

(B) PROCESS.

(a) *Writ of Summons.*

(1) *Duration and Renewal of the Writ.*

(2) *Special Indorsement of Particulars of Claim.*

(b) *Service of.*

(1) *On Public Bodies.*

(2) *On Lunatics.*

(3) *On Prisoners.*

(4) *When Defendant without the Jurisdiction.*

(5) *Writ of Distringas or Order in lieu of.*

(C) APPEARANCE.

(D) PARTICULARS.

(a) *Where there are Special Counts.*

(b) *Giving Credits in.*

(c) *Delivery of, with Declaration.*

(d) *Further and better Particulars.*

(E) DECLARATION.

(a) *Time within which Plaintiffs must declare.*

(b) *Notice to declare.*

(c) *Rule for time to declare.*

(F) PLEA.

(a) *Time to plead.*

(b) *Issuable Pleas.*

(c) *Several Pleas.*

(d) *Framed to embarrass.*

(e) *Puis Darrein Continuance.*

(f) *Withdrawing Plea.*

(G) PLEADING AND DEMURRING TOGETHER.

(H) DEMURRER.

(I) SUGGESTION OF NEW MATTER.

(J) TRIAL.

(a) *Notice of Trial.*

(1) *After Injunction.*

(2) *Short Notice.*

(b) *Issue, Nisi Prius Record, and Entry of Causes.*

(c) *View and Inspection.*

(d) *By Proviso.*

(e) *Proceedings at the Trial.*

(1) *Conduct of the Cause.*

(2) *Right to begin.*

(3) *Addressing the Jury.*

(4) *Withdrawing the Record.*

(f) *Adjourning or Postponing.*

(g) *Verdict and Nonsuit.*

(K) NEW TRIAL.

(L) SPECIAL CASES.

(M) IRREGULARITY.

(N) STAYING AND SETTING ASIDE PROCEEDINGS.

(O) MASTERS OF THE COURTS.

(P) CONSOLIDATION OF ACTIONS.

(Q) DISCONTINUANCE.

(R) NOTICE TO PROCEED.

(S) ENTRY OF SATISFACTION ON THE ROLL.

(T) MOTIONS AND RULES.

(U) JUDGES' ORDERS.

(V) INTERROGATORIES.

(W) SETTING OFF COSTS.

(A) RULES AND ORDERS FOR REGULATING.

The rules of Hilary term 1853 change the practice only as to written rules; and rules by statute, or unwritten rules, remain unchanged in so far as they are

not inconsistent with the New Rules. *Begg v. Forbes*, 23 Law J. Rep. (N.S.) C.P. 222; 13 Com. B. Rep. 614.

(B) PROCESS.

(a) *Writ of Summons.*

[Where defendant resides within the jurisdiction see 15 & 16 Vict. c. 76. s. 2.—As to form of action in, see section 3.—As to date and teste of, see section 5.—As to indorsements upon, see section 8.—As to attorney's name and address on, or where plaintiff sues in person, see section 6.—As to demand of attorney's authority and client's name and address, see section 7.—As to indorsing claim of mandamus, see section 68.—As to claim of injunction, see section 80.—As to omission to indorse, see section 20.—As to personal service, see section 17.—As to service in any county, see section 14.]

(1) *Duration and Renewal of the Writ.*

[See 15 & 16 Vict. c. 76. s. 11.]

A writ of summons was issued, dated the 7th of November 1853, with a view to save the Statute of Limitations. It was renewed on the 6th of May 1854. On the 6th of November following, the plaintiff applied to the officer of the court to renew the writ again; but the latter refused, considering it too late, and that the six months had expired. The Court, without deciding that the renewal would be valid, directed that the writ should be renewed as of the 6th of November, *nunc pro tunc*, as the dates would appear on the record. *Anonymous*, 24 Law J. Rep. (N.S.) Q.B. 23.

Quere—whether the six months for which a writ of summons renewed under section 11. of the Common Law Procedure Act, 1852, is to be available, are to be calculated exclusive or inclusive of the day of renewal. *Anonymous*, 24 Law J. Rep. (N.S.) C.P. 1; s. c. *nom. Black v. Green*, 15 Com. B. Rep. 262.

Where a writ had been renewed on the 1st of May, and on the 1st of November an application to renew it again was made to the officer, and he had refused, the Court, on the 2nd of November, ordered the renewal seal to be affixed *nunc pro tunc*, without expressing any opinion whether the renewal was in time or not. *Ibid.*

(2) *Special Indorsement of Particulars of Claim.*

[See 15 & 16 Vict. c. 76. s. 25.]

Where a writ is specially indorsed under the Common Law Procedure Act,—*semble*, that it is irregular for the plaintiff to deliver any other particulars of demand, besides those indorsed on the writ, without leave of the Court or a Judge. *Fromant v. Ashley*, 22 Law J. Rep. (N.S.) Q.B. 237; 1 E. & B. 723.

But where the plaintiff delivered with his declaration other particulars, without leave, and the defendant, instead of objecting, pleaded and went to trial, he was held to have waived the irregularity, and the plaintiff was allowed to avail himself of the second particulars. *Ibid.*

A plaintiff cannot sign final judgment under the 25th section of the Common Law Procedure Act, 1852, for want of appearance to a writ, specially indorsed, claiming (*inter alia*) the expense of noting and commission on a bill of exchange; the same

being unliquidated damages. *Rogers v. Hunt*, 24 Law J. Rep. (N.S.) Exch. 23; 10 Exch. Rep. 474.

Where judgment was signed under the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 25, on a writ specially indorsed, claiming, *inter alia*, interest on an I O U, the Court refused to set aside the judgment on the ground that the defendant, by not appearing to the writ, had admitted a contract, express or implied, to pay interest. *Rodway v. Lucas*, 24 Law J. Rep. (N.S.) Exch. 155; 10 Exch. Rep. 667.

Although the Common Law Procedure Act, 1852, s. 25, does not limit the right of specially indorsing a writ with interest to cases where there has been either an express or implied contract to pay interest, yet in all cases, except bills of exchange and promissory notes, if any party not entitled to interest makes a claim for it by special indorsement to gain an improper advantage, the Court will set aside the judgment and compel the attorney making such indorsement to pay the costs. *Ibid.*

(b) *Service of.*

(1) *On Public Bodies.*

[See 15 & 16 Vict. c. 76. s. 16.]

By 1 & 2 Geo. 4. c. 93. s. 9, "the principal officers and Commissioners of the Navy" for the time being were empowered to bring and maintain any action of ejectment or other proceeding for recovering possession of lands, &c. vested in them, and to bring, maintain, or defend any other action in respect of the said lands, &c., and it was enacted that in every such action they should be called by the above name, without naming any of them. By subsequent acts, the powers, &c. of the above body were vested in the defendants. A writ in an action of debt against the defendants by their collective name was served upon A M, one of their number. It required the defendants to enter an appearance in an action of debt, and stated that, in default, an appearance would be entered for them. Upon a motion to set aside this writ and the service thereof for irregularity, the affidavits stated that the action was brought for half-pay, which was not a cause of action for which an action for debt could be maintained against the defendants by their collective name:—Held, first, that the Court could not upon this motion look at the affidavits as to the cause of action, and that inasmuch as the 1 & 2 Geo. 4. c. 93. s. 9. authorized some actions of debt to be maintained against the defendants by their collective name, there was no ground for setting aside the process as irregular; secondly, (*per Maule, J.*) that the proper method of effecting complete service upon the Commissioners is by serving each of them. *Williams v. the Commissioners for executing the Office of Lord High Admiral*, 20 Law J. Rep. (N.S.) C.P. 245; 11 Com. B. Rep. 420; 2 L. M. & P. C. 456.

Semble—that the Court will never, upon motion to set aside process for irregularity, decide that the plaintiff has no cause of action, and thereby deprive him of his appeal, however clear the matter may appear on the affidavits. *Ibid.*

The Caledonian Railway is situated in Scotland, with the exception of six miles, which lie in Cumberland. The railway company's act incorporates so much of the 8 Vict. cc. 16. and 17, (the English and Scotch Companies Clauses Acts), as may be necessary

for carrying into effect the object and purposes of the act in relation to the English portion of the railway. The plaintiff having a claim against the company in respect of the amalgamation of a Scotch company with the Caledonian Railway, served a writ of summons upon the secretary of the company in London:—Held, that the company filled the double character of a Scotch and English railway company, and that the service was regular. *Wilson v. the Caledonian Rail. Co.*, 20 Law J. Rep. (N.S.) Exch. 6; 5 Exch. Rep. 822.

To an action on a judgment of the Court of Queen's Bench in Ireland, the defendants (a corporation) pleaded that they were not served with any process, and that the plaintiff, irregularly and behind the backs of the defendants, caused an appearance to be entered for the defendants, and obtained judgment when the defendants were not within the jurisdiction, and had not been served with process:—Held, that the plea was bad, for not shewing that the defendants did not know of the summons, or that they did not appear in the action. *Sheehy v. the Professional Life Assurance Co.*, 22 Law J. Rep. (N.S.) C.P. 244; 13 Com. B. Rep. 787.

Quære—whether the 9th section of the 13 & 14 Vict. c. 18, which provides for substitution of service by the Irish Courts, applies to corporations. *Semble, per Maule, J.*, that it does apply to service upon the agent of a corporation. *Ibid.*

(2) On Lunatics.

A Judge at chambers having made an order directing an appearance to be entered for a lunatic defendant, upon an affidavit of service of the writ of summons by leaving a copy with the keeper of an asylum in which the lunatic was confined, without a previous writ of *distringas*,—the Court set aside the order. *Blake v. Cooper*, 11 Com. B. Rep. 680.

There is no provision in the Common Law Procedure Act, 1852, for the service of a writ of summons upon a lunatic in a private house; and as the writ of *distringas* is abolished, there is no means of proceeding in an action against such lunatic. *Holmes v. Service*, 24 Law J. Rep. (N.S.) C.P. 24; 15 Com. B. Rep. 293.

The 17th section of the act, which enables the Court to allow an action to proceed after reasonable efforts to effect personal service, applies only where the writ has come to the defendant's knowledge or he wilfully evades the service. *Ibid.*

(3) On Prisoners.

The governor of Cold Bath Fields Prison having, in obedience to an order of the visiting Justices, refused to allow service of a writ upon a defendant, who was in the prison under criminal sentence, the Court granted a rule to shew cause why an attachment should not issue against him; after which the Justices permitted service of the writ. *Danson v. Le Capelain*, 21 Law J. Rep. (N.S.) Exch. 219; 7 Exch. Rep. 667.

(4) When Defendant without the Jurisdiction.

If a writ of summons be issued for service within the jurisdiction against a defendant supposed to be resident in England, and a Judge's order be obtained to allow the plaintiff to proceed to judgment if no appearance be entered by a specified time, on affi-

davits shewing that reasonable efforts have been made to effect service, but in vain, and that the writ has come to the defendant's knowledge, the defendant is entitled to have the order (but not the writ) set aside, on his shewing that he has been resident out of the jurisdiction ever since the issuing of the writ. *Hesketh v. Fleming*, 24 Law J. Rep. (N.S.) Q.B. 167.

A writ of summons having been served upon the defendant in France, he appeared by attorney, and, the declaration having been delivered, he obtained an order to inspect and inspected the promissory notes on which the action was brought; he then applied to the Court to set aside the writ and all subsequent proceedings on the ground of the writ having been served beyond the jurisdiction of the Court, and of the action having been brought for a breach of a contract made beyond the jurisdiction of the Court:—Held, that the writ being regular, and the appearance voluntary, the defendant was not entitled to set aside the writ and all subsequent proceedings. *Forbes v. Smith*, 24 Law J. Rep. (N.S.) Exch. 167; 11 Exch. Rep. 161.

(5) Writ of *Distringas* or Order in lieu of.

[See 15 & 16 Vict. c. 76. ss. 17, 24.]

The defendant had no known residence, and could not be found, but he called occasionally at his solicitors' for letters and answered such letters, posting them in London. The plaintiff's solicitor wrote to the defendant, inclosing a copy of the writ of summons, directed to the defendant at his solicitors', and a correspondence afterwards passed between the plaintiff's attorney and the defendant respecting a compromise of the plaintiff's claim:—The Court granted a *distringas* to compel an appearance, though there had not been the usual calls and appointments. *Gorringe v. Terrewest*, 20 Law J. Rep. (N.S.) Q.B. 209; 2 L. M. & P. C. 12.

Orders under the 17th section of the Common Law Procedure Act will in general be granted absolute in the first instance, and need not be served. *Barringer v. Handley*, 22 Law J. Rep. (N.S.) C.P. 6; 12 Com. B. Rep. 721.

(C) APPEARANCE.

[As to the mode of appearing to a writ of summons, see 15 & 16 Vict. c. 76. s. 31.—In person, see section 30.—By one of several defendants, see section 33.—Non-appearance when writ not specially indorsed, see section 28.—Before judgment, see section 29.]

An appearance *sec. stat.* having been entered for the defendant, who was an infant, the Court set it and all subsequent proceedings aside, without costs, notwithstanding a delay of several days in the application, but they required the defendant to undertake to appear by guardian within four days. *Leech v. Clabburn*, 21 Law J. Rep. (N.S.) Exch. 37.

Where an appearance *sec. stat.* has been entered before the 24th of October, when the 15 & 16 Vict. c. 76. came into operation, the 27th and 28th sections of that act do not apply. Therefore, where a writ was issued on the 29th of September, upon which an appearance *sec. stat.* was entered on the 8th of October, and on the 27th of October a declaration was filed, with a notice to plead indorsed thereon, and no plea pleaded,—Held, that judgment signed, without any notice of filing the declaration having been

given to the defendant, was irregular, and the judgment and execution thereon were set aside. *Goodliffe v. Neaves*, 21 Law J. Rep. (n.s.) Exch. 330; 8 Exch. Rep. 134.

By the Common Law Procedure Act, 15 & 16 Vict. c. 76. s. 27, in case of the non-appearance of the defendant where the writ of summons is indorsed in the special form therein provided, the plaintiff is enabled, on filing a Judge's order for leave to proceed under the provisions of the act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the schedule to the act. And by the same section it is enacted, that "it shall be lawful for the Court or a Judge, either before or after final judgment, to let in the defendant to defend upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits":—Held, that an application to rescind the Judge's order may be made on affidavits contradicting those upon which the order was obtained, without disclosing a defence upon the merits. *Hall v. Scotson*, 23 Law J. Rep. (n.s.) Exch. 85; 9 Exch. Rep. 238.

Quære—whether, if the order stands, the judgment signed in pursuance of it can be set aside without such affidavits as are mentioned in the statute. *Ibid.*

Quære—whether the words of the 27th section, being affirmative, take away the general power of the Court over its judgments, or are merely cumulative. *Ibid.*

A plaintiff issued a writ of summons specially indorsed, which was served on the 11th of February. The 13th was the last day for appearance by the defendant, and in default of appearance judgment was signed:—Held, that execution might issue on the 27th of February, although the 26th was a Sunday, the 174th rule of the Rules of Hilary term, 1853, not being applicable to such a case. *Rowberry v. Morgan*, 23 Law J. Rep. (n.s.) Exch. 191; 9 Exch. Rep. 730.

(D) PARTICULARS.

[When they may be obtained, see Reg. Gen. Hilary term, 1853, 16 Vict. r. 20, 22 Law J. Rep. (n.s.) ix; 1 E. & B. App. vi. And see as to form of, *Nosotti v. Page*, title DEBT. Also title EVIDENCE, (A) (d).]

(a) Where there are special Counts.

The plaintiff's particulars of demand claimed "One year's salary from the 1st of June 1850, to the 1st of June 1851, at the rate of 200*l.* per annum, or damages for the dismissal of the plaintiff before the end of the year." The jury having negatived any employment for a year,—Held, that the plaintiff was entitled to recover under the above particulars, and upon a count for work and labour, for work actually done by him during the year as servant to the defendants. *Harris v. Montgomery*, 20 Law J. Rep. (n.s.) C.P. 221; 11 Com. B. Rep. 393; 2 L. M. & P. C. 425.

(b) Giving Credits in.

[See Reg. Gen. Hilary term, 1853, 16 Vict. r. 13, 22 Law J. Rep. (n.s.) viii; 1 E. & B. App. lxxxi.]

To an action of debt for 44*l.* 8*s.* the defendant pleaded payment of 15*l.* in satisfaction, &c.:—Held,

upon motion for judgment *non obstante veredicto*, that the plea was good; inasmuch as since Reg. Gen. Trin. term, 1 Vict. credits given in the particulars of demand need not be pleaded, a less sum than the debt in the declaration might, with credits so given, be equal to such debt. *Turner v. Collins*, 2 L. M. & P. C. 99; 20 Law J. Rep. (n.s.) Q.B. 259.

(c) Delivery of, with Declaration.

[See Reg. Gen. Hilary term, 1853, 16 Vict. r. 19, 22 Law J. Rep. (n.s.) iv; 1 E. & B. App. v.]

Where a writ is specially indorsed under the Common Law Procedure Act,—*semble*, that it is irregular for the plaintiff to deliver any other particulars of demand besides those indorsed on the writ, without leave of the Court or a Judge. But where the plaintiff delivered with his declaration other particulars, without leave, and the defendant, instead of objecting, pleaded and went to trial, he was held to have waived the irregularity, and the plaintiff was allowed to avail himself of the second particulars. *Fromant v. Ashley*, 22 Law J. Rep. (n.s.) Q.B. 237; 1 E. & B. 723.

(d) Further and better Particulars.

In ordering further and better particulars, the Court will not compel the plaintiff to give particulars of payments made by the defendant. *Russell v. Gordon*, 13 Com. B. Rep. 847.

(E) DECLARATION.

(a) Time within which Plaintiff must declare.

[See 15 & 16 Vict. c. 76. s. 58.]

A plaintiff who files a declaration within one year after the process is returnable is to be deemed out of court within the Reg. Gen. Hil. term, r. 35, unless he also serves notice of declaration within the same period. *Eadon v. Roberts*, 23 Law J. Rep. (n.s.) Exch. 8; 9 Exch. Rep. 227.

On the 13th of April 1852, the plaintiff issued his writ of summons. On the 24th of October the Common Law Procedure Act came into operation. On the 13th of November the plaintiff entered an appearance for the defendant *sec. stat.* and filed a declaration, and on the 12th of November 1853 gave notice of declaration:—Held, that the appearance *sec. stat.* was good, and that the declaration ought to be set aside. *Ibid.*

A plaintiff who, being abroad, has, after service of the writ of summons on the defendant, been ordered to give security for costs, with a stay of proceedings in the mean time, and does not give security, but on his return to England has the order discharged, is at liberty to declare, although more than a year has elapsed since the service of the summons. *Ross v. Green*, 24 Law J. Rep. (n.s.) Exch. 193; 10 Exch. Rep. 891.

(b) Notice to declare.

[See 15 & 16 Vict. c. 76. s. 53.]

(c) Rule for Time to declare.

[See Reg. Gen. Hilary term, 1853, 16 Vict. r. 7, 22 Law J. Rep. (n.s.) viii; 1 E. & B. App. iii.]

(F) PLEA.

(a) Time to plead.

[Notice to plead, see 15 & 16 Vict. c. 76. s. 62.—number of days, see section 63.—after amendment; see section 90.]

An order to plead several matters was obtained, after the rule office was closed, upon the day that the time for pleading expired. The pleas were delivered the same evening, with a copy of the order and a notice that the rule would be drawn up and served as soon as it could be obtained from the office. At 10 o'clock the following day the plaintiff signed judgment:—Held, that the judgment was regular. *Glen v. Lewis*, 22 Law J. Rep. (N.S.) Exch. 24; 8 Exch. Rep. 132.

(b) Issuable Pleas.

[See title BOND, (D) (c).]

A plea is not issuable which has been already decided to be bad by the judgment of a Court. *Beauclerk v. Hook* (in error), 20 Law J. Rep. (N.S.) Q.B. 485.

In error to reverse outlawry, the error assigned being that, at the time of issuing the *exigi facias*, the plaintiff in error was beyond the seas, the defendant pleaded that the plaintiff left the realm before the awarding of the *exigi facias*, and voluntarily remained absent; and that he had notice that he was about to be demanded at the county courts, and might have returned before they were holden:—Held, that this plea was not issuable. *Ibid.*

A plea to the further maintenance of an action, brought by the indorsee against the acceptor of a bill of exchange, stating that the defendant was indebted to T the drawer, that it was agreed between them that the defendant should pay by four instalments, and that the defendant should accept a bill; that the defendant accepted the bill in the declaration mentioned as security for the payment of the debt; that T indorsed to the plaintiff to hold the bill as his agent; that the defendant paid three of the instalments before action, and the fourth after action, on the day when it became due, and that it became the duty of T to return the bill to the plaintiff,—Held, a bad and non-issuable plea. *Besant v. Cross*, 20 Law J. Rep. (N.S.) C.P. 173; 10 Com. B. Rep. 895.

Where the plaintiffs stated in the declaration that the defendant was indebted to them for calls on shares by virtue of the Companies Clauses Consolidation Act and the Railway Act, the defendants being under terms to plead issuably, pleaded that the action was upon contracts without specialty, and that the action did not accrue within six years,—Held, that this was an issuable plea, and not a frivolous one on account of which the plaintiffs were entitled to sign judgment. *Cork and Bandon Rail. Co. v. Goode*, 22 Law J. Rep. (N.S.) C.P. 147; 13 Com. B. Rep. 618.

The abstract accompanying a rule to plead several matters described this plea as the Statute of Limitations, but the plea was held not to be objectionable on that account. *Ibid.*

(c) Several Pleas.

[See 15 & 16 Vict. c. 76. s. 81.]

The defendant to an action of trespass *quare*

clausum fregit may still plead together the pleas of not possessed and *liberum tenementum*, notwithstanding the former plea puts in issue the possession and also the right to the possession of the close in question. *Slocombe v. Lyal*, 20 Law J. Rep. (N.S.) Exch. 96; 6 Exch. Rep. 119.

A traverse of excuse for profert may be pleaded with other pleas in bar. *Porch v. Cresswell*, 21 Law J. Rep. (N.S.) Exch. 301.

In an action by the public officer of a banking co-partnership, the Court allowed a plea denying that the co-partnership were, at the commencement of the suit, carrying on the business of bankers, in addition to pleas of non-assumpsit and accord and satisfaction. *Roe v. Fuller*, 21 Law J. Rep. (N.S.) Exch. 104; 7 Exch. Rep. 220.

Parties may appeal to the Court against a Judge's order allowing several pleas on the ground that they are founded on the same ground of defence, although the Common Law Procedure Act enacts that all objections to pleadings on that ground shall be heard on the summons to plead several matters. *Griffith v. Selby*, 23 Law J. Rep. (N.S.) Exch. 226; 9 Exch. Rep. 226.

To a declaration complaining of the breach of an agreement by the defendant to buy of the plaintiff, a patentee, all goods to be ordered by the defendant for the use of the patent, a Judge at chambers allowed the defendant to plead a plea denying the plaintiff's readiness and willingness to deliver the goods, and also a plea "that the goods which the plaintiff was ready and willing to deliver were not fit and proper for working the patent." The Court disallowed the latter plea, on the ground that the defence was available under the plea of readiness and willingness. *Ibid.*

(d) Framed to embarrass.

[See 15 & 16 Vict. c. 76. s. 52.]

[See PATENT.]

In an action of covenant for carrying on trade by the defendant, the declaration alleged that the plaintiff was engaged in the trade in Liverpool, *whereof the defendant had notice*, and assigned as a breach that the defendant carried on the same trade in Liverpool contrary to his covenant. The defendant pleaded that he had no such notice, and the plaintiff demurred to the plea on the ground that the traverse was immaterial. The defendant applied to a Judge at chambers to set aside the demurrer as frivolous, or to strike out the allegation of notice in the declaration. The summons being dismissed, a similar application was made to the Court by the defendant, but no bad faith or trick being shewn to exist on the part of the plaintiff, the Court refused to grant either alternative. *Tallis v. Tallis*, 21 Law J. Rep. (N.S.) Q.B. 269; 1 E. & B. 397.

Cutts v. Surridge, 9 Q.B. Rep. 1015; s. c. 16 Law J. Rep. (N.S.) Q.B. 193, explained and qualified. *Ibid.*

To an action containing two counts upon two mortgage deeds, and two upon bonds collateral to them, the defendant pleaded to each count the Statute of Limitations, 3 & 4 Will. 4. c. 42; to which the plaintiff replied, that the defendant before the commencement of the suit made an acknowledgment that the debt remained unpaid and due to the plain-

tiff, within the true intent and meaning of the statute, and that the action was brought within twenty years after such acknowledgment:—Held, that this replication was framed to embarrass and prejudice the fair trial of the cause, and must be amended by specifying one or more of the modes of acknowledgment mentioned in the statute. *Forsyth v. Bristowe*, 22 Law J. Rep. (N.S.) Exch. 70; 3 Exch. Rep. 347.

(e) *Puis darrein Continuance*.

To an action on a recognizance of bail, the defendant pleaded, first, no record of such recognizance; secondly, no writ of *ca. sa.*; and thirdly, payment. The plaintiff having obtained judgment on the first two pleas, the issue on the third came on for trial at Nisi Prius, when the defendant tendered a plea *puis darrein continuance*, which was accepted by the Judge, and the jury discharged from trying the issue joined:—Held, that the plea *puis darrein continuance* was properly received, as it was a waiver of those pleas which only remained to be tried. *Wagner v. Imbrie*, 20 Law J. Rep. (N.S.) Exch. 235; 6 Exch. Rep. 380.

(f) *Withdrawing Plea*.

The plaintiff becoming insolvent after issue joined, the defendant, by leave of a Judge, given under the statute 15 & 16 Vict. c. 76. s. 142, (the plaintiff's assignees not giving security for costs), pleaded a plea of the plaintiff's insolvency, withdrawing his old pleas. The plaintiff, confessing the plea and giving notice to tax his costs, under rule 23. of the New Pleading Rules, the Court held that the plaintiff was entitled to costs under the rule if the plea of insolvency stood, but allowed the defendant to withdraw that plea, and to substitute his old pleas again and to go on with the action. *Plummer v. Hedge*, 24 Law J. Rep. (N.S.) Q.B. 24.

(G) PLEADING AND DEMURRING TOGETHER.

[See 15 & 16 Vict. c. 76. s. 80.]

Where a party has obtained a Judge's order for leave to traverse and demur to a pleading under the 80th section of the Common Law Procedure Act, 1852, and judgment has been given against him on the demurrer, the Court will not rescind the order as to the traverse and strike it out. *Sheehy v. The Professional Life Assurance Co.*, 22 Law J. Rep. (N.S.) C.P. 249.

Where a party applies for leave to plead by way of traverse, and demur to the same pleading, under the 15 & 16 Vict. c. 76. s. 80, he ought to swear that the allegations proposed to be traversed are untrue. *Lumley v. Gye*, 22 Law J. Rep. (N.S.) Exch. 9.

Semble—that in such cases if the facts are within his own personal knowledge, he must swear positively to that effect; if not, then that he is so informed and believes; and if a third person is vouched he should shew either that he has made inquiry of that person, or that it would be impossible or inconvenient to do so. *Ibid*.

In an action on a contract the Court allowed the defendant both to plead and demur to the declaration, although the validity of the contract had been affirmed on a motion for an injunction in the Court of Chancery, to which the defendant was a party,

and in the decision of which Court he had acquiesced. *Ibid*.

It is discretionary with the Judge whether he will allow a party to plead and demur together, although the affidavit may be made as required by the 15 & 16 Vict. c. 76. s. 80. *Thompson v. Knowles*, 24 Law J. Rep. (N.S.) Exch. 43.

(H) DEMURRER.

[As to form of paper books, see Reg. Gen. Hil. term, 1856, 16 Vict. r. 17; 22 Law J. Rep. (N.S.) ix; 1 E. & B. App. v.]

Special demurrers pending at the time when the Common Law Procedure Act came into operation are not affected by its provisions, but must be decided according to the previous law. *Pinhorn v. Souster*, or *Sonster*, 22 Law J. Rep. (N.S.) Exch. 18; 8 Exch. Rep. 138.

The objection that paper books have not been delivered in time nor paid for, may be taken in the Common Pleas without any notice of an intention to take it. *Dorsett v. Aspdin*, 2 L. M. & P. P.C. 625; 11 Com. B. Rep. 651.

(I) SUGGESTION OF NEW MATTER.

[See 15 & 16 Vict. c. 76. s. 143.]

To entitle a defendant to a rule for a suggestion under the 143rd section of the Common Law Procedure Act, it must be clearly and satisfactorily shewn by affidavit, that the facts sought to be added by the suggestion will make the pleading good. *Manley v. Boycot*, 22 Law J. Rep. (N.S.) Q.B. 265; 2 E. & B. 46.

In order to entitle a party to a suggestion after a pleading has been adjudged defective under section 143. of the Common Law Procedure Act, he must shew by affidavit a clear and satisfactory *prima facie* case of the truth of the facts proposed to be suggested, and of their sufficiency to render the pleading good. *Fisher v. Bridges*, 22 Law J. Rep. (N.S.) Q.B. 270; 2 E. & B. 118.

(J) TRIAL.

[Judgment for not proceeding to trial, see title JUDGMENT.]

(a) *Notice of Trial*.

(1) *After Injunction*.

A town cause having been made a *remanet*, and then postponed by consent to the Sittings after Hilary term, 1849, further proceedings were stayed by an injunction obtained by the defendant on the 11th of January 1849. The injunction was dissolved on the 7th of August 1850:—Held, that the plaintiff was not bound to give a fresh notice of trial for the sittings after Michaelmas term. *The Stockton and Darlington Rail. Co. v. Fox*, 20 Law J. Rep. (N.S.) Exch. 96; 6 Exch. Rep. 127.

(2) *Short Notice*.

[See Reg. Gen. Hil. term, 1853, 16 Vict. r. 35, 22 Law J. Rep. (N.S.) xi; 1 E. & B. App. ix.]

The defendant having obtained time to plead, taking short notice of trial, if necessary, before the sheriff, delivered two pleas on the 5th of August, whereupon the defendant on the 10th delivered a replication joining issue on the pleas, and on the following day delivered the issue with notice of trial

indorsed to try the issue before the sheriff on the 18th. The defendant having returned the issue and notice of trial, and the cause having been tried in his absence, it was objected that the plaintiff was not entitled to give short notice of trial; and that the word "issue" had been improperly used for "issues":—Held, that the writ of trial was good. *Flowers v. Welch*, 23 Law J. Rep. (n.s.) Exch. 7; 9 Exch. Rep. 272.

In an action on a judgment the defendant pleaded *nul tiel record*. The plaintiff joined issue, and gave notice on Saturday of his intention to produce the record on the following Monday:—Held, that the notice was sufficient. *Maguire v. Kincaid*, 21 Law J. Rep. (n.s.) Exch. 264; 7 Exch. Rep. 608.

[And see, as to the length of notice, 15 & 16 Vict. c. 76. s. 97.—as to form and service, Reg. Gen. Hil. term, 1853, 16 Vict. r. 34, 22 Law J. Rep. (n.s.) xi; 1 E. & B. App. ix.—as to notice of trial without joining issue, Reg. Gen. Hil. term, 1853, 16 Vict. r. 40, 22 Law J. Rep. (n.s.) xi; 1 E. & B. App. x.—as to continuance, Reg. Gen. Hil. term, 1853, 16 Vict. r. 34, 22 Law J. Rep. (n.s.) xi; 1 E. & B. App. ix.—as to countermand, stat. 15 & 16 Vict. c. 76. s. 98, and Reg. Gen. Hil. term, 1853, 16 Vict. r. 34, 22 Law J. Rep. (n.s.) xi; 1 E. & B. App. ix.]

(b) *Issue, Nisi Prius Record, and Entry of Causes.*

[See 15 & 16 Vict. c. 76. ss. 102, 103.—Reg. Gen. Hil. term, 1853, 16 Vict. r. 43. and Schedule.]

(c) *View and Inspection.*

[See 15 & 16 Vict. c. 76. s. 114. and 17 & 18 Vict. c. 125. s. 58.]

(d) *By Proviso.*

[See 15 & 16 Vict. c. 76. s. 116; and Reg. Gen. Hil. term, 1853, 16 Vict. r. 42, 22 Law J. Rep. (n.s.) xi; 1 E. & B. App. x.]

(e) *Proceedings at the Trial.*

(1) *Conduct of the Cause.*

The wife of a plaintiff cannot claim to manage the cause for him at Nisi Prius, he being absent and in custody. *Cobbett v. Hudson*, 15 Q.B. Rep. 988.

And, where the Judge refused, in such a case, to hear the wife as advocate, and, the husband not appearing in person or by attorney, a nonsuit was directed, the Court refused to set the nonsuit aside. *Ibid*.

But, *per Lord Campbell, C.J.*, on an application directly concerning liberty, as a motion for a *habeas corpus*, the wife may be heard on behalf of her husband. *Ibid*.

The 2nd section of the act to amend the law of evidence, 14 & 15 Vict. c. 99, does not abridge the former right of a party to a suit to act as his own advocate; and a Judge at Nisi Prius has no authority to prevent a party to a suit addressing the jury as his own advocate, and afterwards giving evidence as a witness in support of his own case: but such a course of proceeding is most objectionable. *Cobbett v. Hudson*, 22 Law J. Rep. (n.s.) Q.B. 11; 1 E. & B. 11.

(2) *Right to begin.*

A new trial will not be granted because a Judge has wrongly ruled at Nisi Prius as to which party

must begin, unless such ruling did clear and manifest injustice. *Branford, or Brandford, v. Freeman*, 20 Law J. Rep. (n.s.) Exch. 36; 5 Exch. Rep. 734.

In assumpsit for goods sold, the defendant pleaded as to all but 1711. 7s. 6d. non assumpsit, and as to that sum that he gave the plaintiff a bill of exchange for that amount, which was not due at the time the action was brought. This was denied by the replication, and by the particulars of demand the plaintiff's demand was limited to 1711. 7s. 6d.:—Held, that the defendant was entitled to begin. *Edge v. Hillary*, 3 Car. & K. 42.

(3) *Addressing the Jury.*

[See 17 & 18 Vict. c. 125. s. 18.]

Where, at the close of the plaintiff's case at Nisi Prius, the Judge rules that there is no evidence to go to the jury, the plaintiff's counsel is not entitled to sum up under the 17 & 18 Vict. c. 125. s. 18. *Hodges v. Ancrum*, 24 Law J. Rep. (n.s.) Exch. 257.

(4) *Withdrawing the Record.*

The plaintiff's counsel having, after the usual time of entering causes had elapsed, stated to the Court before a cause was called on that he should withdraw the record, and he applied to the Court to be allowed to re-enter it; this was objected to by the counsel for the defendant, who immediately entered a *ne recipiatur*. The plaintiff's attorney then, without taking the record out of the possession of the officer, stated to him that he wished to withdraw the record and re-enter it, and he paid the usual fees. An application having been afterwards made by plaintiff's counsel to have the cause tried in its order,—Held, first, that the record had been withdrawn; secondly, that the plaintiff was not entitled to re-enter it. *Pope v. Fleming*, 3 Car. & K. 146.

(f) *Adjourning or Postponing.*

[See 17 & 18 Vict. c. 125. s. 13.]

The defendant, a master mariner, having gone abroad, in the course of his business, after the commencement of the action, and after time obtained to plead, but before issue joined,—the Court refused to postpone the trial until his return to England, on the ground that his evidence was material and necessary to make out his defence. *Solomon v. Howard*, 12 Com. B. Rep. 463.

(g) *Verdict and Nonsuit.*

[See 17 & 18 Vict. c. 125. s. 33, and Reg. Gen. Hil. term, 1853, 16 Vict. r. 50, 22 Law J. Rep. (n.s.) xii; 1 E. & B. App. xii.]

Nonsuit will not lie upon a wrong venue, if there is no issue in the pleadings upon the locality. *Hitchings v. Hollingsworth*, 7 Moore, P.C. 228.

In an action of debt upon a bond, the jury returned a verdict for the plaintiff. The Supreme Court of Jamaica afterwards, upon motion by the defendant, ordered a judgment of nonsuit to be entered for the defendant, upon the ground that the action was a local one, and that the venue was laid in a wrong country. The plaintiff had not been called at the trial, nor was any leave reserved to enter a nonsuit. Such judgment, upon appeal, reversed,

the Judicial Committee holding, that the supreme Court had no authority to grant such judgment of nonsuit, and the judgment ordered to be set aside, and a *venire de novo* awarded. *Ibid.*

If, upon the trial of a cause, the Judge directs a nonsuit, and the plaintiff does not appear when called, and judgment of nonsuit is therefore entered against him, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the Judge improperly directed the nonsuit. The proper course is for the plaintiff to appear and require the Judge to direct the jury in point of law in his favour, and upon the Judge refusing to permit him to appear, and nonsuiting him against his will, or refusing to direct the jury in his favour, the plaintiff may tender a bill of exceptions, and bring a writ of error. *Corsar v. Reed*, 21 Law J. Rep. (N.S.) Q.B. 18; 17 Q.B. Rep. 540; 2 L. M. & P. P.C. 646.

A plaintiff in a county court has a right to elect to be nonsuited at the latest moment before the Judge has pronounced his judgment, or, when there is a jury, before they have delivered their verdict. *Outhwaite v. Hudson*, 21 Law J. Rep. (N.S.) Exch. 151; 7 Exch. Rep. 980.

If there be any evidence to support any count of the declaration, the Judge will not nonsuit. *Harman v. Johnson*, 3 Car. & K. 272.

The Court will not nonsuit a plaintiff on the ground that, to make out a case in his favour, part of the testimony of his own witnesses must be disbelieved. *Brien v. Rust*, 3 Car. & K. 294.

Where a point was reserved on the trial of a cause before the passing of the Common Law Procedure Act, 1854, the party in whose favour it is reserved cannot, if he fail in the Court below on his motion to enter a verdict or nonsuit on the reserved point, appeal from the decision of that Court to a court of error, under section 34. of the above-mentioned act, for that section only authorizes proceedings in error in the case on points reserved since the act passed—*Platt, B. dissente*. *Vansittart v. Taylor*, 24 Law J. Rep. (N.S.) Q.B. 198; 4 E. & B. 910.

Where a rule *nisi* drawn up on reading an affidavit and deposition, called on the defendant to shew cause why a new trial should not be had "on the grounds set forth in the said affidavit and deposition":—Held, that this was not a compliance with the 17 & 18 Vict. c. 125. s. 33, which enacts, that in every rule *nisi* for a new trial, &c. "the grounds upon which such rule shall have been granted shall be shortly stated therein." *Drayson v. Andrews*, 24 Law J. Rep. (N.S.) Exch. 22; 10 Exch. Rep. 472.

(h) Issue for the Judge.

The plaintiff having tendered secondary evidence of the contents of a letter, the defendant produced a letter, alleging it to be the original, which being denied by the plaintiff, the defendant tendered evidence to prove the originality. The Judge refused to receive the evidence at that period of the cause, ruling that it might be produced by the defendant, as part of his case, to the jury:—Held, that the Judge ought to have received evidence on the point as a collateral issue, and have decided as to the admissibility of the original letter, or of secondary evidence of its contents, without reference to the jury. *Boyle v. Wiseman*, 24 Law J. Rep. (N.S.) Exch. 284.

(K) NEW TRIAL.

The Judge at the trial offered the plaintiff's counsel leave to amend, which was refused by him, owing to the strong opinion expressed by the Judge that the contract was a joint contract:—Held, no ground for a new trial. *Lucas v. Beale*, 20 Law J. Rep. (N.S.) C.P. 134; 10 Com. B. Rep. 739.

Where the jury have found a verdict for the defendant, with leave given to the plaintiff to enter a verdict for a sum at which his damages have been contingently assessed at the trial, the Court will not afterwards grant a new trial in order that there may be a fresh assessment of damages, unless the plaintiff's counsel has objected to such contingent assessment at the trial. *Booth v. Cline*, 20 Law J. Rep. (N.S.) C.P. 161; 10 Com. B. Rep. 827.

Where a Judge, in summing up to the jury, mistakes the law upon a collateral point, upon which a bill of exceptions would not lie, a new trial will not be granted as of right, but the Court will exercise its discretion according to its opinion of the result being in accordance with the justice of the case. *Black v. Jones*, 20 Law J. Rep. (N.S.) Exch. 152; 6 Exch. Rep. 213.

A verdict having been found for both defendants, a rule for a new trial was moved for on the ground of misdirection; but it being admitted that there was no evidence against one of the defendants, the Court, in granting the rule *nisi*, imposed as a term that his name should be struck out of the declaration, and the plaintiff should pay his costs. *De Bernardy v. Harding*, 22 Law J. Rep. (N.S.) Exch. 340; 8 Exch. Rep. 822.

Where a bill of exceptions has been tendered the party cannot afterwards move for a new trial upon a point which might have been (but was not) included in the bill of exceptions, without abandoning the bill of exceptions. *Adams v. Andrews*, 20 Law J. Rep. (N.S.) Q.B. 39; 15 Q.B. Rep. 284, 1001.

Seemle—that if the point could not have been included in the bill of exceptions, the motion for a new trial might have been made concurrently. *Ibid.*

Where a party has obtained a rule *nisi* for a new trial by leave of the Court after the expiration of the first four days of term, but without giving notice within that period to the opposite party of his intention to move, and the opposite party has signed judgment without any notice of the motion, the Court will not permit the rule to be made absolute, if the objection is raised on shewing cause. *Doe d. Whitty v. Carr*, 20 Law J. Rep. (N.S.) Q.B. 83; 16 Q.B. Rep. 117.

Quere—whether an application to set aside the judgment might not have been made promptly. *Ibid.*

Where a plaintiff had stated that a certain agreement had not been attested, and evidence was given by the defendant of its having been attested, and of the attestation having been torn off:—Held, that assuming the defendant's evidence to be true, yet as the defendant had not been injured, nor the merits of the cause affected by the plaintiff's evidence, there was no ground for a new trial. *Honeyman v. Lewis*, 23 Law J. Rep. (N.S.) Exch. 204.

Where the verdict was for a sum not exceeding 20*l.* a new trial was granted, the Judge expressing himself dissatisfied with the verdict, and there being

an uncontradicted affidavit that before the defendant's case had been heard one of the jurymen had said, "The parson (meaning the defendant) will get served out." *Martin, B. dissentiente. Allum v. Boulbee*, 23 Law J. Rep. (N.S.) Exch. 208.

On the trial of an indictment for obstructing a navigable strait of the sea by erecting walls and placing stones there, the jury acquitted the defendant:—Held (*Coleridge, J. dissentiente*), that this was not a proceeding in which the Court could grant a new trial. *Regina v. Russell*, 23 Law J. Rep. (N.S.) M.C. 173.

Per Coleridge, J., where a proceeding is in form criminal, but really for the trial of a civil right, the Court will not grant a new trial unless the jury have been clearly misdirected by the Judge, or have returned a perverse verdict; and where a Judge has used in the course of his summing up an inaccurate expression, but the substance of his direction was correct, and the jury do not appear to have been misled, the Court will not interfere. *Ibid.*

Semble—that a new trial may be granted after an acquittal upon an indictment, upon the ground that the verdict is against the evidence. *Ibid.*

The effect of the 44th section of the second Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, is, that where a verdict is set aside on the ground of its being against evidence, a party who fails on the first trial but succeeds on the second has to pay his own costs of the first trial. *Evans v. Robinson*, 24 Law J. Rep. (N.S.) Exch. 214.

(L) SPECIAL CASES.

[See titles COSTS—ERROR. And stat. 15 & 16 Vict. c. 76. ss. 42, 46.]

A deed having been stamped with the duty of 1*l.* 15*s.*, and nine progressive stamps of 1*l.* 5*s.* each, and the opinion of the Commissioners of Inland Revenue having been desired on the question under the 13 & 14 Vict. c. 97, they were of opinion that the deed was chargeable under the 55 Geo. 3. c. 185, with the *ad valorem* duty of 1,000*l.*, and with nine progressive duties of 1*l.* each as a conveyance upon the sale of property, but stated a special case for the opinion of this Court:—Held, first, *dissentiente Pollock, C.B.*, that the counsel for the appellant was entitled to begin. Held, secondly, that the Crown had the general right of reply; and, *per Pollock, C.B.*, in the Exchequer the Crown has the right to a general reply in all cases where the Crown has an interest. *Chandos v. the Commissioners of Inland Revenue*, 20 Law J. Rep. (N.S.) Exch. 269; 6 Exch. Rep. 264.

The Court directed a special case to be set down for argument, which was signed by the plaintiff (who intended to argue it in person), and by counsel for the defendants. *Udney v. the East India Co.*, 22 Law J. Rep. (N.S.) C.P. 211; 13 Com. B. Rep. 742.

The Chancery Practice Amendment Act (15 & 16 Vict. c. 86. s. 61.), which takes from the Court of Chancery the power of sending cases for the opinion of a court of common law, is not retrospective in its operation, so as to prevent the argument of a case sent before the 1st of November 1852, the day of the act coming into operation. *Hobson v. Neale*, 22 Law J. Rep. (N.S.) Exch. 25; 8 Exch. Rep. 131.

Quere—whether that section applies to causes affecting the rights of the Crown. *Ibid.*

The plaintiff and the defendant, in January 1854, agreed to state a special case, under the Common Law Procedure Act, 1852. On the 23rd of October 1854, their attorneys signed, in parts, a consent to a Judge's order for the stating of the special case. The plaintiff's attorney, on the 24th of October 1854, the day on which the Common Law Procedure Act, 1854, came into operation, on producing the consent signed by the defendant's attorney, obtained a Judge's order for stating the special case. The case did not contain any clause prohibiting the parties from bringing error upon it:—Held, that, as the Judge's sanction to stating the case was not given until after the Common Law Procedure Act, 1854, had come into force, though the parties had consented to state the case before, error might be brought upon the special case under the provisions of the last-mentioned act. *Elliott v. Bishop* (in error), 24 Law J. Rep. (N.S.) Exch. 158.

On a special case under the Common Law Procedure Act, 1852, without pleadings, the question being, whether the plaintiff was entitled to certain trade and tenant's fixtures, the Court directed judgment to be entered for the plaintiff, except as to tenant's fixtures, and, in the absence of any agreement between the parties, the plaintiff was allowed the general costs of the cause, after deducting the defendant's costs relating to the tenant's fixtures. The defendant brought error under the provisions of the Common Law Procedure Acts, 1852 and 1854; but the Court of error, reversing the judgment below as to the tenant's fixtures, gave judgment for the plaintiff both as to the trade and tenant's fixtures, but gave no judgment as to the costs. On an application to the Court below to direct the Master to allow the plaintiff his costs of the special case and proceedings thereon without the deduction originally made,—Held, that the Court had no power so to direct the Master, the costs being under the controul of the Court of error. *Elliott v. Bishop*, 24 Law J. Rep. (N.S.) Exch. 303.

(M) IRREGULARITY.

[See Reg. Gen. Hil. term, 1857, 16 Vict. rr. 135, 136, 22 Law J. Rep. (N.S.) xvii; 1 E. & B. App. xxiv.]

The plaintiff, on the 24th of March, gave notice of trial for the first sittings for London in Easter term, and on the 20th of April gave notice of his intention to enter and try the cause as undefended at the second sittings. The defendant accordingly did not appear at the first sittings, on the 22nd of April, when the cause was tried, and a verdict found for the plaintiff. The defendant, on the 6th of May, moved for a rule to set aside the proceedings for irregularity:—Held, that he ought to have moved within four days from the day of trial. *Ellaby v. Moore*, 22 Law J. Rep. (N.S.) C.P. 253; 13 Com. B. Rep. 907.

(N) STAYING AND SETTING ASIDE PROCEEDINGS.

[See *ante*, (L).]

An action of debt having been brought in the superior court to recover 9*l.* 10*s.*, the defendants pleaded, except as to 8*l.* 14*s.*, never indebted, and as to 8*l.* 14*s.* a tender and payment of that sum into court. The jury found a verdict for the plaintiff on the first issue, damages 16*s.*, and for the defendants on the plea of tender. A motion having been made to stay the proceedings on payment of the debt, with-

out costs, on the ground of the action being frivolous, the Court refused the rule. *Nurden, or Nurdin, v. Fairbanks*, 20 Law J. Rep. (n.s.) Exch. 20; 5 Exch. Rep. 738.

The Court will not stay an action by the provisional assignees of an insolvent debtor against an alleged debtor of the insolvent, on the ground that by an order of Nisi Prius, made in an action between the insolvent himself and the same debtor for the same cause of action, all matters in difference in the cause were referred to an arbitrator, before whom the matters so referred are still pending. *Sturgis v. Curzon*, 21 Law J. Rep. (n.s.) Exch. 38; 7 Exch. Rep. 17.

Where eight passengers in a ship signed a round robin, and employed the same attorney to bring separate actions against the owners, for damages arising out of a breach of contract for the passage, whereby the plaintiffs suffered in their health, the Court refused a rule to stay proceedings in seven of the actions till one should be tried, although the defendants offered to undertake not to defend the others if there should be a verdict found against them on such trial. *Westbrook v. the Australian Royal Mail Steam Navigation Co.*, 23 Law J. Rep. (n.s.) C.P. 42.

The plaintiff, suing as executor, having admitted that he had not obtained probate of the testatrix's will, the Court, in the exercise of its general common law jurisdiction, to prevent an abuse of its process, stayed the proceedings until probate should be taken out, and reasonable notice thereof given to the defendant. *Webb v. Adkins*, 14 Com. B. Rep. 401; 23 Law J. Rep. (n.s.) C.P. 96.

An action having been brought by a married woman as executrix, in which her husband was made co-plaintiff, the Court refused to order the proceedings to be stayed altogether, but ordered they should be stayed until security was given to the husband by the attorney against the costs of the action, the affidavits shewing that the husband and wife were living separate, and that the action was brought without his sanction and against his will. *Proctor v. Brotherton*, 23 Law J. Rep. (n.s.) Exch. 116; 9 Exch. Rep. 486.

(O) MASTERS OF THE COURTS.

[As to their attendance and duties, see Reg. Gen. Hil. term, 1853, 16 Vict. rr. 1, 154, 172, and 173, and as to references to them, r. 171, 22 Law J. Rep. (n.s.) xix; 1 E. & B. App. ix.]

(P) CONSOLIDATION OF ACTIONS.

Where eight passengers in a ship signed a round robin, and employed the same attorney to bring separate actions against the owners, for damages arising out of a breach of contract for the passage, whereby the plaintiffs suffered in their health, the Court refused a rule to stay proceedings in seven of the actions till one should be tried, although the defendants offered to undertake not to defend the others if there should be a verdict found against them on such trial. *Westbrook v. the Australian Royal Mail Steam Navigation Co.*, 23 Law J. Rep. (n.s.) C.P. 42; 14 Com. B. Rep. 113.

(Q) DISCONTINUANCE.

The defendant having died after issue joined and notice of trial given, a suggestion of his death was duly made, and his administratrix appeared and

pleaded to the suggestion. The plaintiff afterwards applied to a Judge at chambers for leave to discontinue on payment of the costs of the pleas to the suggestion, but the Judge made the usual order on payment of full costs:—Held, that the order was right; for that the 138th section of the Common Law Procedure Act put the administratrix in the same position as if she had been the original defendant in the action. *Benge v. Swaine*, 23 Law J. Rep. (n.s.) C.P. 132; 15 Com. B. Rep. 784.

(R) NOTICE TO PROCEED.

If a plaintiff has good cause for not proceeding in the action after issue joined, and the defendant notwithstanding gives him a twenty days' notice under section 101. of the Common Law Procedure Act, 1852, to force him to trial, the plaintiff need not wait until the defendant has entered a suggestion that the plaintiff has failed to proceed to trial, although duly required, but may at once apply to the Court to extend the time for proceeding, and the Court will in such case grant an extension for a definite period. *Farthing v. Castles*, 22 Law J. Rep. (n.s.) Q.B. 167; 1 Bail C.C. 142.

After interlocutory judgment had been entered for 25*l.* for default, the rest of the action was referred and an award made. There was no power of entering up judgment on the issues referred. After the lapse of a year, the plaintiff gave the defendant notice that the Court would be moved in a week. Within a month from the date of the notice, in Hilary term last, the plaintiff applied for a rule calling on the defendant to pay the 25*l.*, or why the plaintiff should not be allowed to sign final judgment. There was a proper demand of the money. The rule was discharged on the ground that there had not been a month's notice of proceeding. A subsequent notice was given by the plaintiff that he would after a month proceed in the action by applying to sign final judgment. After the month had expired, the plaintiff applied for a rule similar to the previous one of Hilary term. There had been no fresh personal demand of the money since the discharge of the last rule. The Court made the rule absolute. *Burlington v. Richardson*, 22 Law J. Rep. (n.s.) Q.B. 385.

(S) ENTRY OF SATISFACTION ON THE ROLL.

The plaintiff having obtained judgment against the defendants, took them in execution under two *ca. sa.*'s, from which they were afterwards discharged on paying a portion of the debt. The plaintiff afterwards seized the defendants' goods under a *fi. fa.* for the balance of the debt, which execution was afterwards set aside by the Court, on the report of the Master that the plaintiff had ratified the discharge of the defendants under the *ca. sa.*'s. The plaintiff having afterwards brought an action against the defendants upon the original judgment, the Court refused, on affidavits of the above facts, to allow satisfaction to be entered on the roll. *Ward v. Bromhead*, 21 Law J. Rep. (n.s.) Exch. 216; 7 Exch. Rep. 726.

(T) MOTIONS AND RULES.

An expired rule cannot be enlarged. *Price v. Thomas*, 11 Com. B. Rep. 543.

Service of a rule upon "a female servant at the lodgings of the defendant," is not good service. *Ibid.*

A rule *nisi* cannot be made absolute, no cause being shewn, on an affidavit which states that service of the rule has been effected on a clerk of the defendant at the warehouse of the defendant. The old practice of requiring a service at the defendant's dwelling-house must be adhered to. *Medlicott v. Williams*, 20 Law J. Rep. (N.S.) Q.B. 33.

A rule *nisi* for a nonsuit in a cause tried before the Assessor of the Liverpool Passage Court, was moved for by counsel and granted. The rule was drawn up on reading the writ of trial and an affidavit verifying the assessor's notes:—Held, on cause shewn against the rule, that without the affidavit the Court had no materials on which to entertain the motion. *Winch v. Williams*, 21 Law J. Rep. (N.S.) C.P. 216; 12 Com. B. Rep. 416.

Upon special paper days a counsel cannot bring on a contested motion when called upon to move for his argument. *Palmer v. Wagstaffe*, 22 Law J. Rep. (N.S.) Exch. 295; 8 Exch. Rep. 840.

The plaintiff's attorney took out a summons to attend chambers at half-past three. He attended with counsel at the time specified and for half an hour, in the last five minutes of which attendance (the defendant not appearing) the plaintiff's counsel applied for and obtained an order from the Judge, and went away. Within a few minutes after four the defendant's attorney came with his counsel to oppose the summons. The Court set aside the order, and heard the case on the merits. *Moyse v. Dingle*, 23 Law J. Rep. (N.S.) Q.B. 305.

On the last day of term, the Court will make a rule *nisi* concerning a matter of a pressing nature returnable at chambers; but it is not the practice to enlarge rules to be returnable at chambers, without the consent of the parties. *Casse v. Wight*, 23 Law J. Rep. (N.S.) C.P. 144; 14 Com. B. Rep. 562.

According to the practice of the Court of Queen's Bench, a rule *nisi* to pay money pursuant to an award may be issued to shew cause at chambers. *Drew v. Woolcock*, 24 Law J. Rep. (N.S.) Q.B. 22.

A rule *nisi* to pay money pursuant to an award may be moved for on the last day of term, although an attachment to enforce the award cannot. *Leblé v. Carrell*, 24 Law J. Rep. (N.S.) Q.B. 96.

(U) JUDGE'S ORDERS.

[See titles ACTION, (A) (e)—EXECUTION (C).]

An execution issued upon a Judge's order is an execution obtained by "confession" within the 6 Geo. 4. c. 16. s. 108. Therefore, where a debtor's goods were seized under an execution issued upon a Judge's order, and an act of bankruptcy was afterwards committed by the debtor, and a fiat issued before the sale, the assignees of the bankrupt were held to be entitled to the goods. *Andrews v. Deeks*, 20 Law J. Rep. (N.S.) Exch. 127; 4 Exch. Rep. 827.

Applications to review the decision of a Judge at chambers should be made in the course of the next term after the decision has been made. *Meredith v. Gittens*, 21 Law J. Rep. (N.S.) Q.B. 273; 18 Q.B. Rep. 257.

It is a good preliminary objection on shewing cause against a rule to rescind a Judge's order, that the affidavits on which the order was made have not been brought before the Court. After a rule has been discharged upon such an objection, a second application may be made. *Pocock v. Pickering*, 21 Law J. Rep. (N.S.) Q.B. 365; 18 Q.B. Rep. 789.

A cause was, on the 2nd of April 1852, referred to arbitration: the costs to abide the event. On the 9th of the following June the arbitrator certified that the plaintiff was entitled to 6*l.* 18*s.* 6*d.* in addition to the sum of 10*l.* which the defendant had paid into court. No steps were taken by the plaintiff to obtain his costs until the 7th of February 1853, when an application for the same, under the 13 & 14 Vict. c. 61. s. 13, was made to a Judge at chambers. On the hearing of the summons, it was objected that the application was too late. The learned Judge refused to decide the question, but referred the parties to the Court:—Held, that the application was not too late, and that the plaintiff was, therefore, entitled to his costs. *Morris v. Bosworth*, 22 Law J. Rep. (N.S.) Q.B. 276; 2 E. & B. 213.

Where a Judge has made an order giving the plaintiff his costs under 15 & 16 Vict. c. 24. s. 4. and 9 & 10 Vict. c. 95. s. 128, on the ground that "the cause of action did not arise wholly or in some material point within the jurisdiction of the county court within which the defendant carried on his business at the time of the action brought," the Court has power to review such order, and to rescind it if the Judge has drawn a wrong conclusion from the affidavits. *Stokes v. Grissell*, 23 Law J. Rep. (N.S.) C.P. 141; 14 Com. B. Rep. 678.

The Judge's order for taxation directed that the parties, if the bill should be reduced on taxation, should remain in the same position as to costs as if the verdict had been found for the smaller amount; and between the making of that order and the taxation the Judge before whom the cause was tried died, so that it was impossible to get a certificate from him under the County Courts Act to save the plaintiff's costs. The Court refused, after the bill had been taxed under 50*l.*, to rescind the Judge's order as far as regarded the state of parties as to costs after taxation. *Borradaile v. Nelson*, 23 Law J. Rep. (N.S.) C.P. 159; 14 Com. B. Rep. 655.

The plaintiff having agreed to act at the defendant's theatre for the season of 1853, which ended in September, at 8*l.* per week, and having been dismissed, brought an action, on the 23rd of April, for a wrongful dismissal, claiming to receive 32*l.* for four weeks' salary up to that day. The defendant pleaded payment into court of 32*l.*, to which the plaintiff replied, taking that sum out of court, under the mistaken supposition that he would be afterwards entitled to recover for each week's salary as it should become due. Having discovered his mistake, he applied to a Judge, who made an order for setting aside the replication, the plaintiff paying the costs, and repaying the money received out of court and costs, the plaintiff to be at liberty to amend the declaration and particulars, and the defendant to plead *de novo*:—Held, that the Judge exercised a proper discretion in making the order. *Emery v. Webster*, 23 Law J. Rep. (N.S.) Exch. 9; 9 Exch. Rep. 242; affirmed, *Webster v. Emery*, 24 Law J. Rep. (N.S.) Exch. 186; 10 Exch. Rep. 901.

By the 78th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125.) the Court or a Judge have power if they or he think fit, on the application of a plaintiff in detinue, to order execution for the return of the chattel without giving the defendant the option of retaining it on paying the value:—Held, that this rule does not apply where, at the

trial, the value of the chattel has not been assessed. *Chilton v. Carrington*, 24 Law J. Rep. (N.S.) C.P. 78; 15 Com. B. Rep. 730.

The Court will review the order of a Judge made under this section. Therefore, where at the trial of an action of detinue for a lease deposited as security for 150*l.*, the parties agreed that the jury should be discharged from finding the value of the lease, and a Judge made an order on the defendant to deliver up the lease, the Court rescinded that order. *Ibid.*

Quere—whether if the value had been assessed, the Court could have ordered the lease to be delivered up on payment of the 150*l.* *Ibid.*

Applications to review the decision of a Judge at chambers should be made in the course of the next term after the decision has been made,—affirming *Meredith v. Gittens* and *Orchard v. Moxey*. *Collins v. Johnson*, 24 Law J. Rep. (N.S.) C.P. 132; 16 Com. B. Rep. 588.

The pursor of a mine, assuming to be authorized to sue on behalf of the adventurers, instructed an attorney to sue in the name of twelve of them. At the trial, the record was withdrawn, and the defendant obtained a rule for the costs of the day. Immediately after taxation, on the 19th of September 1854, three of the plaintiffs obtained Judge's orders to strike their names from the record, on the ground that they had ceased to have any interest in the mine, and that their names had been used without their knowledge or consent. On the 5th of May 1855 the defendant obtained a rule to rescind these orders, and for the attorney to pay the costs already incurred, and to give security for the defendant's future costs:—Held, that the application was too late. *Ibid.*

Quere—whether, if the application had been in time, the Court would have made either branch of the rule absolute. *Ibid.*

(V) INTERROGATORIES.

A defendant will not be allowed to deliver interrogatories before plea, unless a case of urgency is made out. *Martin v. Hemming*, 24 Law J. Rep. (N.S.) Exch. 3; 10 Exch. Rep. 476.

Quere—whether the right to deliver interrogatories is limited to cases in which a discovery would be obtained in equity. *Ibid.*

(W) SETTING OFF COSTS.

The plaintiff, having succeeded upon issues of fact joined upon two counts of the declaration, but judgment having been given upon a demurrer to a third for the defendant, had obtained a rule to shew cause why satisfaction should not be entered upon the roll as to the defendant's costs, and those costs be deducted from his own damages and costs, without regard to the lien of the defendant's attorney. The rule was made absolute, and it was held that in such case the defendant's costs were "interlocutory costs in the same suit" within the meaning of Rule 93. of Hil. term, 2 Will. 4., and that the former part of the rule prohibiting the allowance of any set-off of costs to the prejudice of the attorney's lien applies only to the costs of *different* suits. *Scott v. De Richebourg*, 20 Law J. Rep. (N.S.) C.P. 263.

Semle—per Maule, J.—no application to the Court was necessary. *Ibid.*

PRACTICE, IN EQUITY.

[See ATTORNEY AND SOLICITOR—COSTS—INJUNCTION—PLEADING—PARTIES TO SUITS—PRODUCTION AND INSPECTION OF DOCUMENTS, 15 & 16 Vict. cc. 80, 86, 87.]

(A) BILLS.

- (a) *In general.*
- (b) *Of Discovery.*
- (c) *Of Revivor.*
- (d) *Supplemental and of Review.*
- (e) *Service of Copy of.*
- (f) *Amendment of.*
- (g) *Taking pro Confesso.*
- (h) *Dismissal of.*

(B) CLAIMS.

(C) SUIT BY SUMMONS.

(D) PROCESS.

(E) CONTEMPT.

(F) APPEARANCE.

(G) ANSWERS.

- (a) *In general.*
- (b) *Supplemental.*

(H) DISCLAIMER.

(I) DEMURRER.

(J) REPLICATION.

(K) TRAVERSING NOTE.

(L) PETITIONS.

(M) MOTIONS.

- (a) *In general.*
- (b) *Notice of Motion.*
- (c) *For Decree.*

(N) PRODUCTION OF DOCUMENTS.

- (a) *General Points.*
- (b) *Privileged Documents.*
- (c) *Original Will.*

(O) INTERROGATORIES.

(P) AFFIDAVITS.

(Q) SPECIAL EXAMINERS.

(R) EXAMINATION OF WITNESSES.

(S) EXAMINATION OF PARTIES.

(T) EVIDENCE BEFORE THE MASTER.

(U) CONDUCT OF SUIT.

(V) ATTENDING PROCEEDINGS.

(W) STAYING PROCEEDINGS.

(X) SUPPLEMENTAL STATEMENT.

(Y) SETTING DOWN AND HEARING CAUSE.

(Z) INTERLOCUTORY APPLICATIONS.

(AA) ASSISTANCE OF COMMON LAW JUDGE.

(BB) ORDERS AND DECREES.

- (a) *In general.*
- (b) *Order to revive.*
- (c) *Supplemental Order.*

(CC) ISSUE AND CASE SENT TO LAW.

(DD) REFERENCES.

- (a) *Generally, and Proceedings.*
- (b) *To Chambers.*
- (c) *Adjournment from Chambers.*
- (d) *Report.*

(EE) EXCEPTIONS.

- (a) *Answers.*
- (b) *Reports and Certificates.*
- (c) *Scandal and Impertinence.*

(FF) SALES AND PURCHASES UNDER DIRECTION OF THE COURT.

- (a) *Conduct of Sale.*

- (b) *Opening Biddings.*
- (c) *Purchaser.*
- (d) *Conveyancing Counsel.*

- (GG) PAYMENT INTO COURT.
- (HH) PAYMENT OUT OF COURT.
- (II) RECEIVER.
- (JJ) INFANTS' SUITS.
- (KK) GUARDIAN AD LITEM.
- (LL) NEXT FRIEND.
- (MM) PAUPER.
- (NN) CREDITORS' SUITS.
- (OO) SPECIAL CASE.
- (PP) JURISDICTION OF THE COURT.
- (QQ) REHEARING.
- (RR) APPEAL.
- (SS) ENROLMENT OF DECREE.
- (TT) RECTIFYING PROCEEDINGS.
- (UU) ABATEMENT.
- (VV) REPRESENTATION OF DECEASED DEFENDANT.
- (WW) INVESTMENT.
- (XX) TRANSFER OF STOCK.
- (YY) INCOME PENDENTE LITE.
- (ZZ) UNDERTAKING.
- (AAA) COPIES OF PLEADINGS.
- (BBB) IMPERTINENCE.
- (CCC) IRREGULARITY.
- (DDD) ATTACHMENT.
- (EEE) SEQUESTRATION.

(A) BILLS.

(a) *In general.*

Where a bill was filed in writing (being for an injunction) pursuant to section 6. of the statute 15 & 16 Vict. c. 86, and had been duly impressed with a 1*l*. stamp, as directed by the 6th of the Orders of the 25th of October 1852, and a printed copy of the bill was, within fourteen days, tendered to the Clerk of Records and Writs for reception, and to be filed, he refused, on the ground that he was precluded from doing so by the 12th section of the Chancery Suits' Relief Act (15 & 16 Vict. c. 87); but the Lords Justices being of opinion that in such a case only one stamp was necessary, ordered the printed bill to be received and filed, but directed that in all cases where a written bill is filed, the same shall be retained in the office together with the printed bill. *Jones v. Batten*, 22 Law J. Rep. (n.s.) Chanc. 13; 2 De Gex, M. & G. 111; 9 Hare, App. lvii.

A printed bill was prepared, pursuant to section 1. of the statute 15 & 16 Vict. c. 86, but there being a mistake by the transposition of the christian names of the next friend, the error was corrected in ink, and the officers declined to file it as a printed bill; but the Court held that the alteration was of so slight a nature, that it did not constitute a sufficient ground for refusing to file the bill, and directed it to be received and filed accordingly. *Yeatman v. Mousley*, 22 Law J. Rep. (n.s.) Chanc. 20; 2 De Gex, M. & G. 220; 9 Hare, App. viii.

The indorsement on bill of complaint or claim may be altered at the discretion of the Court from the form prescribed by the Schedule to the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86), and such indorsement is not required by the act to

be printed.—*semble. Baines v. Ridge*, 22 Law J. Rep. (n.s.) Chanc. 110; 9 Hare, App. xxvii.

In a case of emergency, several adhesive stamps, to the amount required to be paid on filing a bill of claim, may be affixed in lieu of one stamp denoting the amount. *Brain v. Brain*, 22 Law J. Rep. (n.s.) Chanc. 288; 9 Hare, App. xc.

A plaintiff must state his whole case, whether upon a claim or bill; but he need not state facts in anticipation of the defence. *Jacobs v. Richards*, 23 Law J. Rep. (n.s.) Chanc. 557; 5 De Gex, M. & G. 55; 18 Beav. 300.

A written bill having been filed, and an order made, upon an undertaking by the defendant, to stay all proceedings in the cause, whereby the plaintiff was precluded from filing a printed copy, as required by the 3rd Order of August 1852,—the Court, by consent, dispensed with the filing of a printed copy until further order, and retained the written bill on the file in the mean time. *Lord Abingdon v. Thornhill*, 24 Law J. Rep. (n.s.) Chanc. 536.

A plaintiff having filed a bill for the appointment of new trustees in a case in which it might be done by petition, was ordered to pay all the costs. *Thomas v. Walker*, 18 Beav. 521.

The indorsement on a bill or claim may, under the 3rd section of the 15 & 16 Vict. c. 86, be varied as circumstances require; and, therefore, when the plaintiff has obtained an order for the service of defendants out of the jurisdiction, fixing periods for their appearance, the indorsement may be altered so as to make the time specified in the indorsement correspond with the time allowed by the order. *Chatfield v. Berchtoldt*, 9 Hare, App. xxviii.

Numerical statements in bills may be printed in figures, and not in words at length. *Anon.*, 9 Hare, App. lxxxiii.

It is not necessary now in every case to insert a charge of documents in a bill, as a foundation for the usual interrogatory concerning them. *Perry v. Turpin*, Kay, App. xlix.

Exceptions to an answer to the interrogatory concerning documents are now unnecessary, because the discovery may be enforced in chambers. *Ibid*.

(b) *Of Discovery.*

Upon a bill against a stock-broker for discovery and for an account of dealings in shares of incorporated companies,—Held, that such shares, not being guaranteed by government, did not fall within the 7 Geo. 2. c. 8, and that the defendant must answer the interrogatories, as by the transactions he was not subjected to any penalty or forfeiture. *Williams v. Trye*, 23 Law J. Rep. (n.s.) Chanc. 860; 18 Beav. 366.

Where at the hearing liberty is given to a party to establish his right at law, the defendant must obtain the leave of the Court to enable him to file a bill of discovery. (*Per Sir C. C. Pepys and Lord Langdale.*) *Few v. Guppy*, 13 Beav. 457.

Where an action is brought in the name of a party having the legal title, a bill of discovery in aid of the defence must be filed against that party alone. (*Per Lord Lyndhurst.*) *Ibid*.

Practice under the statute in cases of injunctions to stay proceedings at law. *Lovell v. Galloway*, 17 Beav. 1.

Though a party may now at law examine his op-

ponent, he is still entitled to a discovery in equity in aid of his case at law. *Ibid.*

Where the plaintiff in a bill of discovery in aid of a defence at law has a *bona fide* case verified by affidavit, shewing that information may be given by the answer which may assist him in wholly or partially destroying the case made against him at law, he is entitled to that discovery, and to an injunction until the discovery is given. *Ibid.*

(c) Of Revivor.

Before decree a plaintiff has an option whether he will revive or not, and the executor of a defendant who had died cannot compel the plaintiff to revive. *Reeves v. Baker*, 20 Law J. Rep. (n.s.) Chanc. 278; 13 Beav. 115.

A bill was filed by certain persons, as plaintiffs, for the administration of the personal estate of a testator, and the usual decree for accounts was taken, the Master's report was made, and a decree was made on further directions. The suit having been neglected, the Master committed the prosecution of the decree to a party who had been found by the report to be a legatee. The suit afterwards abated by the marriage of one of the female plaintiffs. The plaintiffs having declined to take any proceedings to revive, the legatee filed a bill of revivor. A demurrer to this bill by the plaintiffs in the original suit, was allowed. *Williams v. Chard*, 21 Law J. Rep. (n.s.) Chanc. 9; 5 De Gex & S. 9.

No order will in future be made upon a bill of revivor and supplement; but the proceedings in a suit must be continued under an order obtained under the 15 & 16 Vict. c. 86. s. 52, even though an admission of assets may be required. In the present case, however, the Court made a decree. *Edwards v. Batley*, 23 Law J. Rep. (n.s.) Chanc. 872; 19 Beav. 457.

(d) Supplemental, and of Review.

After decree a plaintiff became bankrupt, it was ordered that he and his assignees should elect either to file a supplemental bill, or that all proceedings should be stayed. *Clarke v. Tipping*, 16 Beav. 12.

A trustee under the 7 & 8 Vict. c. 70. for facilitating arrangements between debtors and creditors, of a plaintiff, was put to his election within twenty-eight days to file a supplemental bill in the nature of a bill of revivor, or in default all proceedings were directed to be stayed till further order. This order was made, notwithstanding the protection against arrest, granted to the plaintiff under the act, had been held at common law valid. *Hardy v. Dartnell*, 4 De Gex & S. 568.

In an administration suit by a single plaintiff where an inquiry was directed in the decree as to the persons entitled to the residue, and the Master made a report finding a great number of persons—nephews and nieces, and descendants of nephews and nieces—answering the descriptions in the testator's will, and consisting in part of married women and infants, and persons out of the jurisdiction, the Court declared the rights of the parties, without a supplemental bill being filed to bring them before the Court. *Williamson v. Parker*, 5 De Gex & S. 419.

Form of the order as made. *Ibid.*

A supplemental suit grafts into the original suit the new parties brought before the Court by the supplemental suit, and enables the Court to deal with the parties to both records as if they were all parties to the same record. *Wilkinson v. Fowkes*, 9 Hare, 193; 22 Law J. Rep. (n.s.) Chanc. 137.

A defendant to an original suit is not to be made a party to a supplemental suit, on the mere ground of a right to question the representative character of a defendant to the supplemental suit, for his title to sustain that character cannot be tried in this court. *Ibid.*

The original defendants are necessary parties to a supplemental bill where the supplemental suit is occasioned by an alteration after the original bill is filed, affecting the rights and interests of the original defendants as represented on the record; but they are not necessary parties to a supplemental bill where there may be a decree upon the supplemental matter against the new defendant, unless the decree will affect the interest of the original defendants; nor are they necessary parties when the supplemental bill is brought merely to introduce formal parties. *Ibid.*

A defendant after a decree may file a supplemental bill to add parties, or otherwise duly prosecute the decree. *Lee v. Lee*, 10 Hare, App. lxxii.

(e) Service of Copy of.

Where service of a bill has been made upon a defendant incorrectly named in the bill, leave will be given to enter a memorandum of service upon such defendant, stating his name correctly. *Witham v. Salvin*, 21 Law J. Rep. (n.s.) Chanc. 915.

Though a fee of one guinea is paid upon service of a copy of a written bill, a second fee must be paid upon service of a copy of the printed bill. *The Trustees of the Birkenhead Dock v. the Shrewsbury and Chester Rail. Co.*, 22 Law J. Rep. (n.s.) Chanc. 22.

Motion by plaintiff for leave to serve the defendant's attorney with the bill, which was filed to restrain the defendant from proceeding in an action at law against the plaintiff, the defendant being out of the jurisdiction:—Held, that an affidavit of merits was not necessary. *Sergison v. Beavan*, 22 Law J. Rep. (n.s.) Chanc. 287.

A defendant served with a copy of a bill under the 23rd Order of the 26th of August 1841 must be re-served if the bill is amended. *Vincent v. Watts*, 3 Mac. & G. 248.

Where all the *cestuis que trust* were served with a copy of a bill for appointment of new trustees and transfer to them of the trust fund, there being nothing asked in the bill as to the transfer of the fund into court,—Held, that all the *cestuis que trust* must be served with notice of motion to transfer the fund into court, as there was nothing in the bill to indicate that it was intended so to deal with the trust fund. *Lewellin v. Cobbold*, 1 Sm. & G. 572.

(f) Amendment of.

The sole defendant to a bill put in his answer. The bill was afterwards amended, and an answer put in to the amended bill. The plaintiff, within four weeks from the time that the answer was to be deemed sufficient, obtained an order from the Master for leave to amend, without the production of the

affidavit mentioned in the 68th Order of May 1845:—Held, that the order was regular. *Masterman v. the Midland Great Western Rail. Co. of Ireland*, 20 Law J. Rep. (N.S.) Chanc. 43.

Upon an application for leave to amend under the 68th Order of May 1845, the party must not only pledge his oath that the proposed amendments are material and could not, with reasonable diligence, be sooner introduced, but must also set forth in his affidavit such a case as will satisfactorily shew to the Court that the fact is so. *Stuart v. Lloyd*, 20 Law J. Rep. (N.S.) Chanc. 329; 3 Mac. & G. 181: reversing 1 Sim. N.S. 56.

Defendant answered the original bill, and upwards of four weeks elapsed from the time such answer was put in. The plaintiff amended his bill, and the defendant put in his answer. An application by the plaintiff to the Master for leave to amend, within four weeks after the answer to the amended bill had been put in,—Held, not to be obnoxious to the 68th Order of May 1845. *Macintosh v. the Great Western Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 550.

Where an amendment made in a bill exceeds two folios the bill must be reprinted. *Stone v. Davies*, 22 Law J. Rep. (N.S.) Chanc. 672; 3 De Gex, M. & G. 240.

The bill alleged that certain bequests in a will were obtained by the exercise of undue influence over the testator. Evidence was taken upon this issue, and publication having passed, the cause was ready for hearing. The plaintiff then moved for leave to amend, or file a supplemental statement, upon the ground that the evidence proved that the testator had not read the will, and was not aware that it contained these bequests:—Held, that the plaintiff, at this stage of the proceedings, could not be allowed to introduce an entirely different case, and that as the effect of the amendment would be to shew that part of the will was not the will, this Court could not adjudicate upon the question without interfering with the jurisdiction of the ecclesiastical court. *Tomson v. Judge*, 23 Law J. Rep. (N.S.) Chanc. 929; 2 Drew. 414.

A plaintiff filed his bill, asserting a legal right, and at the hearing he was ordered to establish it at law. Before the trial, he alleged he had discovered circumstances which happened before he filed his bill, but of which he was not aware when he instituted the suit, and moved for leave to amend, under the 53rd section of the 15 & 16 Vict. c. 86. The Court, overruling a decision of one of the Vice Chancellors, gave leave to amend. *Bolton v. Ridsdale*, 24 Law J. Rep. (N.S.) Chanc. 70.

A plaintiff is at liberty to obtain an order of course to amend his bill after having served notice of motion for a decree, if the motion has not been set down for hearing, notwithstanding that affidavits in answer and in reply have been filed. *Gill v. Rayner*, 24 Law J. Rep. (N.S.) Chanc. 399; 1 Kay & J. 395.

Order to amend an information obtained under the 68th Order of 1845 on the affidavit of the solicitor alone; and which, after detailing certain circumstances, stated "that having regard to these circumstances," the amendments could not with reasonable diligence have been sooner introduced:—Held, regular. *Attorney General v. the Corporation of London*, 13 Beav. 313.

The plaintiff filed his bill against several defen-

dants; all the answers, except one, were got in, and the cause was in a position in which, but for the want of that answer, it might have been put at issue. Certain of the defendants having moved to dismiss the bill for want of prosecution, the plaintiff applied for leave to amend. The Lord Chancellor granted the application, treating the defendant whose answer had not been got in as a substantial party, and holding that the plaintiff had not been guilty of negligence in not putting the case at issue as against him. *Collett v. Preston*, 3 Mac. & G. 432.

Held, also, that the only effect of the motion to dismiss was to render necessary a special order for leave to amend; and further that the application was to be regulated by the provisions of the 67th Order of the 8th of May 1845, and not by those of the 68th Order. *Ibid*.

Under an order giving liberty to add parties by amendment or supplemental bill, a plaintiff may do both. *Minn v. Stant*, 15 Beav. 129.

The common order to amend may be obtained after a claim has been set down for hearing. *Gwynne v. the British Peat, Charcoal and Manure Co.*, 17 Beav. 7.

Where a demurrer has been overruled, and an appeal from the order is pending, an *ex parte* order to amend is irregular; and a plaintiff having obtained such an order, after he had notice that the appeal had been set down, it was discharged with costs, and the amendments were expunged. *Ainslie v. Sims*, 17 Beav. 174.

By a clerical error a defendant to a bill was named twice: first, by her maiden name; and, secondly, as the wife of B. On motion *ex parte* the Court gave leave to the plaintiff to amend the record by striking out the name of the defendant by her maiden name, without re-serving the parties with the copy of the amended bill. *Barnes v. Ridgway*, 1 Sm. & G. App. xviii.

The 67th and 68th Orders of 1845 apply to an application to the Court, as well as to an application to the Master. *M-Leod v. Lyttleton*, 1 Drew. 36.

A motion for leave to amend by striking out the name of a plaintiff and making him a defendant, must be supported by the affidavits required by the 67th and 68th Orders of 1845. *Ibid*.

An order of course may be obtained after replication, to amend by adding parties, where no new issue is thereby tendered. *Bryan v. Wastell*, Kay, App. xlvii.

(g) Taking pro Confesso.

The defendant had never been in this country, and there was doubt as to the information given him:—Held, that he could not be deemed to have absconded to avoid answering, or to have refused to obey the order of the Court; and an application to take the bill *pro confesso*, as against him, was refused. *Zulueta v. Vincent*, 21 Law J. Rep. (N.S.) Chanc. 415; 15 Beav. 272.

An order of Court duly served on a defendant is a sufficient notice under the 86th and 87th Orders of May 1845, to enable the Court to make a decree absolute on a bill taken *pro confesso*. *Trilley v. Keefe*, 21 Law J. Rep. (N.S.) Chanc. 914; 16 Beav. 83.

Although it is not the course of the Court to hear special motions on other days than those appointed, yet, as every day in term is a motion day, a notice

inserted in the *Gazette*, under the 79th Order of May 1845, for taking a bill *pro confesso* on a day in term, is a good notice, notwithstanding that the day for which notice is given is not a day regularly appointed for motions. *Chaffers v. Baker*, 24 Law J. Rep. (n.s.) Chanc. 49; 5 De Gex, M. & G. 482.

The word "week" in the 79th Order of May 1845, interpreted to mean the ordinary reckoning from Sunday to Sunday. *Bazalgette v. Lowe*, 24 Law J. Rep. (n.s.) Chanc. 416, 368.

The plaintiff should proceed with the greatest care in *pro confesso* cases, and bring the case strictly within the General Orders. *Buttler v. Mathews*, 19 Beav. 549.

Bill taken *pro confesso* for want of answer against an absconding defendant, though no interrogatories had been delivered. *Ibid*.

Where a defendant is abroad it is not necessary to issue an attachment previous to taking the bill *pro confesso*. *Ibid*.

The Court will not order a claim to be taken *pro confesso* against an absconding defendant, although the course of proceeding prescribed by the stat. 1 Will. 4. c. 36. s. 4, for taking bills *pro confesso* against such defendants, has been duly followed. *Henderson v. Thomas*, 10 Hare, App. lxvii.

(h) Dismissal of.

The answer became sufficient on the 2nd of August, and the four weeks allowed from that time to amend the bill, extra the vacation, expired on the 18th of November. The defendant served notice of motion to dismiss at half-past seven o'clock on the evening of the 18th of November:—Held, that the four weeks did not expire till twelve o'clock at night, and consequently that the notice of motion was given before the plaintiff was in default. Motion dismissed, with costs. *Preston v. Collett*, 20 Law J. Rep. (n.s.) Chanc. 228.

The Court will not, without evidence on the part of the plaintiff, or consent of the defendant, give leave to amend the bill on motion to dismiss it for want of prosecution. *Freeston v. Claydon*, 22 Law J. Rep. (n.s.) Chanc. 640.

The certificate of filing the defendant's answer must be produced to the Registrar. *Ibid*.

A motion for the dismissal of a suit for a receiver *pendente lite*, for want of prosecution in not bringing the suit to a hearing, after the receiver had been appointed, is irregular. *Edwards v. Edwards*, 22 Law J. Rep. (n.s.) Chanc. 1055.

A mortgagee, who is a defendant in a foreclosure suit, may, upon proving a tender to the plaintiff of his principal and interest and offering to secure a sufficient sum to answer the costs to which the plaintiff may be liable, move to dismiss the plaintiff's bill on payment of his principal and interest, and providing for the costs when taxed, but before such tender the motion cannot be entertained. *Paynter v. Carew*, 23 Law J. Rep. (n.s.) Chanc. 596; Kay, App. xxxvi.

The other mortgagees, defendants in the suit, have not, before decree, such an interest in the suit as will entitle them to resist such a motion. *Ibid*.

Vacations are not excepted in the computation of the three months within which, under the 29th Order of August 1842, a plaintiff must set down the cause for hearing or move for a decree; but the

Court has a discretion to dismiss the bill or give the plaintiff further time. *Bottomley v. Squire*, 24 Law J. Rep. (n.s.) Chanc. 437.

In the case of a bill against several defendants, one only of whom had appeared, and which one was not required to answer, the Court permitted that defendant to move to dismiss at the end of three months, although Easter vacation was included in the computation of that period, but gave the plaintiff further time. *Ibid*.

A bill of 1,500 folios was filed in February 1850, and the answer of 900 folios was filed in June. On motion to dismiss in January 1851, the plaintiff desired time to amend,—Held, that the delay was inexcusable, and the bill must be dismissed unless the plaintiff filed his replication forthwith. *Thruston v. Smith*, 13 Beav. 112.

A decision, on the authority of which a suit had been instituted, being overruled, the plaintiff offered to dismiss his bill without costs:—Held, that this was no answer to a motion to dismiss for want of prosecution, and that the plaintiff must either proceed or have his bill dismissed on the usual terms. *The Lancashire and Yorkshire Rail. Co. v. Evans*, 14 Beav. 529.

Plaintiff, an executor, did not appear at the hearing; and upon proof of service of the subpoena to hear judgment, the bill was dismissed with costs. An application to restore the cause to the paper, on the ground that the plaintiff had, seven months previously, become bankrupt, and believed that his rights passed to the assignees, which was not the fact, refused with costs. *Frost v. Hilton*, 15 Beav. 432.

A and B had charges on a plantation and the slaves. In 1834 an issue was tendered in a suit between them as to their priority on the slave compensation money. B withdrew his claim, and the bill was on motion dismissed sixteen years afterwards, when the witnesses were dead. B's executors raised the same question of priority in regard to the plantation itself:—Held, that they were concluded by the transaction of 1834. *Bushby v. Ellis*, 17 Beav. 279.

A suit stood dismissed for want of prosecution in consequence of the plaintiff not serving a subpoena to hear judgment within the time limited by an order to speed. The plaintiff moved to stay the taxation of the costs of suit:—Held, that the motion ought to have been to restore the bill; and that although the Court would feel inclined to grant indulgence in the case of a *bond fide* mistake, yet that it was not to be extended to such an extent as to encourage parties in proceeding negligently with their suits. *Barlett v. Harton*, 17 Beav. 479.

Ignorance of the practice held to be no sufficient ground for restoring the suit, nor the fact that the long vacation had intervened. *Ibid*.

Bill, filed after seventeen years to set aside a purchase of the testator's estate by his executor at an undervalue, dismissed on the ground of the delay; although the sale, if recent, would have been set aside. *Baker v. Read*, 18 Beav. 398.

A bill was filed by a tithe-owner claiming tithes against several occupiers of land who had not rendered any tithe, and disputed the plaintiff's title to it. One of the defendants was a Quaker, and applied to the plaintiff on that ground to dismiss the bill against

him, which the plaintiff consented to do, provided the Quaker's answer admitted the actual title of the plaintiff so as to enable the plaintiff to obtain his tithes against the Quaker by the ordinary proceedings before Justices in the country. The draft of the Quaker's proposed answer was then shewn to the plaintiff, and was by arrangement altered so as not to deny the plaintiff's title, but so as to object merely on the grounds of religious scruples entertained by him as a Quaker. On this answer being produced in evidence, the plaintiff recovered his tithes before the Justices, and the further prosecution of the suit against the Quaker became unnecessary. On motion by the plaintiff the suit was dismissed against the Quaker defendant; but as it appeared upon the affidavits and the draft of the answer originally prepared that the defendant had, previously to and at the time when the bill was filed, disputed the plaintiff's title, the bill was dismissed without costs of the suit or of the motion. *Wright v. Barlow*, 5 De Gex & Sm. 43.

A bill was filed in 1849 for the purpose of taking the accounts of an abortive railway undertaking. Upon a motion in July 1851 by a defendant to dismiss the bill, the plaintiff undertook to file a replication on or before the first day of Hilary term 1852. He made default in performing his undertaking. Upon a motion made in February following, the plaintiff proved that he had been unable to serve the other defendants so as to perfect the suit which he was prosecuting *bonâ fide*.—Held, that the plaintiff must be held to the undertaking, and that if he had a case entitling him to be relieved from that undertaking, he ought to have made a special application to be discharged from it. *La Mert v. Stanhope*, 5 De Gex & Sm. 247.

Other defendants had abstained from moving for the dismissal of the bill, relying on the undertaking given on the motion in July 1851, but on default of the plaintiff to perform that undertaking by filing a replication, these defendants, in February 1852, moved for the dismissal of the bill as against them, and the Court dismissed the bill accordingly. *Ibid.*

Motion by the defendant for the dismissal of the plaintiff's bill for want of prosecution, ordered—upon the application of the plaintiff, and upon affidavit that the plaintiff had obtained the relief which he sought by his suit, and that any further proceedings would be unnecessary and useless, and that the defendant was a pauper—to stand over to give the plaintiff liberty to move to dismiss his bill; and upon such motion the bill was dismissed without costs. *Pinfold v. Pinfold*, 9 Hare, App. xiv.

Dismissal of bills in which executors and trustees are parties, may be by consent, but not upon terms of an agreement between the parties, unless the Court has heard and sanctioned such terms. *Warwick v. Cox*, 9 Hare, App. xiv.

After bill filed the sole defendant became bankrupt, and obtained her certificate, and then put in her answer stating these facts. No proceedings were taken for six years, and the defendant moved for the dismissal of the bill with costs. The plaintiff, not desiring to proceed, offered to do so rather than pay the costs. The Court dismissed the bill, without costs. *Kemball v. Walduck*, 1 Sm. & G. App. xxvii.

(B) CLAIMS.

Claim for payment by the defendant on being indemnified by the plaintiffs of amount of lost cheque given by him to alleged agent of the plaintiffs, for goods sold and delivered. The cheque was lost during transmission by alleged agent through the post to another agent of the plaintiffs. The defendant promised to give them another cheque for the amount, but afterwards refused to do so, denied the alleged agency and debt, and stated that he had given the cheque by way of loan to the alleged agent to enable him to pay a debt due from the latter to the plaintiff. The alleged agency was not proved otherwise than by the affidavits of the plaintiffs, and the affidavit of a third person, stating that he had received a letter (not produced) from the alleged agent, informing him that the latter had, as agent of the plaintiffs, transmitted the cheque by post:—Held, first, that the evidence was insufficient to prove the plaintiffs' case. Secondly, that the claim was insufficient in allegations necessary to establish a case for relief in equity on the ground that the cheque had, under the circumstances, become the property of the plaintiffs; and, thirdly, that no consideration being shewn for the defendant's promise to give the plaintiffs another cheque, the promise could not be enforced. *Johns v. Mason*, 20 Law J. Rep. (N.S.) Chanc. 305; 9 Hare, 29.

The claim, having been filed by leave of the Court, was dismissed without prejudice to further proceedings by the plaintiffs. *Ibid.*

Material evidence, in the power of both parties, having been withheld on both sides, the claim was dismissed, without costs. *Ibid.*

The General Orders of April 1850 were not intended to affect or alter the ordinary rule of the Court requiring parties to proceed in establishing their case *secundum allegata et probata*. *Ibid.*

If, at the hearing of a claim, it will be necessary for the Court to direct special inquiries, and the claim does not contain any specific statements upon which to ground those inquiries, the claim will be dismissed. *Penny v. Penny*, 20 Law J. Rep. (N.S.) Chanc. 339; 9 Hare, 39.

In a legatee's claim against a surviving executor, who denies assets, the representatives of the deceased co-executors are necessary parties. *Ibid.*

Observations on the 8th Order of April 1850, as to parties necessary to be named in a claim in the first instance. *Ibid.*

Construction of the 32nd Order of August 1841. *Ibid.*

A testator, by his will, devised his real estate to A and B on the usual trusts for sale, and directed them to pay a share of the purchase-moneys to A. The testator died in February 1816, and A and B proved the will. A died in October 1817. B died in 1849, having appointed C his executor. Letters of administration of A's estate were granted to D in June 1850. A claim filed by D, the administrator of A, against C, the executor of B, in respect of the share of the purchase-moneys of the testator's estate given to A, was dismissed, with costs, but without prejudice to a suit. *Pawsey v. Barnes*, 20 Law J. Rep. (N.S.) Chanc. 393.

Where a claim is called on and the plaintiff does not appear, the defendant will not be entitled to a

decree for the dismissal of the claim with costs, unless he produces, before the rising of the Court, an affidavit of service of the writ of summons. *Rackham v. Cooper*, 20 Law J. Rep. (N.S.) Chanc. 394.

Where a question, which ought to have been made the subject of a special claim, is brought before the Court on a common claim, the Court will give leave to have it filed as a special claim *nunc pro tunc*. *Mathews v. Pincomb*, 20 Law J. Rep. (N.S.) Chanc. 395; 4 De Gex & Sm. 485.

A testator bequeathed a legacy, payable to the legatee at the age of twenty-one, with interest from his death, and died in 1840. The legatee attained the age of twenty-one in 1850, and filed a common claim for the legacy, with interest from her majority, and obtained a decree for the payment of the amount claimed, and received the money. The legatee afterwards, having discovered that she was entitled to interest from the testator's death, filed another common claim for this interest:—Held, that she was entitled to this interest, but that she ought to have made it the subject of a special claim. *Ibid*.

The hearing of a claim will not be stayed on the ground that a bill has been filed by other parties, in respect of the same and additional subject-matters, if a decree for the same relief must be made in either suit, although the plaintiff in the claim may be entitled to further relief under the decree on the bill. *Scott v. Lord Hastings*, 20 Law J. Rep. (N.S.) Chanc. 530.

Order made on a claim that the money to be received in respect of mortgages, forming part of the personal estate of an intestate, should be got in by the administrator, and divided from time to time by him among the parties interested. *Bullivant v. Bellairs*, 20 Law J. Rep. (N.S.) Chanc. 549.

In a suit by claim for foreclosure, it is optional with the plaintiff to take the usual order at the hearing, or an inquiry as to other incumbrances. *Robinson v. Turner*, 20 Law J. Rep. (N.S.) Chanc. 629; 9 Hare, 129.

The object of the Orders of April 1850 was to obviate the necessity of bringing before the Court, in the first instance, numerous parties having concurrent interests with the plaintiff, and to restore the former practice of the court, acted upon in the time of Lord Chancellor Hardwicke, when such parties appeared in the first instance before the Master. *Eccles v. Cheyne*, 20 Law J. Rep. (N.S.) Chanc. 631; 9 Hare, 215.

Proceedings by claim are applicable only to simple cases, and where the decree would have been as of course if a bill had been filed and all parties had been before the Court at the hearing. *Ibid*.

In a claim the plaintiff moved that the defendant might be ordered to pay into court a sum of money admitted by him upon affidavit to be due, and also to produce a document admitted to be in his possession. The Court made the order. *Jefferies v. Biggs*, 20 Law J. Rep. (N.S.) Chanc. 638.

Upon a claim filed by some of the residuary devisees, under the will of a testatrix who had given various legacies to Roman Catholic priests and charities, for the administration of her estate, a reference to the Master was asked, to inquire whether any of the legacies so given by the will were held upon any secret trusts, for the performance of pious

acts connected with the Roman Catholic religion:—Held, that these inquiries could not be directed upon a claim. If the plaintiffs wanted more than the common administration decree they must file a bill for the purpose. *Gilpin v. Magee*, 20 Law J. Rep. (N.S.) Chanc. 639.

A claim not stating all the facts of the case within the plaintiff's knowledge is liable to be dismissed, with costs, and if the plaintiff withholds those facts and takes the chance of relief from what may turn up from the affidavits, the Court will not adjudicate upon the claim. *Goode v. West*, 21 Law J. Rep. (N.S.) Chanc. 127; 9 Hare, 378.

When trustees have paid any monies into court under the Trustees Indemnity Acts, the remedy of a plaintiff as to the sum paid in can be prosecuted only under those statutes, and not under the ordinary jurisdiction of the Court by bill or claim. *Ibid*.

Where errors had been committed in carrying out the proceedings under an original claim, leave was given to file a supplemental claim. *Naylor v. Robson*, 21 Law J. Rep. (N.S.) Chanc. 280.

Quære—if an objection to a claim is to be raised by motion to take it off the file. *Davies v. Davies*, 21 Law J. Rep. (N.S.) Chanc. 543.

A claim must state all the material facts of the plaintiff's case; and if such facts be suppressed, the claim will, on that ground alone, be dismissed. *Bromitt v. Moor*, 22 Law J. Rep. (N.S.) Chanc. 129; 9 Hare, 374.

A claim for foreclosure by a mortgagee with power of sale, and a proviso that the power should not prejudice his right to foreclose or his other rights as mortgagee, is a special claim, and requires the leave of the Court to file it. *Varney v. Forward*, 22 Law J. Rep. (N.S.) Chanc. 247.

A special claim may be filed for specific performance of a contract to grant a lease. *Anonymous*, 22 Law J. Rep. (N.S.) Chanc. 257; 9 Hare, App. xi.

The representatives of a deceased executor, not parties to an administration claim against the surviving executor, cannot be made parties by summons on the Master's certificate, under the 18th General Order of April 1850; but, if necessary, they must be brought before the Court by original or supplemental claim. *Ewington v. Fenn*, 22 Law J. Rep. (N.S.) Chanc. 256; 9 Hare, App. x.

If the plaintiff in a claim make default at the hearing, every defendant who appears is entitled to have the claim dismissed, with costs, without producing any affidavit of service of the writ of summons. *Charlton v. Allen*, 22 Law J. Rep. (N.S.) Chanc. 257; 9 Hare, App. lxvii.

The omission to print counsel's name upon a claim requiring his signature will not prevent its being filed. *Coppeard v. Mayhew*, 22 Law J. Rep. (N.S.) Chanc. 408.

A mortgagee held not to be chargeable with the increased costs occasioned by his proceeding for foreclosure by bill and not by claim. *Holford v. Yate*, 10 Hare, App. xl.

Exceptions are necessary in order to object to reports on claims, as well as to reports on bills. *Ewington v. Fenn*, 10 Hare, App. xl.

A plaintiff having an agreement which upon a bill he might probably have had specifically performed, filed a claim for that purpose; but the Court, finding it impossible to determine the question between the

parties as it was presented on that mode of proceeding, dismissed the claim, with costs, and without prejudice to the plaintiff's right to file a bill. *Rawlings v. Dalgleish*, 1 Sm. & G. 76.

Where a plaintiff does not appear on a claim, it will be dismissed without any affidavit. *Bell v. Hornby*, 14 Beav. 439.

Leave given to file a claim to enforce the specific performance of a verbal agreement to purchase land, containing a statement of facts shewing part performance. *Burnley v. the Eastern Counties Rail. Co.*, 5 De Gex & Sm. 314.

Where the plaintiff omitted to prosecute an order upon a claim,—Held, that the Court might give a defendant leave to sue out a writ of summons to bring before the Master the parties required by the terms of the order. *Turnbull v. Warne*, 2 De Gex, M. & G. 281.

Motion for an order under the 31st General Order of May 1815, against a defendant to a claim who had absconded, refused. *Smith v. Corles*, 1 Sim. N.S. 259.

Order to elect made in the case of a claim, though not literally within the Orders. *Davison v. Mason*, 18 Beav. 540.

(C) SUIT BY SUMMONS.

A woman, on her marriage, had personal property settled to her separate use, with a general power of appointment by will over the same. By a deed of separation between her and her husband, she had secured to her, by the covenant of her husband with trustees, the power of disposing, by sale, bequest or otherwise, of all property she had or might have. By her will, she appointed, gave, devised and bequeathed everything which, by virtue of any power, she was competent to dispose of, in trust for the maintenance of A B until she should be twenty-one, and afterwards in trust for her absolutely. The executors proved the will, and the probate was limited to such personal estate as under the settlement and deed of separation the testatrix had the power of appointing and disposing of:—Held, that the Court had jurisdiction under the 45th section of the statute 15 & 16 Vict. c. 86, at the instance of the party beneficially entitled under the will of the married woman, to entertain an application for a summons calling upon the executors to shew cause why an order for the administration of the personal estate of the testatrix should not be made. *Ashley v. Sewell*, 22 Law J. Rep. (N.S.) Chanc. 659; 3 De Gex, M. & G. 933.

Parties out of the jurisdiction must be served with notice of the decree in a suit commenced by summons out of chambers. *Strong v. Moore*, 22 Law J. Rep. (N.S.) Chanc. 917.

A release of all demands must be set aside before any proceedings can be taken in respect of matters covered by such release. *Acaster v. Anderson*, 24 Law J. Rep. (N.S.) Chanc. 437; 19 Beav. 161.

The chief clerk has no jurisdiction to issue a summons from chambers which incidentally will have the effect of avoiding a release of all demands. *Ibid.*

In a suit commenced by summons, for the administration of the estate of an intestate, against the administratrix and her husband, the husband became lunatic, though not so found by inquisition, and the Court on motion *ex parte* supported by affidavit of

fitness, appointed a guardian *ad litem*. *Osbaldiston v. Crowther*, 1 Sm. & G. App. xii.

(D) PROCESS.

Decree taken against a defendant on an affidavit of service of the subpoena to hear judgment. The affidavit stated service on T, who, according to the belief of the deponent, was the defendant's solicitor:—Held, that if it should appear on the record that T was such solicitor, the affidavit would be sufficient. *Marsden v. Blundell*, 20 Law J. Rep. (N.S.) Chanc. 104.

A defendant having gone abroad, substituted service of the replication and other process in a supplemental suit, not requiring personal service, was ordered to be made on the solicitor in the original suit. *Scott v. Wheeler*, 20 Law J. Rep. (N.S.) Chanc. 331; 18 Beav. 239.

Upon motion for leave to enter an appearance for a defendant, who was alleged to have absconded to avoid criminal process,—Held, that process included civil and criminal process; and the motion was granted. *Allen v. Loder*, 20 Law J. Rep. (N.S.) Chanc. 658.

Where a defendant resided abroad, a general order was made for substituting service of the orders of the Court on the party upon whom an order to revive was directed to be served. *Forster v. Menzies*, 22 Law J. Rep. (N.S.) Chanc. 835; 16 Beav. 568.

Where a defendant generally keeps out of the way, he will be deemed to be absconding to avoid service, and substituted service will therefore be ordered by the Court under the 39th General Order of May 1845. *The Manchester and Stafford Rail. Co. v. How*, 22 Law J. Rep. (N.S.) Chanc. 1044.

Substituted service ordered of a writ of summons issued upon the Master's certificate upon a claim. *Baker v. Anthony*, 14 Beav. 26.

Leave given to serve a writ of summons in America. *Thomas v. Colworth*, 14 Beav. 208.

(E) CONTEMPT.

A party in contempt in a suit in another branch of the Court will be ordered to be brought up if wanted for examination. *Hill v. Travis*, 21 Law J. Rep. (N.S.) Chanc. 541.

Where a defendant is in custody for contempt for want of answer, notice of motion for an order, under the 12th rule of the 15th section of the above statute, that he remain in custody until answer or further order, must be served upon him. *Aveling v. Martin*, 22 Law J. Rep. (N.S.) Chanc. 695.

An answer was filed by a defendant while in contempt, and an order was made to clear the contempt on payment of the costs; but as they were not paid after taxation,—Held, that the plaintiff was entitled to have the answer taken off the file. *Coyle v. Alleyne*, 22 Law J. Rep. (N.S.) Chanc. 937; 16 Beav. 543.

A, a defendant to a suit, was in contempt for not obeying an order made in the cause for him to pay a sum of money to the plaintiff. A sequestration issued against A, to which a return was made that he had no lay property, but that he had an ecclesiastical benefice. An order was made, on motion by the plaintiff, for a writ of *sequestrari facias de bonis ecclesiasticis* against the defendant directed to the Bishop of the diocese in which the benefice was

situated. *Allen v. Williams*, 24 Law J. Rep. (N.S.) Chanc. 160; 2 Sm. & G. 455.

Substituted service of a copy of a bill having been ordered upon a defendant out of the jurisdiction, the Court will not commit him for contempt upon his subsequently coming within the jurisdiction and neglecting to enter an appearance. *Hackwood v. Lockerby*, 24 Law J. Rep. (N.S.) Chanc. 408.

On an application by the defendant to stay proceedings of the plaintiff in the trial of an issue, until the plaintiff should pay costs, for non-payment of which he was in contempt, the plaintiff being at the same time under terms to try the issue at the next assizes; the Court gave the plaintiff an enlarged time for proceeding to trial, but made his right conditional on the payment of such costs. *Reeve v. Hodson*, 10 Hare, App. xli.

(F) APPEARANCE.

Service of the subpoena to appear to the amended bill was made upon the solicitor of the defendant, who had appeared for him on the original bill, the defendant residing abroad. The Court ordered an appearance to be entered for the defendant under the 29th of the Orders of May 1845. *Zulueta v. Vincent*, 20 Law J. Rep. (N.S.) Chanc. 474; 3 Mac. & G. 246; 13 Beav. 227.

An appearance of a defendant to a bill of revivor is not necessary since the passing of the Procedure Amendment Act. *Ward v. Cartwright*, 22 Law J. Rep. (N.S.) Chanc. 1006; 10 Hare, App. lxxiii.

A solicitor was held entitled to charge 6s. 8d. for every three defendants to a bill for whom he entered appearances, although such appearances were entered for all the defendants on the same day. The scale of fees, as to entering appearances, set forth in the 5th General Order of the 23rd of October 1852, was not intended to be confined to appearances to a summons. *Morriss v. Walton*, 23 Law J. Rep. (N.S.) Chanc. 1003.

Parties against whom a supplemental order had been made under the 15 & 16 Vict. c. 86. s. 52. not having entered their appearance, liberty was given to the plaintiff to enter an appearance for them. *Cross v. Thomas*, 16 Beav. 592.

(G) ANSWER.

(a) In general.

A defendant, in his answer to the usual interrogatory as to deeds, &c. stated that he had, in the schedule thereto, set forth a list of all the deeds, &c. relating to the matters in question in the suit, and traversed the interrogatory. One of the items in the schedule was "Banker's Pass-book";—Held, that this description was sufficient. *Houghton v. Barnett*, 20 Law J. Rep. (N.S.) Chanc. 444.

If a defendant answers a bill, he must answer fully; and if he is protected from answering, he must avail himself of his protection by plea or otherwise. *Chadwick v. Chadwick*, 22 Law J. Rep. (N.S.) Chanc. 329.

The test of the materiality of a fact alleged by the plaintiff, is the service it would be in proving his case if admitted or answered in the affirmative by the defendant. *Ibid.*

Where the sole gist and object of a suit are to convict the defendant in a penalty, a Court of equity will not grant any incidental discovery; but if such

be not the object of the suit, a defendant who answers part of the bill cannot refuse to answer any other material parts on the ground that an admission of the facts interrogated might expose the defendant to a criminal prosecution. *Ibid.*

An answer may be filed, if it be properly headed and sufficiently identified with the cause, although not entitled according to the form given in the General Orders of August 1852. *Rabbeth v. Squire*, 22 Law J. Rep. (N.S.) Chanc. 639; 10 Hare, App. iii.

Where the jurat of an answer has been partially and inadvertently cancelled before the filing of the answer, the latter must be re-sworn in the form of the original jurat. *Attorney General v. Henderson*, 22 Law J. Rep. (N.S.) Chanc. 706.

Under the 21st section of the Chancery Procedure Improvement Act (15 & 16 Vict. c. 86.) the jurat to a joint and several answer may be qualified as to a defendant's belief of the truth of other acts than his own. *Ibid.*

An order for committal after three insufficient answers is irregular. *Hayward v. Price*, 23 Law J. Rep. (N.S.) Chanc. 549; Kay, App. xxxi.

An order made by the chief clerk at chambers that a defendant, who had put in three insufficient answers, should attend on a certain day to be examined, and in default, or if his examination should be insufficient, should be committed, discharged for irregularity. *Ibid.*

Where an error is discovered in an answer after it has been sworn and before it is filed, the original jurat may be cancelled, and the corrected answer filed as re-sworn. *Attorney General v. the Governors of the Donnington Hospital*, 22 Law J. Rep. (N.S.) Chanc. 707.

In a suit to stay proceedings at law, a defendant obtained time to answer, and then pressed on the action and obtained judgment. After a very considerable delay, he again applied for further time to answer; but held, that as he came for an indulgence, it could only be granted upon the terms of staying execution in the action. *Zulueta v. Vincent*, 15 Beav. 575.

Practice as to lunatic answering where he is made defendant to a bill filed by the committee of his person and estate. *Worth v. Mackenzie*, 3 Mac. & G. 363.

A defendant took out a warrant for six weeks' "further time to answer." The plaintiff's solicitor indorsed it, "we consent to fourteen days." The order as drawn up, gave the time "to plead, answer, or demur, not demurring alone." The defendant having put in a plea of the plaintiff's insolvency, it was ordered to be taken off the file with costs, and the order was varied so as to limit it to time to answer only. *Newman v. White*, 16 Beav. 4.

Upon the motion of some of the defendants, and on their submitting to such order as the Court might make as to their cross-examination or otherwise, the Court ordered that their answers might be read as affidavits at the hearing of the cause. *Howell v. Williams*, 1 Sm. & G. App. xi.

A defendant not being required by the bill to do so, did not file any answer. The cause came on upon a motion for a decree, when the defendant, at the bar, pleaded the Statute of Limitations; the Court holding that a defendant who intended to set up such

a defence ought to do so by answer, disallowed the objection thus taken. *Holding v. Barton*, 1 Sm. & G. App. xxv.

An answer, part of which is indorsed on the outside skin of parchment, will not be filed by the record and writ clerks. *M'Keone v. Seaber*, 18 Beav. 411.

Practice in such a case. *Ibid*.

The 21st section of 15 & 16 Vict. c. 86. does not involve any alteration of the form of the oath to be administered to a defendant on putting in his answer. *Attorney General v. Hudson*, 9 Hare, App. lxiii.

Re-swearing the answer of a defendant which had been taken out of the record office, and of which the jurat had been cancelled by the officer of the court. *Ibid*.

Where an incorporated company in answer to an interrogatory in a bill as to documents, which ever were in the power of agents formerly and not now in their employ, stated ignorance as to the fact, but did not state that they had made any particular inquiries of such former agents,—Held, that the answer was sufficient, there being no special circumstances alleged applicable to any particular document, or any particular person. *M'Intosh v. the Great Western Rail. Co.*, 4 De Gex & S. 502.

Where a corporation were interrogated by a bill to which they and their engineer were defendants, as to what had taken place between the plaintiff's testator and the engineer,—Held, first, that it was not sufficient for the corporation to state ignorance, without stating that they had made inquiries of the engineer; secondly, that the Court could not, in deciding on the insufficiency of the answer of the corporation, regard the circumstance that the engineer in a separate answer (which had not been excepted to in that particular) stated that he did not remember, and could not set forth any of the particulars inquired after. *M'Intosh v. the Great Western Rail. Co.*, 4 De Gex & S. 544.

Seemle—that the answer of a defendant made a party as the officer of the corporation also defendants, cannot be read in evidence against the latter. *Ibid*.

Three persons, the committees of a lunatic, made statements by answer to the plaintiff's bill. The lunatic died intestate. One of the committees, and the wives of the two others, became her personal representatives. In their answer to a bill of revivor and supplement, they all craved the benefit sought by their former answer, as if they had therein repleaded the said several matters:—Held, that they must be considered as stating and averring, after the grant of letters of administration to them, the whole contents of their former answer; and although no replication had been filed to the answer to the bill of revivor, parts of the original answers were allowed to be read against all the defendants. *Percival v. Cancy*, 4 De Gex & S. 610.

Where an answer in equity is read at law against a defendant, the whole being read there, every fact which by way of assertion or denial he states in it is considered in evidence, but not as conclusively proved; but where part only of an answer is read in equity, the unread portion is generally not even *prima facie* evidence for the defendant. A plaintiff is not bound by all that he reads conclusively; for if upon the whole evidence and case taken together,

the Judge is satisfied that part of the answer read is untrue, he may and ought so to treat it, and to believe, and act on one portion of the answer, and to disbelieve and decline acting upon another portion of it, even where it positively denies a fact deposed to by one witness only. *Ibid*.

Presumption against the estate of a deceased person, arising from the spoliation of a document by a person who afterwards becomes the personal representative of the deceased, and as such is made defendant to a suit. *Ibid*.

Defendants, husband and wife, having answered a bill, seeking the amounts of a business in question in the suit extending over upwards of thirty years, in which the plaintiff had been a partner with the defendant, the husband, for the last ten years, an order was made under which the plaintiff obtained access to all the documents. The plaintiff amended his bill, introducing interrogatories as to minute particulars of the dealings and accounts. The defendants, by their answer to the amended bill, stated they had no means of obtaining the particulars inquired after, except by the books in the defendants' possession, which were eight in number, and the books in the possession of plaintiff and defendant, which were sixty in number; and alleged that the plaintiff had had access to all the documents, and that the plaintiff's professional accountant had examined them and made many extracts therefrom; and also that the books were ordinary business books kept with regular entries, and that to set forth the accounts as required would subject the defendants to an oppressive amount of labour; and they submitted they were not bound to answer such interrogatories in detail. Upon the plaintiff's exception to this answer,—Held, that though the answer was technically insufficient, yet the Court, having regard to the bill and answer, was bound to consider what object the plaintiff could gain by a more full answer; and in the absence of an allegation that anything had been fraudulently or erroneously inserted in or omitted from the accounts, the Court could not see any object to be gained by the plaintiff by a more full answer, and overruled the exceptions. *White v. Barker*, 5 De Gex & S. 746.

(b) Supplemental.

A supplemental answer may by consent be filed after replication, without withdrawing the replication already filed. *Parsons v. Hardy*, 21 Law J. Rep. (N.S.) Chanc. 400.

(H) DISCLAIMER.

In a suit instituted for the redemption of prior and the foreclosure of subsequent incumbrances, creditors by judgment and by deposit of title-deeds, who had parted with their interest in the securities before they were made parties to the suit, put in their respective answers disclaiming all interest in the estates mortgaged:—Held, that they were entitled not only to the general costs of the suit, but also to the costs of the evidence which one of them had gone into in support of the statements in his answer, which had been replied to. *Hurst v. Hurst*, 22 Law J. Rep. (N.S.) Chanc. 546.

(I) DEMURRER.

Where a question had been decided in one suit,

and the same point was raised between other parties in another suit, the Court, upon appeal, declined to decide the case upon demurrer. *Evans v. Evans*, 23 Law J. Rep. (N.S.) Chanc. 827.

The demurrer on the record having been overruled, and a demurrer *ore tenus* for want of parties having been allowed, the Court ordered the defendants to pay the costs of the former, but made no order as to the costs of the latter; and gave the plaintiff leave to amend either by adding parties, or striking out the passages which made the new parties necessary. *Macintyre v. Connell*, 1 Sim. N.S. 257.

(J) REPLICATION.

Where the plaintiff duly gives notice of motion for a decree or decretal order, under the 15 & 16 Vict. c. 86. s. 26, it is not proper to file replication. *Duffield v. Sturges*, 22 Law J. Rep. (N.S.) Chanc. 288; 9 Hare, App. lxxxvii.

Where an appearance has been entered by the plaintiff for the defendant who has absconded, notice of the filing of the replication under the Chancery Procedure Amendment Act and the 28th of the General Orders of August 1852, is to be left at the last known place of abode of the defendant, and to be advertised in the *Gazette* and in two county papers. *Barton v. Whitcomb*, 22 Law J. Rep. (N.S.) Chanc. 523; 16 Beav. 205.

Some of the defendants having put in their answers after replication, leave was given to file a further replication as to the subsequent defendants, and the time for taking evidence was enlarged so as to include all the defendants. *Rogers v. Hooper*, 23 Law J. Rep. (N.S.) Chanc. 449; 2 Drew. 97.

A copy of the bill was served upon the defendant's solicitors, and the time for taking the intermediate steps having expired, and the defendant not having put in an answer, and not being to be found, an order was made under the Chancery Amendment Act that notice of filing replication should be given in the *Gazette* and in two other newspapers, and the defendant was then to have nine weeks, before being served with subpoena to hear judgment. *Jenkyn v. Vaughan*, 24 Law J. Rep. (N.S.) Chanc. 495; 3 Drew. 20.

Where notice of replication having been filed is not served on the adverse party on the day on which the replication is filed, the proper application is to enlarge the time for closing the evidence, and not to take the replication off the file. *Lloyd v. the Solicitors' and General Life Assurance Society*, 24 Law J. Rep. (N.S.) Chanc. 704.

The application having been made without previously communicating with the other side, the Court gave no costs of the motion. *Ibid.*

Bill filed for specific sums in lieu of tithes, the amounts were inaccurately stated. On the information of the collector, certain books shewing the true amounts were in the vestry-room and accessible to the rector, but he did not actually inspect them, and did not discover their contents till after replication was filed; leave was given to withdraw the replication, and to amend on paying the costs of suit up to that time, and costs of the application. *Champneys v. Buchan*, 3 Drew. 5.

(K) TRAVERSING NOTE.

Where a plaintiff has filed a traversing note

against one defendant under the 37th Order of May 1845, he may move for a decree under the 15th section of the Procedure Amendment Act, 15 & 16 Vict. c. 86, and the Clerk of Records and Writs is to issue his certificate in order to enable the plaintiff to enter the cause for hearing with the Registrar. *Maniere v. Leicester and Kamp*, 23 Law J. Rep. (N.S.) Chanc. 263; 5 De Gex, M. & G. 75; Kay, App. xlviii.

(L) PETITIONS.

Under the Chancery Procedure Amendment Act, one Vice Chancellor has jurisdiction to hear a petition for another Vice Chancellor. *Holloway v. Phillips*, 22 Law J. Rep. (N.S.) Chanc. 1091.

Legatees applying by petition for payment of their legacies in an administration suit, before or at the time the cause is heard for further directions, ordered to pay the costs of all parties of such petition. *Edwards v. Hall*, 10 Hare, App. lxi.

According to the recent practice, the Court disapproves of the appearance of the parties, on the hearing of a petition, though served, where their appearance is unnecessary, and their costs will be disallowed. *Day v. Croft*, 19 Beav. 518.

Where a petition was answered and brought on, and stood over with liberty to amend by adding co-petitioners, one of the persons to be added was found to be dead, and the name of his administrator, under letters dated subsequent to the date of the Lord Chancellor's fiat, was inserted in the petition, and it was presented as a new petition,—Held, that a new petition was not necessary. *Maude v. Maude*, 5 De Gex & Sm. 418.

The original petition having been lost, the Court allowed the copy left for the Judge to be filed. *Smith v. Harwood*, 1 Sm. & G. 137.

(M) MOTIONS.

(a) *In general.*

Reservation of the costs of a motion, but providing for the event of the bill being dismissed before the hearing. *Jones v. Batten*, 10 Hare, App. xi.

The Court, on motion by consent, ordered the plaintiff in one suit to serve the plaintiff in another with warrants to attend before the Master in proceedings in the first suit. *Hills v. Macrae*, 20 Law J. Rep. (N.S.) Chanc. 533.

Motion before evidence had been entered into for an issue to try the validity of the will, that being the only point in dispute, refused. *Roberts v. Kerslake*, 23 Law J. Rep. (N.S.) Chanc. 632.

The Order of August 5, 1818, does not apply to a notice of motion to vary the chief clerk's certificate, and a party giving such a notice will not be allowed to abandon his motion on payment of 40s. costs. *Tucker v. Hernaman*, 24 Law J. Rep. (N.S.) Chanc. 456.

(b) *Notice of Motion.*

Notice of motion may be well served by leaving it at the unoccupied place of address of the solicitor in the cause, who has absconded. *Newton v. Thomson*, 22 Law J. Rep. (N.S.) Chanc. 10.

Where notice of motion is irregularly given before the Master of the Rolls, in a Vice Chancellor's cause, this Court has jurisdiction to award costs. *Yearsley v. Yearsley*, 19 Beav. 1.

Two counsel having been instructed by the respondents in such a case, 42s. costs were summarily given. *Ibid.*

Where a notice of motion does not ask for costs, it is irregular, where the respondent does not appear, to take an order for costs upon an affidavit of service. *Pratt v. Walker*, 19 Beav. 261.

Leave given to serve notice of motion before appearance, does not also include leave to serve short notice, and if that be required, it must be expressly given; but where short notice has been given without the leave of the Court to that effect, it is not, of course, to order the party moving to pay costs, unless any costs have been specially occasioned to the other parties by the irregularity. *Newton v. Charlton*, 10 Hare, App. xxxi.

Parties, though not formally served with a notice of motion, yet substantially made respondents, held entitled to their costs. *Shaw v. Forrest*, 20 Beav. 249.

(c) For Decree.

Under the 22nd of the General Orders of the 7th of August 1852, where the plaintiff serves notice of motion for a decree, he ought to enter it concurrently with the registrar, and no further notice of setting down the cause will be necessary. An *ex parte* application to set down a cause at the expiration of a month from the service of the motion, refused. *Boyd v. Jaggard*, 22 Law J. Rep. (N.S.) Chanc. 895.

A cause coming on to be heard on motion for decree may be set down to be heard as a short cause. *Ames v. Ames*, 22 Law J. Rep. (N.S.) Chanc. 1005; 10 Hare, App. liv.

A motion for a decree "according to the prayer of the bill," will entitle the plaintiff to all the relief he could have at the hearing of the cause. *Norton v. Steinkopf*, 23 Law J. Rep. (N.S.) Chanc. 35; Kay, App. x.

Replication having been filed in a suit instituted before the Chancery Procedure Amendment Act came into operation, and a defendant having been afterwards added by amendment,—Held, that, as against such new defendant, the cause might be heard, on motion for a decree, under the 15th section of the act, notwithstanding replication had been filed in the original suit. *Gwyon v. Gwyon*, 24 Law J. Rep. (N.S.) Chanc. 136; 1 Kay & J. 211.

Where defendants to a suit commenced under the old practice have not been required to answer, and have not answered the bill, the time for answering having expired, the cause may be heard upon notice of motion for a decree under the new practice, notwithstanding that a traversing note has not been filed. *Jones v. Howell*, 24 Law J. Rep. (N.S.) Chanc. 521.

A plaintiff in a suit commenced by bill before as well as since the stat. 15 & 16 Vict. c. 86. came into operation, may move for a decree under the 15th section of that statute. *Cousins v. Vasey*, 9 Hare, App. xxxi.

On a motion for a decree the answer of a defendant may be read against himself, without notice having been given under the 23rd General Order of the 7th of August 1852, of the intention to read the same as an affidavit against such defendant; but the answer of one defendant cannot be read against another defendant without notice being given to such

other defendant of the intention to read it. *Cousins v. Vasey*, 9 Hare, App. lxi.

A deed mentioned in the answer of a defendant is admissible in evidence on a motion for decree against such defendant, without notice of his intention to use it—*semble*. *Ibid.*

An application under the 26th Order of the 7th of August 1852, for liberty to use further evidence, on a motion for a decree, cannot be made *ex parte*. *Richards v. Curlewis*, 18 Beav. 462.

A motion for a decree may be heard by consent before the time fixed by the general order for motion has expired. *Loinsworth v. Rowley*, 10 Hare, App. lv.

Notice of motion for a decree under the 15th section of 15 & 16 Vict. c. 86. may be served on a defendant out of the jurisdiction. *Meek v. Ward*, 10 Hare, App. lv.

The order for leave to serve the notice out of the jurisdiction is to be drawn up and served, and is to specify the time allowed for filing affidavits in reply. *Ibid.*

(N) PRODUCTION OF DOCUMENTS.

(a) General Points.

A defendant admitted that certain documents were in the possession of himself and W C his co-executor, and that others were in the possession of their solicitor, W C not being a party to the suit:—Held, that an order for production could not be made against the defendant on such an admission. *Morrell v. Wootten*, 20 Law J. Rep. (N.S.) Chanc. 81; 13 Beav. 105.

The defendant, by his answer, denied the possession of certain documents. The answer was admitted to be sufficient. The plaintiff alleging by affidavit that the denial of possession was untrue, and that the particular documents were wilfully suppressed, moved for their production:—Held, that assuming fraud, falsehood and misrepresentation to be proved, the plaintiff was not entitled to move for production, but must file a bill. *Reynell v. Sprye*, 21 Law J. Rep. (N.S.) Chanc. 13; 1 De Gex, M. & G. 656.

The bill alleged that an estate was devised under a power to the defendant for life or until he should alienate by forfeiture or otherwise; that the execution of the power was invalid, and that the plaintiff was entitled to the estate in default of appointment. One of the interrogatories to the bill was, whether the defendant had not in his possession the title-deeds of the estate; and if not, in whose possession were they? The bill also asked that the defendant might set forth a schedule of the deeds in his possession, and that he might state in whose possession those deeds were which he had parted with. The defendant admitted that some of the deeds were in his possession, and set forth a schedule of them, and he stated that he had had other deeds, but refused to answer in whose possession they now were, as it might subject him to a forfeiture of the estate:—Held, that an exception which comprised the answer to the whole of the interrogatory was good, although part of it had been answered. *Hambrook v. Smith*, 21 Law J. Rep. (N.S.) Chanc. 320.

Held, also, that as in any event the documents might assist the plaintiff at the hearing, he was entitled to production. *Ibid.*

Held, further, that the estate having been given to the defendant until alienation, he could not protect himself from discovery on the ground of forfeiture. *Ibid.*

Application for production of documents is to be made, in the first instance, by summons at the chambers of the Judge. Questions of difficulty as to the production are to be adjourned to and argued in court (Masters in Chancery Abolition Act, 15 & 16 Vict. c. 80. s. 26). *Thompson v. Teulon*, 22 Law J. Rep. (n.s.) Chanc. 11; 9 Hare, App. xlix.

Under an order that one of the defendants should allow the plaintiffs, their solicitors or agents, to inspect certain documents, it was held, that the defendant was justified in refusing to allow the inspection to take place in the presence of a co-defendant, although employed as an agent of the plaintiffs. *Bartley v. Bartley*, 22 Law J. Rep. (n.s.) Chanc. 47; 1 Drew. 233.

A motion by the defendant that the plaintiff should produce, on oath, all the documents in his possession or power relating to the matters in the suit (the defendant not specifying any documents or giving any evidence that the plaintiff had any), was refused, with costs. *Piott v. Mullins*, 22 Law J. Rep. (n.s.) Chanc. 72; 1 Sm. & G. 1.

In a suit by a contractor against a railway company, in respect of works done for them, a motion was made by the defendants, that the plaintiff should produce all written communications which had passed between certain persons, naming them, and all account books, documents, papers and writings relating to the contracts in the bill mentioned. The defendants' solicitor made an affidavit in support of the motion, that he believed that the plaintiff had documents as stated in the notice of motion; and the plaintiff, by an affidavit in answer, admitted that he had in his possession a great mass of documents relating to the works in question, but stated that to ascertain which of them came within the terms of the motion would be productive of great expense and inconvenience to him. The Court made the order according to the terms of the motion. *Macintosh v. the Great Western Rail. Co.*, 22 Law J. Rep. (n.s.) Chanc. 72; 1 Sm. & G. 4.

A plaintiff, under an order for himself, his solicitors and agents, will not be allowed to take with him a relation to assist in the inspection of documents admitted by the defendants to be in their custody. *Summerfield v. Prichard*, 22 Law J. Rep. (n.s.) Chanc. 528; 17 Beav. 9.

Upon motion for production of documents, an affidavit was made by the plaintiff that the defendant had in his possession a certain document not admitted in his answer:—Held, that production could only be obtained of such documents as were admitted by the defendant upon his oath to be in his possession, and that the 18th section of the Chancery Amendment Act did not vary the practice so as to entitle the plaintiff to production, upon any other oath than that of the defendant himself. *Lamb v. Orton*, 22 Law J. Rep. (n.s.) Chanc. 713; 1 Drew. 414.

Held, also, that the draft of an answer in another suit was protected under the rule regarding confidential communications. *Ibid.*

Under an order for production of documents, the denial upon oath of the relevancy of concealed

passages will not be sufficient; and upon the Court itself ascertaining that they might possibly refer to the questions at issue, an order was made upon the defendant for the production of the concealed passages, with costs. *Caton v. Lewis*, 22 Law J. Rep. (n.s.) Chanc. 946.

The Court will, on motion by either party, order the clerk of records and writs to issue a writ *duces tecum* to the registrar of an ecclesiastical court to attend and produce a will at the hearing. *Wigan v. Rowland*, 23 Law J. Rep. (n.s.) Chanc. 69; 10 Hare, App. xviii.

Documents relating to matters in question in a suit were pledged by the defendant previous to the institution of the suit. The Court held, that the defendant was not compellable to redeem them for the purpose of production. *Liddell v. Norton*, 23 Law J. Rep. (n.s.) Chanc. 169; Kay, App. xi.

Documents produced at chambers in an administration suit, by a claimant in support of his claim as a creditor of the testator, ordered to be produced before the chief clerk for the inspection of witnesses on the part of the plaintiff, in order to test their authenticity, solicitors for both parties being permitted to be present at the production and inspection. *Groves v. Groves*, 23 Law J. Rep. (n.s.) Chanc. 199; Kay, App. xix.

Upon the examination of a witness for one defendant before a special examiner, documents were placed in his hands to be proved as exhibits by proof of handwriting, and no more; the plaintiff then required to inspect the documents, but the examiner decided that he was not entitled to inspect them. Upon appeal, one of the Vice Chancellors affirmed the decision; and on appeal to the Lords Justices,—Held, that the counsel or solicitor for the plaintiff in such a case had no right to inspect the documents placed in the hands of the witness. *Lord v. Colvin*, 23 Law J. Rep. (n.s.) Chanc. 469; 5 De Gex, M. & G. 47; 2 Drew. 205.

There was no right before the passing of the statute 15 & 16 Vict. c. 86, to compel the production and inspection of documents so produced, before the time for cross-examination had arrived; and the 31st section of that statute gives no such power as a matter of course, and without any special ground being laid. *Ibid.*

Where the Court requires for its own information the production of a record from the Record Office, no fee ought to be paid for the same. *Drysdale v. Mace*, 23 Law J. Rep. (n.s.) Chanc. 518; 5 De Gex, M. & G. 103; 2 Sm. & G. 225.

An order for production of documents under the 18th section of the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86.) may be made after a plea has been put in and issue joined. *Parkinson v. Chambers*, 24 Law J. Rep. (n.s.) Chanc. 47; 1 Kay & J. 72.

Before ordering the production of original records, the Court requires it to be shown that the office copies will not be sufficient. *Anon.* 13 Beav. 420.

Where a defendant has in his possession documents belonging to his client or *cestui que trust*, a production will not be ordered in their absence (*per* Sir L. Shadwell). But where an action at law is brought by a trustee by the direction and for the benefit of the *cestui que trust*, such trustee is bound to produce all the documents to the same extent as

if he had not only the legal, but also the beneficial interest (*per* Lord Lyndhurst). *Few v. Guppy*, 13 Beav. 457.

A bill of discovery was filed in aid of a defence to an action at law, which at the hearing of the cause the plaintiff had liberty to bring:—Held, that the defendant was not bound to produce letters or documents relating to the trial written preparatory to the action at law in the suit (*per* Lord Lyndhurst and Sir L. Shadwell). *Ibid*.

Where at the hearing the bill is retained, and liberty is given to the plaintiff to establish his right at law, it is not the practice to direct by the order a production of books and papers in the parties' possession relating to the matters, nor to give leave to the defendant to file a bill of discovery in aid of his defence. The rule is the same when the order directs certain admissions to be made on points not in controversy, but it is different in the case of an issue being directed (*per* Sir C. C. Pepys). *Ibid*.

A bill of discovery insisted on the invalidity of a patent, on the ground that it had been assigned to more than five persons, and prayed a production of the documents, &c. "relating to the matters aforesaid":—Held, that the defendants were bound to produce those documents only which related to that point, and were entitled to seal up such parts as related to other matters (*per* Lord Lyndhurst). *Ibid*.

No affidavit is necessary to support an application for production on oath of documents under the 15 & 16 Vict. c. 86. s. 20. *The Rochdale Canal Co. v. King*, 15 Beav. 11.

The Court has settled an order under that act, requiring the plaintiff to make an affidavit of the documents in his possession, and to produce such as he does not thereby object to produce. *Ibid*.

A defendant is entitled of right to such an order for production, and a delay in making the application does not deprive him of it. *Ibid*.

Two defendants admitted the possession of documents. One died:—Held, that a motion for production against the survivor, in the absence of the representatives of the deceased defendant, could not be maintained. *Robertson v. Shewell*, 15 Beav. 277.

The trustees and executors, defendants in an administration suit, admitted by their answer the possession of title-deeds of mortgage securities in which they had properly invested their testator's assets, but alleged that the mortgagors objected to the production of the deeds, and would prefer to pay off their debts, and they objected to the production of the deeds in the suit in the absence of the mortgagors. On a motion for production,—Held, that the deeds must be produced. *Gough v. Offey*, 5 De Gex & S. 653.

The 20th section of the 15 & 16 Vict. c. 86. does not extend to enable a defendant to obtain an order for the production of documents in the possession of a co-defendant; in such a case a cross-bill may still be necessary. *Attorney General v. Clapham*, 10 Hare, App. lxviii.

A was a transferee of a mortgage for 4,000*l.*, and claimed also under a judgment 880*l.* A bill was filed by a subsequent mortgagee to redeem the mortgage for 4,000*l.*, and for payment of the plaintiff's incumbrance in priority over the judgment debt. The bill alleged that A had in his possession a deed of conveyance of the estate, in which was a recital

that the judgment debt had been paid off. A admitted the possession of the deed, and set out a portion of it, by which it was recited that the judgment debt was paid off; but he said that in fact this was only done for the purpose of clearing the estate, and that he had taken an assignment of the debt:—Held, that if he had not been a mortgagee, he must have produced the deed, and 4,000*l.* having been paid to him without prejudice to any question in the cause, held, that he could not set off 880*l.* of that as due to the judgment debt, but must be taken to be paid off as mortgagee, and therefore liable to produce the deed. *Cannock v. Jauincey*, 1 Drew. 497.

Upon a claim, the Court refused a motion made by the plaintiff under the 15 & 16 Vict. c. 86. s. 18, for the production of documents supported by the plaintiff's affidavit alone of their importance to the cause. *Wing v. Harvey*, 1 Sm. & G. App. x.

A defendant held not bound to set forth a list of documents in his possession relating to his own title. *Sutherland v. Sutherland*, 17 Beav. 209.

On a bill to set aside a deed filed by one plaintiff only, praying that, if necessary, it might be taken as in behalf of creditors generally, it appeared that A claiming under the deed had a power of appointment, and that she had appointed under her power; the plaintiff moved for production of documents in the hands of the trustee of the deed, offering to confirm the appointment of A. The appointees were not parties:—Held, that the production could not be enforced in the absence of these persons. *Ford v. Dolphin*, 1 Drew. 222.

(b) *Privileged Documents.*

The defendant purchased an advowson, and then mortgaged it to the plaintiff, who subsequently filed a bill against the defendant and his agent who acted in the purchase and the mortgage. The bill prayed an account as to the amount due upon the mortgage, and charged that the plaintiff had been deceived in the value of the property. Upon motion for production of documents, it was held, that as there was no allegation that the documents were written after the dispute arose, or contained legal advice or opinions, they must be produced. *Hawkins v. Gathercole*, 20 Law J. Rep. (n.s.) Chanc. 303; 1 Sim. N.S. 150.

The defendants in a suit were shareholders in a company, and had been authorized by the other shareholders to wind up its affairs, and for this purpose among other things to send out agents to India. The plaintiffs in the suit having brought actions against the defendants as shareholders, in respect of certain debentures issued by the company, the defendants thereupon filed a bill on behalf of themselves and the other shareholders to restrain the actions and to obtain relief in respect of the debentures. The plaintiffs then filed a bill against the defendants for discovery in aid of the actions. From the answers of the defendants to this bill, it appeared that they had in their actual possession certain letters which had passed between the defendants and the directors and shareholders of the company, and the agents in India, after the dispute had arisen and in contemplation of and pending proceedings in respect of the dispute, and for the purpose of assisting the defence of the defendants and the other shareholders. On a motion by the plaintiffs for the production of

these letters, the defendants submitted that they were not bound to produce them, first, because they held them on behalf of themselves and also of the other shareholders of the company who were not parties to the suit; and, secondly, because the letters fell within the class of privileged communications:—Held, ordering the production, that the defendants sufficiently represented the whole body of shareholders for the purposes of the litigation, and that, so far as the parties by or to whom the letters were sent were shareholders of the company, the letters were not privileged. *Glyn v. Caulfield*, 3 Mac. & G. 463.

Held, also, that the circumstance that the letters related to the matters in dispute, and arose out of communications between the shareholders themselves with a view to their defence in the suit, formed no ground of protection. *Ibid*.

Professional privilege, as a ground of exemption from production of documents, is adopted simply from necessity, and ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety. *Ibid*.

A defendant admitted that he had in his possession documents relating to the matters in the bill, but refused to set forth a list of them, because they had been procured by his solicitor since the institution of the suit, and for the purpose of his defence to it; and the same were, as he was advised and insisted, confidential communications:—Held, that the allegation relative to the documents did not justify the defendant's refusal to set forth a list of them, and therefore his answer was insufficient. *Balguy v. Broadhurst*, 1 Sim. N.S. 111.

The attorney of the plaintiffs in an action communicated to the plaintiffs in another action against the same defendant, and involving, substantially, the same question, a case and opinion taken on behalf of the plaintiffs in the former action, with permission to copy it. The defendant in the actions filed a bill of discovery against the plaintiffs, to whom the case and opinion had been lent:—Held, that they could not be compelled to produce the copy which they had made. *Enthoven v. Cobb*, 2 De Gex, M. & G. 632; 5 De Gex & S. 595.

Communications between a person and his legal adviser, who had been a solicitor, but, at the time of the communication, had, without his knowledge, ceased to practise, are privileged. The communications had reference to the validity of a will, and passed between the plaintiff and his legal adviser between the date of the will and the death of the testator. It was objected that they could not have taken place in contemplation of a suit respecting the validity of the will, and were therefore not protected:—Held, that this did not take them out of the rule. *Calley v. Richards*, 19 Beav. 401.

(c) Original Will.

The probate of the will not being sufficient to satisfy the Court that the testator's will was so set out as to enable them to construe it correctly, required the production of the original, and did not confine its attention to the probate. *Manning v. Purcell*, 24 Law J. Rep. (N.S.) Chanc. 522.

(O) INTERROGATORIES.

Where a written bill is filed under the Chancery Digest, 1850—1855.

Procedure Amendment Act (15 & 16 Vict. c. 86. s. 6.) interrogatories may be filed before the printed copy of the bill is filed. *Lambert v. Lomas*, 22 Law J. Rep. (N.S.) Chanc. 12; 9 Hare, App. xxix, lvii.

Only one stamp is to be paid for by a plaintiff filing a written and printed copy of a bill. *Ibid*.

Under the 12th section of the statute 15 & 16 Vict. c. 86, and by the 17th and 18th Orders of the 7th of August 1852, requiring a copy of interrogatories to be delivered "to a defendant or defendants, or his or their solicitor," it is sufficient that such copy be left at the office of the solicitor, and need not be served on the solicitor personally. *Bowen v. Price*, 22 Law J. Rep. (N.S.) Chanc. 179; 2 De Gex, M. & G. 399.

The time within which the interrogatories ought to be delivered, under the 17th Order of the 7th of August 1852, having expired, the Court, under the 20th Order, upon a motion, of which notice was given, enlarged the time within which such interrogatories should be delivered. *Empson v. Bowley*, 2 Sm. & G. App. iii.

Order to exhibit further interrogatories for the examination of witnesses under a commission, not restricting the further examination to the new witnesses. *Forbes v. Forbes*, 9 Hare, App. lxxvii.

(P) AFFIDAVITS.

At the hearing of a claim a plaintiff's affidavit cannot be received as evidence of a disputed fact. *Smith v. Constant*, 20 Law J. Rep. (N.S.) Chanc. 126; 4 De Gex & S. 213.

A defendant's affidavit on a claim is entitled to the same weight as a defendant's answer in a cause heard on bill, answer, replication and depositions on interrogatories. *Ibid*.

It is competent for the Court to decide claims, where there are disputed facts and a conflict of evidence, on affidavit evidence alone. *Ibid*.

The difference between affidavit evidence and depositions taken on interrogatories is not so great as to induce the Court, on the hearing of a claim involving questions of fact alone, to direct a bill to be filed. *Ibid*.

In orders made upon claims, the affidavits of the plaintiffs and the defendants will be entered as read, with a direction to the Master that the plaintiffs' affidavits are not to be considered as evidence, and that the defendants' affidavits are to be treated in all respects as if they were their answers to bills filed against them. *Cockburn v. Green*, 20 Law J. Rep. (N.S.) Chanc. 216.

An affidavit will be permitted to be sworn in open court in case of urgency. *The Mercers Co. v. the Witham Navigation Co. and the Great Northern Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 557; 14 Beav. 20.

It is irregular to swear an affidavit before the solicitor of the deponent, and all proceedings consequent upon an affidavit so sworn will be set aside, with costs. *Hopkin v. Hopkin*, 22 Law J. Rep. (N.S.) Chanc. 728; 10 Hare, App. ii.

An affidavit sworn in Australia, before an officer describing himself as "a Commissioner for taking affidavits," is, under the 22nd section of the 15 & 16 Vict. c. 86, receivable in evidence, without proof of the handwriting of the Commissioner, notwithstanding such affidavit was sworn before the said act came

into operation. *Bateman v. Cooke*, 22 Law J. Rep. (n.s.) Chanc. 744; 3 De Gex, M. & G. 39.

After a cause was called on for hearing, a motion was made by the plaintiff (upon special circumstances stated by him) that an affidavit, filed by him in answer to the defendant's affidavits, after the expiration of the time for closing the evidence, might be read at the hearing, or that the time for closing the evidence might be enlarged. The Court (considering that the evidence ought to be admitted) ordered that the affidavit should be read at the hearing, saving just exceptions. *Hope v. Threlfall*, 23 Law J. Rep. (n.s.) Chanc. 33; 1 Sm. & G. App. xxi.

The plaintiff, having elected to take evidence orally, moved for leave to read affidavits already filed and to be filed, on account of the age and infirmity of the witnesses and their residence in the country, the defendants to have liberty to cross-examine orally.—Held, that there were no circumstances to induce the Court, under the 15 & 16 Vict. c. 86, s. 36, to allow affidavits to be read; as a special examiner could be sent down, who might take the examination in chief orally, as well as the cross-examination; and that a question relating to an intricate pedigree, where the witnesses were in humble life, was one in which oral testimony was particularly desirable. *Rogers v. Hooper*, 23 Law J. Rep. (n.s.) Chanc. 449; 2 Drew. 97.

Where a defendant had filed three insufficient affidavits as to documents, and upon the plaintiff's obtaining an attachment filed a fourth affidavit, the Court refused to take it off the file. *Harford v. Lloyd*, 23 Law J. Rep. (n.s.) Chanc. 710.

The words "at their respective places of business" in the 2nd section of the 16 & 17 Vict. c. 78, are not to be construed as defining the place where the oath is to be administered, but the area within which the solicitors are to be considered as practising. *In re Clerk of Records and Writs*, 23 Law J. Rep. (n.s.) Chanc. 1002; 3 De Gex, M. & G. 725, n.

An affidavit was sworn in the United States of America before a notary public, and the jurat stated that fact. Appended to the affidavit was a certificate of the British consul at New York, stating that the notary held such office, and that his signature was entitled to credit. The United States consul in England was sworn to have alleged that notaries were entitled to swear affidavits.—Held, that notwithstanding the words of the 22nd section of the statute 15 & 16 Vict. c. 86, the authentication was sufficient. *Haggitt v. Ineff*, 24 Law J. Rep. (n.s.) Chanc. 120; 5 De Gex, M. & G. 910.

An erasure in an affidavit occurring in the recital of the contents of an exhibit, held to be immaterial. *Savage v. Hutchinson*, 24 Law J. Rep. (n.s.) Chanc. 232.

The jurat to the affidavit of a marksman, sworn in America before a notary public, containing a statement that the affidavit was read over to the deponent, which is the common form in use there, held to be sufficient. *Ibid.*

Where, before the month of January 1855, issue was joined in a cause in which the plaintiff elected to take evidence orally and had examined his witnesses, a defendant applied, under the 7th Order of January 13th, 1855, for leave to prove his case by affidavit, Lord Justice Turner, agreeing with the Master of the Rolls in the particular case before the Court, re-

fused the application. *Musgrove v. Smith*, 24 Law J. Rep. (n.s.) Chanc. 439.

Sums of money ought to be written in the body of affidavits in words at length, and not in figures. *Crook v. Crook*, 24 Law J. Rep. (n.s.) Chanc. 504.

Persons making affidavits to be used in a suit or other proceeding are, at the request of the parties, subject to be cross-examined upon them. *Kay v. Smith*, 24 Law J. Rep. (n.s.) Chanc. 788; 20 Beav. 566.

Affidavit sworn abroad ordered to be filed, although the place at which it was sworn was omitted in the jurat. *Meek v. Ward*, 10 Hare, App. 1.

Affidavits erroneously entitled, allowed to be taken off the file and re-sworn in their proper title without a fresh stamp. *Pearson v. Wilcox*, 10 Hare, App. xxxv.

Affidavits made in one cause, or matter in this court, used as evidence in another cause or matter. *In re Pickance's Trust*, 10 Hare, App. xxxv.

Evidence of the propriety of a sale of an estate by private contract heard and approved of in court, and not referred to chambers. *Pimm v. Insall*, 10 Hare, App. lxxiv.

When the evidence in a cause is taken orally, a general application under the 36th section of the 15 & 16 Vict. c. 86, to be at liberty to use, at the hearing, affidavits already filed, is irregular. The particular facts, or circumstances, proposed to be proved by affidavits, should be specified both in the notice of motion and in the order. *Ivison v. Grassiot*, 17 Beav. 321.

Affidavits as to matters directly in issue in the cause which are filed after the filing of the certificate of the Judge's clerk, will not be admitted at the hearing on further consideration; but, if necessary, upon the suggestion of counsel, an inquiry may be directed. *Fleming v. East*, Kay, App. lii.

It is not enough to identify a document, that it should be inseparably connected with, and referred to as connected in the affidavit. The document must be impressed with some mark, to which the affidavit refers. *Hewetson v. Todhunter*, 2 Sm. & G. App. ii.

(Q) SPECIAL EXAMINERS.

A motion that a person should be specially appointed by the Court to examine witnesses is not a motion of course, but ought to be made in court. *McNeill v. Acton*, 22 Law J. Rep. (n.s.) Chanc. 584.

In cases of urgency, the Court will appoint a special examiner to take the evidence of witnesses in a cause. *Brennan v. Preston*, 22 Law J. Rep. (n.s.) Chanc. 1040; 10 Hare, App. xvii.

Form of order appointing an examiner in several colonies in Australia. *Crofts v. Middleton*, 9 Hare, App. lxxv.

Special examiners are entitled to a fee of five guineas a day only, and, *semble*, their clerks are entitled to 5s. *per diem*. No extra fee is payable for an extended sitting during a day, nor for the preliminary labour of reading the papers. *Payne v. Little*, 21 Beav. 65.

The plaintiff moved that a solicitor might be appointed to examine witnesses residing more than twenty miles from London.—Held, that the application might be made by motion in Court instead of

at chambers; and that in case of witnesses residing so far from London, the old practice was unchanged; but the evidence in this case being special, a barrister to be chosen by both parties, must be the examiner. Costs to be costs in the cause. *Reed v. Prest*, Kay, App. xiv.

(R) EXAMINATION OF WITNESSES.

Under a commission issued forth for the examination of witnesses, both the plaintiff and the defendant examined witnesses:—Held, that the defendant was liable to pay his proportion of the expenses of the execution of the commission. *Grove v. Young*, 20 Law J. Rep. (n.s.) Chanc. 167.

In the absence of a special agreement, a Commissioner for the examination of witnesses will not be required to file the depositions taken in the cause without payment of his fees. *Peters v. Beer*, 20 Law J. Rep. (n.s.) Chanc. 424; 14 Beav. 101.

Order for the examination of a witness who had been examined in the cause. Interrogatories for the examination of the witness settled by the Master, who issued his certificate. Objections to the interrogatories ought to be made upon the depositions being taken, and not by exceptions to the Master's report. *Barker v. Birch*, 20 Law J. Rep. (n.s.) Chanc. 532.

The Court having directed a commission to issue for the examination of witnesses upon the certificate of the Master, and that commission having miscarried, by reason of the defendant being deprived of an opportunity of cross-examining the plaintiff's witnesses, a new commission was directed by the Court to issue without any further certificate of the Master. *Forsyth v. Ellice*, 21 Law J. Rep. (n.s.) Chanc. 590.

A testator gave the residue of his property to be held in deposit for the purpose of inquiring whether there were any relations of his blood living, and if so the said residue was to be divided equally among them. Upon a reference to the Master to make inquiries in conformity with the above residuary bequest, the Master reported that a commission ought to be sent to Venice to examine witnesses as to who were the next-of-kin. The Court, upon the application of the executors, made an order for a foreign commission, and also directed what sum should be allowed out of the testator's property for the expenses of the commission. *Heath v. Chapman*, 21 Law J. Rep. (n.s.) Chanc. 614.

The examination of witnesses *de bene esse* is within the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 28). The examination of witnesses *de bene esse* is to be taken by one examiner. *Cook v. Hall*, 22 Law J. Rep. (n.s.) Chanc. 12; 9 Hare, App. xx.

It is not necessary to obtain an order for liberty to examine a co-defendant under the 14 & 15 Vict. c. 99 (Lord Campbell's Act). *Suann v. Wortley*, 22 Law J. Rep. (n.s.) Chanc. 74; 9 Hare, 460.

If, at the hearing of a claim, the defendant disproves a material fact alleged by the plaintiff, the Court will not, on the application of the latter, order the examination of witnesses *vivâ voce* on the disputed fact. *Wilkinson v. Stringer*, 22 Law J. Rep. (n.s.) Chanc. 107; 9 Hare, App. xxiii.

Semble—in examining witnesses *vivâ voce* at the hearing, under the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86, s. 39), the Court will be

guided by the rule adopted under the old practice of granting issues at the hearing. *Ibid*.

Lord Campbell's Act (14 & 15 Vict. c. 99.) does not alter the practice of the Court in making orders. An order for the examination of a plaintiff *de bene esse* under the statute is an order of course, and the Court will not impose any condition in granting it. *Forbes v. Forbes*, 22 Law J. Rep. (n.s.) Chanc. 144; 9 Hare, 461.

The Court will, if convenient to the examiner of the court, direct his attendance at the residence of a sick witness, to take his examination, but will not give leave in anticipation to serve short notice of any alteration which may unavoidably become necessary in the appointment. *Pillan v. Thompson*, 22 Law J. Rep. (n.s.) Chanc. 1006; 10 Hare, App. lxxvi.

Where further evidence is necessary after a decree, a special order of the Court is not necessary for the oral examination of witnesses before the examiner. Sections 40. and 41. of the statute 15 & 16 Vict. c. 86. *Anonymous*, 23 Law J. Rep. (n.s.) Chanc. 24.

On a motion for an injunction, the defendant is entitled to cross-examine the plaintiff's witnesses before filing his own affidavits. *Besemeres v. Besemeres*, 23 Law J. Rep. (n.s.) Chanc. 198; Kay, App. xvii.

The Court of Appeal has jurisdiction, under the 39th section of the statute 15 & 16 Vict. c. 86, to require the production and examination before itself of a party to a cause, although he may not have been orally examined in the court below. *Hope v. Threlfall*, 23 Law J. Rep. (n.s.) Chanc. 631.

The expression "upon the hearing" in the 39th section, means "whenever or wherever a cause is heard." *Ibid*.

Under a decree in a cause certain inquiries were directed. A witness, having been served with a subpoena to attend before the Master, declined to attend. An order was made *ex parte*, with costs, that he should appear within four days, or be committed to the Queen's Prison. *Brook v. Biddall*, 23 Law J. Rep. (n.s.) Chanc. 696.

A special examiner, appointed to take the cross-examination of witnesses who had made affidavits on a motion for injunction, is at liberty to file the depositions from time to time, without waiting until the examination has been concluded. *Clark v. Gill*, 23 Law J. Rep. (n.s.) Chanc. 711; 1 Kay & J. 19.

Semble—that professional men, although residing within the weekly bills of mortality, may require compensation to be paid to them, and that before they are sworn. *Ibid*.

It is not sufficient under the Chancery Practice Amendment Act, that the examiner should dictate to his clerk the depositions of the witnesses, and authenticate them by his signature; but it is compulsory upon him to take down such depositions in his own handwriting. *Stobart v. Todd*, 23 Law J. Rep. (n.s.) Chanc. 956.

Where a witness has given evidence before the examiner inconsistent with previous statements made by him, and upon being examined as to the previous statements does not admit them, it is competent for the party producing him to bring forward evidence of such previous statements. *Buckley v. Cooke*, 24 Law J. Rep. (n.s.) Chanc. 24; 1 Kay & J. 29.

The interpretation clause (section 99.) of the Common Law Procedure Act, 1854, does not con-

fine the meaning of the word "Judge," in those sections which are extended by the 103rd section to every court of civil judicature in England and Ireland, to a Judge of a common law court. *Ibid.*

The return of a commission from Jamaica, which omitted to state that the Commissioners and their clerks had taken the oaths, ordered to be amended, and to be received in evidence, though, in addition, the signature of the Commissioners had not been affixed to the interrogatories. *Davis v. Barrett*, 14 Beav. 25.

A defendant or witness, if interrogated as to matters tending to criminate him, may decline to answer at any time, notwithstanding what he has disclosed may be sufficient to convict him. The decision in *Ewin v. Osboldiston*, 6 Sim. 608, disapproved of. *The King of the Two Sicilies v. Willcoz*, 1 Sim. N.S. 30.

Attendance of the plaintiff and another witness for oral examination, ordered under the 39th section of the 15 & 16 Vict. c. 86, at the hearing of a claim founded on a legal demand, where prior to that statute the Court would have given the plaintiff leave to bring an action. *Deaville v. Deaville*, 9 Hare, App. xxii.

Depositions are not vitiated by a difference between the title of the depositions and the title of the cause, where the suit in which the depositions are taken is clearly identified. *Harford v. Rees*, 9 Hare, App. lxviii.

On a motion to dissolve an injunction to stay proceedings at law, the plaintiff in equity has no right, under the 40th section of the 15 & 16 Vict. c. 86, to require that the motion shall stand over in order that he might examine orally witnesses who have made affidavits for the defendant. *Normanville v. Stanning*, 10 Hare, App. xx.

Order to read on the trial of an issue the depositions of a living witness taken in a suit to perpetuate testimony, the witness being too infirm to attend at the trial. *Watkins v. Atchison*, 10 Hare, App. xli.

The defendant having obtained an order for the payment of his costs by the plaintiffs, which order recited that the testimony of the witness had been taken, the depositions of the witness must be regarded as having been completely taken, and are not therefore to be excluded on the ground of the want of sufficient cross-examination. *Ibid.*

On the examination and cross-examination of an aged and infirm witness labouring under deafness, the questions were put and answers received through the medium of the daughter of the witness, and the examiner certified that the state of the witness did not permit the examination to be proceeded with without danger to her life, and that much of the cross-examination and all the re-examination had been pretermitted. The defendant afterwards obtained an order for his costs, which recited that the testimony of the witness had been taken:—Held, that the defendant having concurred in the mode of examination adopted could not afterwards object to the use of the testimony by impeaching its fidelity on that ground. *Ibid.*

Where a Commissioner for the examination of witnesses had taken upon himself notwithstanding the demurrer of a witness to examine her,—Held, that the deposition must be suppressed, although upon

hearing the demurrer the Court held it to be untenable. Held, secondly, that where the witness was not informed by the Commissioner that her statement as to the reasons for her demurrer should be upon oath, her demurrer was not invalid by reason of her not having been sworn to the truth of the statement. Held, thirdly, that the Commissioner ought not to have been served with a petition to suppress the depositions, and the petition as against him was dismissed with costs. *Goodale v. Gawthorn*, 4 De Gex & S. 97.

In a cause at issue before the Orders of the 7th of August 1852, the parties in July 1852 agreed to postpone publication till the 2nd of November on the ground that the new practice would then come into operation. The case was one in which it was not clear, but probable that oral examination might be the most effective:—Held, that the postponement of publication was not an agreement to adopt the new practice, but in the absence of special reasons to the contrary, there being a probability of advantage in applying the new practice, it ought according to the intention of the act to be applied. *Howard v. Howard*, 1 Drew. 239.

The Court, under the 15 & 16 Vict. cc. 80, 86, directed that a party to a suit, a witness by affidavit on his own behalf in support of his own state of facts before the Master, should be cross-examined before the examiner instead of the Master, and that all the parties should be examined on interrogatories before the examiner as the Master should direct. *Hextall v. Cheatle*, 1 Sm. & G. 78.

The examination orally in court of a litigant party is not his right, but is a question for the discretion of the Court, and it was refused when asked on behalf of a plaintiff, who by his bill charged fraud against the defendant, which was disproved by his witnesses, and the plaintiff had already before the hearing of the cause stated his case on his own oath. *Oliver v. Wright*, 1 Sm. & G. App. xvi.

The omission by an examiner to sign his name to the depositions of a witness taken by him, and returned to the Record and Writ Clerks' Office, is not such an irregularity as to prevent the Court from directing them to be filed on terms; but where in a suit at issue before the new practice came into operation a special examiner had been appointed by order of the Court, but no commission had been issued according to the old practice, and witnesses were examined upon interrogatories, and not orally, and there had been great delay, the Court refused to order the depositions to be filed. *Stephens v. Wanklin*, 19 Beav. 585.

(S) EXAMINATION OF PARTIES.

Trustees sold out trust stock and handed over the proceeds to J, their solicitor, for re-investment, who misapplied the money. In a suit by the *cestuis que trust* against the trustees and J, the plaintiffs examined J. as a witness, and the bill was dismissed as against him:—Held, that a decree might still be had against the trustees, on the ground that J. was not a necessary party to the suit in order to obtain the relief prayed against the trustees. *Rouland v. Witherden*, 21 Law J. Rep. (N.S.) Chanc. 480; 3 Mac. & G. 568.

Quære—whether the effect of the statute 6 & 7 Vict. c. 85. is to enable the Court to make a decree

against a defendant in equity who has been examined as a witness in the cause. *Ibid.*

A motion by a plaintiff that he might be at liberty to issue a subpoena addressed to the defendant, requiring him to appear at the hearing of the cause, to testify concerning matters in the cause, was refused. *May v. Biggenden*, 22 Law J. Rep. (N.S.) Chanc. 429; 1 Sm. & G. 133.

Where it is desired to examine a defendant who is out of the jurisdiction, the Court will appoint an examiner to take the evidence *vivâ voce*. *Crofts v. Middleton*, 22 Law J. Rep. (N.S.) Chanc. 706; 9 Hare, App. xviii.

Application to examine a plaintiff *vivâ voce* in the Master's office refused. *Wood v. Homfray*, 14 Beav. 7.

The Court refused to direct the oral examination of a party to the cause under a decree which had been made directing accounts and inquiries, before the new Procedure Act came into operation. *Sherwood v. Vincent*, 9 Hare, App. xix.

The plaintiff may since the 14 & 15 Vict. c. 99. examine as a witness a defendant in a suit in equity without prejudicing his right to a decree in the same suit against such defendant. *Harford v. Rees*, 9 Hare, App. lxx.

Where a defendant tendered himself for examination *vivâ voce* below, and the plaintiff opposed his examination, the Court of Appeal declined acceding to a proposition of the plaintiff to examine him. *Hindson v. Weatherill*, 3 De Gex, M. & G. 301.

(T) EVIDENCE BEFORE THE MASTER.

The plaintiff filed an ordinary creditors' bill against the executor of a testator. The plaintiff's debt was disputed, but the Court considered the debt to have been established by evidence and made a decree in his favour. It was contended that the plaintiff's debt having been so established there was no obligation upon him to go into the Master's office in common with the other creditors to prove his debt over again:—Held, that the principle and practice were otherwise, and that the decree must direct the Master to take an account of what was due to the plaintiff and the other creditors of the testator. *Field v. Titmuss*, 20 Law J. Rep. (N.S.) Chanc. 328; 1 Sim. N.S. 218.

An inquiry was directed to be made by the Master; the Master made his report, which was not excepted to. The parties were held to be at liberty, at the hearing of the cause for further directions, to refer to the affidavits and other materials used before the Master on his inquiry. *Nedby v. Nedby*, 21 Law J. Rep. (N.S.) Chanc. 446; 5 De Gex & S. 377.

A party to a matter may be examined *vivâ voce* by the Master on an inquiry directed to him. *In re Kirby's Trust*, 21 Law J. Rep. (N.S.) Chanc. 464; 5 De Gex & Sm. 228.

The 15 & 16 Vict. c. 80. s. 15. and the 15 & 16 Vict. c. 86. do not empower the Court to direct an examination of a defendant *vivâ voce* in the Master's office, in a suit at issue before the latter act was passed. *Rooth v. Tomlinson*, 22 Law J. Rep. (N.S.) Chanc. 75; 16 Beav. 251.

(U) CONDUCT OF SUIT.

Co-plaintiffs must act together, and cannot take

inconsistent proceedings. *Wedderburn v. Wedderburn*, 17 Beav. 158.

One of several co-plaintiffs moved for liberty to take a state of facts into the Master's office, and proceed thereon apart from the rest. The motion was refused with costs. *Ibid.*

(V) ATTENDING PROCEEDINGS.

In the absence of directions made at the hearing of a cause, the Court will not, upon an interlocutory application, make any order to restrain the defendants, though very numerous, from attending the subsequent proceedings in the cause, though the result would be a very large saving to the estate of the testator. *Day v. Crofts*, 20 Law J. Rep. (N.S.) Chanc. 423; 14 Beav. 29.

A wife, in person, has no right to be heard on behalf of her husband upon an application by him to the Court. *Oldfield v. Cobbett*, 20 Law J. Rep. (N.S.) Chanc. 557; 14 Beav. 28.

Order that interested persons not parties to the suit should be at liberty to appear at the hearing. *Lewis v. Clowes*, 10 Hare, App. lxii.

(W) STATING PROCEEDINGS.

Where an agreement to compromise a suit goes beyond the ordinary range of the Court in the existing suit, and the right to enforce the agreement is disputed, and *à fortiori* where the agreement itself is disputed, the proper course of proceeding is by bill for specific performance, and not by motion or petition to stay proceedings in the original suit. *Askew v. Millington*, 20 Law J. Rep. (N.S.) Chanc. 508; 9 Hare, 65.

A creditor, who had brought an action against the executor of a debtor, received notice of a decree for the administration of his estates. After this notice, and before any application was made to stay his proceedings, he went on with the action, and obtained judgment:—Held, that he was entitled to the costs of his proceedings after notice of the decree. *Bear v. Smith*, 21 Law J. Rep. (N.S.) Chanc. 176; 5 De Gex & S. 92.

Where a decree has been made in a legatees' suit for administration of the testator's estate, it is an order of course to stay proceedings in a creditors' suit for the administration of the same estate, which suit had been set down for hearing after notice of the decree in the former suit. *Golder v. Golder* and *Lucas v. Golder*, 22 Law J. Rep. (N.S.) Chanc. 154; 9 Hare, 276.

Where two suits were instituted in different courts for the same purpose, and decrees obtained in both suits, one Vice Chancellor refused to interfere to stay proceedings in the suit instituted in the court of another Vice Chancellor. *Scotto v. Stone*, 22 Law J. Rep. (N.S.) Chanc. 911.

A suit will not be stayed upon an interlocutory application by a defendant paying into court all that a plaintiff claims by his bill, and leaving a portion of the claim to be adjudicated upon in a cross suit. The defendant in the first suit must wholly satisfy the claims of the plaintiff. *Orton v. Bainbrigge* and *Bainbrigge v. Orton*, 22 Law J. Rep. (N.S.) Chanc. 979.

When an order, under a summons to administer an estate, will effect all that can be directed by a decree in a prior suit instituted by bill or claim for

the administration of the same estate, the Court will, on motion, stay the proceedings in the prior suit on payment of the plaintiff's costs. *Ritchie v. Humberstone*, 22 Law J. Rep. (N.S.) Chanc. 1006.

(X) SUPPLEMENTAL STATEMENT.

A supplemental statement cannot be filed under the 15 & 16 Vict. c. 86. s. 53. after a decree has been made; nor can it be used before decree for the purpose of bringing forward new parties: in such a case a supplemental bill is necessary. *Comerall v. Hall*, 23 Law J. Rep. (N.S.) Chanc. 631; 2 Drew. 194.

Before decree, a plaintiff cannot, by means of a supplemental statement under the 15 & 16 Vict. c. 86, obtain the statutory supplemental decree under the 52nd section of the same act. *Heath v. Lewis*, 18 Beav. 527.

The defendant, although he has the conduct of the cause, is not therefore enabled, under the 53rd section of the 15 & 16 Vict. c. 86, and the 44th General Order of the 7th of August 1852, to file a statement of additional facts or circumstances occurring after the institution of the suit, to be annexed to the bill. *Lee v. Lee*, 9 Hare, App. xci.

(Y) SETTING DOWN AND HEARING CAUSE.

The Court will, under circumstances, dispense with the usual certificate of counsel, that a cause is proper to be heard as a short cause. *Hargraves v. White*, 22 Law J. Rep. (N.S.) Chanc. 640.

The minutes of a decree having been agreed upon, the Court ordered the cause to be set down for hearing, notwithstanding that the record and writ clerk had refused his certificate on the ground that there were interrogatories unanswered on the file. *Elston v. Elston*, 24 Law J. Rep. (N.S.) Chanc. 408.

(Z) INTERLOCUTORY APPLICATIONS.

The Court will not give its decision upon important questions of law upon interlocutory application. *Bates v. Brothers*, 23 Law J. Rep. (N.S.) Chanc. 922.

The 55th section of the 15 & 16 Vict. c. 86. is applicable only to cases in which, for the protection of property or other like cause, it is necessary to apply to the Court for a sale, and it was not intended to enable parties in a contested suit to obtain, upon an interlocutory application before the hearing, a decision upon the questions in contest. *Prince v. Cooper*, 16 Beav. 546.

(AA) ASSISTANCE OF COMMON LAW JUDGE.

Application for the assistance in equity of a common law Judge under the 14 & 15 Vict. c. 83. is to be made through the Lord Chancellor. *Hay v. Willoughby*, 22 Law J. Rep. (N.S.) Chanc. 10; 9 Hare, App. xxx.

(BB) ORDERS AND DECREES.

(a) In general.

The dividends of a sum of stock were ordered, upon petition, to be paid to A. for her life, and after her decease to B. for her life; but an order for the transfer of the fund, after the death of the survivor of them, was refused. The dividends of a small sum of stock, arising from the purchase-money of real estate taken by a railway company, were ordered to

be paid to a party claiming under a will, upon production of the probate copy, with an affidavit that it had been examined and was correct. *In re Lowndes's Trust*, 20 Law J. Rep. (N.S.) Chanc. 422.

Applications to discharge orders obtained as of course at the Rolls should be made to the Court to which the cause is attached. *Cooper v. Knox*, 21 Law J. Rep. (N.S.) Chanc. 383.

Where errors in a decree are obvious, the Court will rectify them, even after it is enrolled. *Fearon v. Desbrisay*, 21 Law J. Rep. (N.S.) Chanc. 511.

In directing accounts to be taken under the Masters in Chancery Abolition Act, the form of the order under the old practice referring it to the Master to take the accounts, is inapplicable, and the accounts are to be directed to be taken in a general form. *In re Catling*, 22 Law J. Rep. (N.S.) Chanc. 9; 9 Hare, App. vii.

If defendant makes default at the hearing, the plaintiff will be only entitled to such decree as the Court considers him entitled to on hearing the pleadings and evidence. *Hakevell v. Webber*, 22 Law J. Rep. (N.S.) Chanc. 96; 9 Hare, 541.

A female ward of court, before the passing of the statute 15 & 16 Vict. c. 86, married without the leave of the Court. She was the plaintiff in a suit at this time, and upon her marriage the suit was revived against her husband, and, under an order of the Court, a settlement was made on her and her issue, by which her whole property was vested in trustees. Upon an application, on behalf of the plaintiff, under the 52nd section of the statute,—Held, that this was a change or transmission of interest within the spirit of the section, so as to authorize the Court to make an order against the trustees under that section to the effect of the usual supplemental decree. *Atkinson v. Parker*, 22 Law J. Rep. (N.S.) Chanc. 20; 2 De Gex, M. & G. 221.

Under a decree directing an inquiry to ascertain the nephews and nieces of a testator, nephews and nieces of the half blood will be included with those of the whole blood. Decrees are to be construed according to the general or ordinary meaning of the words used in them. *Grievess v. Rawley*, 22 Law J. Rep. (N.S.) Chanc. 625; 10 Hare, 63.

Where an order has been made on motion and affidavit of service in the absence of parties, the Court will, on proper application, give the absent party leave to move to discharge the order. *Mapp v. Elcock*, 22 Law J. Rep. (N.S.) Chanc. 707.

A lease for twenty-one years was granted to two partners jointly, and all the covenants were joint, and not joint and several. One of the lessees died during the term. The rent was paid up to his death; but it was alleged by the lessors that the estate of the deceased lessee was liable for any breaches of covenant which might take place during the term, and that the executors ought to retain a sufficient portion of the estate to answer such liability. Upon a bill filed praying a declaration that all liability of the deceased lessee in respect of the lease had ceased at his death, it was held, that the Court had no power, under the 15 & 16 Vict. c. 86. s. 50, to make such a declaratory decree. *Jackson v. Turnley*, 22 Law J. Rep. (N.S.) Chanc. 949; 1 Drew. 617.

Semble—that the Court will not, under the 15 & 16 Vict. c. 86, determine a mere question of law

unnecessary to be decided previously to the question of equity, for the mere purpose of making a declaratory decree. *The Trustees of the Birkenhead Docks v. the Birkenhead Dock Co., Laird and another*, 23 Law J. Rep. (N.S.) Chanc. 457; 4 De Gex, M. & G. 732.

The time within which a decree or order of Chancery may be varied on rehearing, has never been defined. The practice has been to allow a party to take his chance of success under a decree before the Master, and if unsuccessful to obtain a re-hearing of the decree. A decree was allowed to be reheard eleven and a half years after it had been pronounced, and notwithstanding it had been acted upon during that period by sales, &c. *Morgan v. Morgan*, 14 Beav. 72.

An order was made on petition and by consent,—Held, that it could only be varied by a proceeding in the nature of one to correct the agreement on the ground of fraud or suppression of facts. Two solicitors, A & B, dissolved partnership, and it was agreed that B should be entitled to half the profits of a suit instituted by them. After some time an order was made by consent of both for the taxation of the costs down to the date. Some of the costs had, unknown to B, been already taxed and received by A. Held, under the circumstances, that the order comprised all such costs, and the previous costs having been omitted in the Master's certificate, the Court, upon a petition to review the taxation, referred the matter back to the Master. *Greenwood v. Churchill*, 14 Beav. 160.

Form of decree in an information without a relator, where a defendant is liable to pay the costs of a co-defendant. *Attorney General v. the Corporation of Chester*, 14 Beav. 336.

Rule of practice as to varying the minutes of decrees. The registrar must first complete the minutes, and any party dissatisfied may then give notice of motion, specifying the subject of complaint. *Prince v. Howard*, 14 Beav. 208.

Form of order, by consent, for hearing a cause upon affidavits. *Sparrow v. the Oxford, Worcester and Wolverhampton Rail. Co.*, 9 Hare, 448.

Order providing for a contingent annuity for the life of a future wife of the son of the testator. *Aaron v. Aaron*, 9 Hare, 821.

Mode in which the directions of the Court are obtained on the question of what parties are to be served with the order or decree, and as to which of the parties service may be dispensed with. *De Balinhard v. Bullock*, 9 Hare, App. xiii.

Decree for the appointment of new trustees and conveyance of the trust estate in a suit by some *cestuis que trust* against the devisees of the last survivor of the former trustees, and a direction to serve the other *cestuis que trust* with notice of the decree. *Jones v. James*, 9 Hare, App. lxxx.

Prospective order for the sale from time to time of so much of the capital of a fund in court as would be sufficient with the income to pay an annuity which the income alone was insufficient to pay. *Lambie v. Lambie*, 9 Hare, App. lxxxiv.

Prospective order enabling parties to pay money from time to time to the credit of the cause, obviating the necessity of a repetition of the orders for the same purpose. *Hutchinson v. Hutchinson*, 9 Hare, App. lxxxiv.

A creditors' suit was instituted in 1803 and in 1806 the usual decree was made and a sum was paid into court. The suit became defective in 1807 by the death of the personal representative of the debtor, and the decree was not prosecuted. In 1853 the representatives of the plaintiff (having revived the suit against the administrator *de bonis non* of the debtor) petitioned for the payment of his debt out of the money in court; the Court gave leave to prosecute the decree as to the debts. *Foster v. M'Kenzie*, 17 Beav. 414.

Case in which the Court refused to make a declaration as to the interests of parties who might be entitled in reversion. *Greenwood v. Sutherland*, 10 Hare, App. xii.

Case in which the Court made a declaratory decree, under section 50. of 15 & 16 Vict. c. 86. *Fletcher v. Rogers*, 10 Hare, App. xiii.

The Court refused to make a declaratory decree on a special case during the lifetime of the tenant for life, with regard to the interests of parties entitled in reversion. *Garlick v. Lawson*, 10 Hare, App. xiv.

Case of a decree for the purpose of carrying into effect an arrangement as to a part of the estate of a testator without administering the estate or executing the trusts of the will generally. *Prentice v. Prentice*, 10 Hare, App. xxii.

A memorandum of service of notice of the decree upon infants, and out of the jurisdiction, ordered to be entered. *Chalmers v. Laurie*, 10 Hare, App. xxvii.

Where 300*l.*, part of a fund in court, was to be settled by the Court, the petition for the settlement was referred to chambers, and after consideration, the trusts were inserted in the order instead of the settlement being referred to the conveyancing counsel. *Chamberlain v. Chamberlain*, 1 Sm. & G. App. xxviii.

A notice to draw up an order served one day for the next is regular. *In re Christmas*, 19 Beav. 519.

Costs are not given on granting the four-day order. *Ibid.*

Where there was error apparent in the decree, and the clerk's certificate, by directing payment out of personal estate instead of apportionment between real and personal estate, the Court altered and corrected the decree and certificate without a rehearing, notwithstanding the 15 & 16 Vict. c. 80. s. 34. and the 51st of the Orders of the 16th of November 1852. *Cradock v. Owen*, 2 Sm. & G. 241.

(b) Order to revive.

An order and decree of revivor and supplement by a plaintiff against a co-plaintiff in a suit commenced by claim, is not within the Chancery Procedure Amendment Act (15 & 16 Vict. c. 86). A printed special claim of revivor and supplement must be filed. *Yate v. Lighthouse*, 22 Law J. Rep. (N.S.) Chanc. 9; 9 Hare, App. li; nom. *Yate v. Leithhead*.

An order and decree of revivor and supplement in a suit, instituted by claim, is within the 15 & 16 Vict. c. 86. s. 52. (Chancery Procedure Amendment Act). *Martin v. Hadlow*, 22 Law J. Rep. (N.S.) Chanc. 9; 9 Hare, App. lii.

Where a suit had become abated, the Court made an order to revive at the instance of a creditor, whose debt had been reported due, and the report had been

confirmed. *Lowes v. Lowes* and *Lowes v. Ives*, 22 Law J. Rep. (N.S.) Chanc. 179; 2 De Gex, M. & G. 784.

It is an order of course to revive a suit against an official assignee, whose predecessor, a defendant, had died without putting in his answer. *Gordon v. Jesson*, 22 Law J. Rep. (N.S.) Chanc. 328; 16 Beav. 440.

In making an order, under the 15 & 16 Vict. c. 86. s. 52, to revive a suit against the executors of a deceased defendant, the Court will not order them to admit assets, or in default direct an account of their testator's estate to be taken. *The Dean and Chapter of Ely v. Edwards*, 22 Law J. Rep. (N.S.) Chanc. 629.

The plaintiff in a foreclosure suit having after decree assigned his interest, the assignee must pay the costs of an order to revive under the 15 & 16 Vict. c. 86. s. 52. *James v. Harding*, 24 Law J. Rep. (N.S.) Chanc. 749.

To a bill filed in 1842, a demurrer was put in, which was allowed, but leave was given to amend. The demurring defendant died. The bill was afterwards amended, and no further steps were taken for ten years, when an order to revive was obtained in August 1854 against the demurring defendant's representatives, who entered an appearance, and after six months moved to discharge the order to revive:—Held, that the order allowing the demurrer did not have the effect of putting the original bill out of court, as leave was given to amend; and that the defendant not having moved to discharge the order to revive within the twelve days allowed by the new practice, the present motion could not be maintained. *Deeks v. Stanhope*, 24 Law J. Rep. (N.S.) Chanc. 580.

On the death of one of several co-plaintiffs it was ordered that the survivors should revive within a limited time, or that the bill should be dismissed, notwithstanding there was no legal personal representative, it being their duty to obtain administration. *Saner v. Deaven*, 16 Beav. 30.

The heir-at-law being made a defendant to a claim filed by a simple contract creditor of a testator died, having by his will devised the estate sought to be made assets, to his son, upon trust for sale, and upon further trusts out of the proceeds thereof to pay a legacy to his executors,—Held, on a motion to revive the suit against the devisee and executor of the heir-at-law, that this was a transmission of interest within the 52nd section of the 15 & 16 Vict. c. 86, but that the order, being *ex parte*, is liable to be discharged. *Lowe v. Watson*, 1 Sm. & G. 123.

The order to revive under the 52nd section of the 15 & 16 Vict. c. 86. is of course, but where anything beyond the order to revive is required there must be a special application to the Court. *Goodall v. Skerratt*, 1 Sm. & G. App. vii.

Pending an account directed by the decree, the accounting party died. An order was made on motion to revive against his executor, and that he might either admit assets or account for his testator's estate. *Cartwright v. Shepherd*, 20 Beav. 122.

A suit having been instituted by A and B, his mortgagee, as co-plaintiffs, B. died before decree. It was ordered, on motion, that A might carry on the proceedings against B's executors and devisees. *Hall v. Clive*, 20 Beav. 575.

After a report in favour of the title in a specific performance suit, the defendant died. Upon a motion by his executors and devisees in trust, the Court ordered that if the plaintiff did not revive within six weeks, the bill should stand dismissed. *Norton v. White*, 2 De Gex, M. & G. 678.

(c) Supplemental Order.

The Court, knowing the facts of a cause recently heard, will make an order that an infant born pending the suit should be bound by the decree, though it was made in her absence, as a party to the suit. *Jebb v. Tugwell*, 24 Law J. Rep. (N.S.) Chanc. 670; 20 Beav. 461.

Before decree a supplemental order may be obtained under sect. 52. of 15 & 16 Vict. c. 86, against an infant who has been born since the filing of the bill, and is a necessary party to the suit. *Pickford v. Brown*, 1 Kay & J. 643.

Order in the nature of a supplemental decree for a creditor who had proved his debt, to carry on a creditors' suit where the original plaintiff had become bankrupt. *English v. Hayman*, 9 Hare, App. lxxxviii.

Order made under the 52nd section of the act, 15 & 16 Vict. c. 86, for the prosecution of a suit against the assignees of a defendant became bankrupt after appearance, but before answer, with liberty for the assignees to answer if they should be so advised. *Nash v. Miller*, 4 De Gex, M. & G. 841.

The birth of one of a class entitled as such after the institution of a suit, is within the 52nd section of the Chancery Improvement Act, and justifies an order for the usual supplemental decree. *Fullerton v. Martin*, 1 Drew. 236.

(CC) ISSUE AND CASE SENT TO LAW.

At the hearing of a foreclosure claim an issue was directed as to a question of notice, which issue was afterwards abandoned by the defendant:—Held, that before the claim could come on again for hearing, an order must be made on motion, that the issue should be taken *pro confesso*. *Hartland v. Damcoz*, 24 Law J. Rep. (N.S.) Chanc. 449; 5 De Gex & S. 561.

An issue was directed to a court of law to ascertain whether the right to certain hereditaments was, on a particular day, vested in the plaintiffs or in the defendant. The Judge directed the jury, that if they could not make up their minds, then, inasmuch as the burthen of proof was on the plaintiffs, they must find for the defendant; the jury, in accordance with this direction, found for the defendant. Upon petition for a new trial, it was held, that this verdict could not be taken as expressing the opinion of the jury that the right was vested in the defendant; that this Court was not at liberty to examine the evidence before the jury, in order to decide the question for itself; that the 79th section of the Lands Clauses Consolidation Act was intended only as a direction to the Court of Chancery how to act, when unable to decide who was entitled to money deposited by a company, and the Judge at law had properly omitted to direct the jury to have regard to this section; that the above verdict was not such as this Court could act upon, and a new trial was directed by means of two issues, one to try the right, and the other the possession, each party being made respectively plaintiffs in the separate issues. *The Freeman and Stallingers of Sunderland v. the Bishop of*

Durham, 22 Law J. Rep. (N.S.) Chanc. 145; 1 Drew. 184.

Practice as to praying a *tates* upon the trial of an issue directed by the Court of Chancery. *Ellis v. Bowman*, 13 Beav. 318.

Except in cases of difficulty this Court will itself determine questions of construction in the first instance without seeking the assistance of courts of law. *Wilson v. Eden*, 14 Beav. 317.

Upon a question whether a close had been comprised in a deed of enfranchisement the Court retained the bill, with liberty for the lord to bring an action upon admissions to be made by the defendant. On the first trial the jury found for the lord, but on a new trial being directed the second jury found adversely to him, and the Court of law refused to grant a second new trial. It did not appear that there had been unfairness, surprise, casualty, or miscarriage, or that any further evidence of importance had been since discovered:—Held, that assuming it to be competent to the Court to direct an issue or a fresh action in which the result of the former should not be set up, sufficient grounds did not exist for taking either of the courses, and that the bill must be dismissed. *Aglionby v. James*, 4 De Gex & S. 7.

Quere—Whether it is competent to the Court to direct such a new investigation in the case of an action. *Ibid*.

In a suit to impeach the validity of a will, the bill was retained for a year, with liberty for the plaintiff to bring an action of ejectment. An action was tried and a verdict given for the defendant. On the plaintiff's petition stating that after the time for obtaining a rule for a new trial had elapsed the plaintiff had discovered new and material evidence, and upon his paying the defendant's costs at law and of the application the bill was retained for six months longer, and the defendant put upon the same terms with respect to a second action as he was with respect to the former. *Mudd v. Suckermore*, 4 De Gex & S. 13.

A question of general law arising out of circumstances which are likely to occur in other cases, and the decision of which might affect the rights of other persons, is a case in which this Court may properly seek the opinion of a Court of law. *The Manchester, Sheffield and Lincolnshire Railway Co. v. the Great Northern Rail. Co.*, 9 Hare, 284.

Terms imposed on the plaintiff in an issue both with regard to the costs and to the examination *de bene esse* of an aged witness, where the plaintiff had failed in trying the issue at the time directed by the Court. *Reeve v. Hodson*, 10 Hare, App. xxiv.

The Court of Chancery is not exceeding its functions in deciding a purely legal question arising in a suit before it either with or without legal assistance, but ought to decide such a question where the controversy and material facts are plain. *The Shrewsbury and Birmingham Rail. Co. v. the Stour Valley Rail. Co.*, 2 De Gex, M. & G. 866.

This Court will not send a question to be tried by a jury, unless it entertains serious doubt on the matter. *Gray v. Haig*, 20 Beav. 219.

The Court will not send to be tried by a jury a question which is supported by competent evidence, and which, if untrue, could have been disproved by evidence in the possession of one party who has taken means to prevent its being made available for the determination of the question by the Court. *Ibid*.

A testator, by his will and three codicils, the last of which was dated in 1851, devised and bequeathed all his real and personal estate in favour of his eldest son and heir, subject to portions for the testator's younger children, and appointed his eldest son and another person executors. By the fourth codicil, dated in April 1853, he substituted another person as executor in the place of his son. And by a will, dated in May 1853, he altered the disposition of his property, modifying considerably the benefit formerly given to his eldest son, and giving his younger children interests in remainder. At the suit of the younger children against the heir an issue was directed by the Palatine Court of Lancaster to try the validity of the will of 1853. Thereupon the eldest son and heir filed his bill in the High Court of Chancery to set aside the will of 1853, and also the codicil of that year, and to establish the preceding will and codicils. Upon an interlocutory motion in this suit, before the issue in the former suit had come on for trial, another issue was directed to try the validity both of the will and the codicil of 1853. *Hopwood v. the Earl of Derby*, 1 Kay & J. 255.

It is not sufficient reason to change the venue of such an issue, that one of the parties interested, and whose conduct is impeached, is lord lieutenant of the county where the action is to be tried. *Ibid*.

Heir-at-law defendant in a suit to establish a will, disputing the will on the ground of insanity, does not, as of course, lose his costs of the trial of an issue *devisavit vel non*, although he has gone into evidence to prove insanity, and failed; but the question of costs is in the discretion of the Court: *Obiter. Roberts v. Kerslake*, 1 Kay & J. 751.

Circumstances under which the heir in such a case will lose his right to costs, both at law and in equity. *Ibid*.

(DD) REFERENCES.

(a) Generally, and Proceedings.

A motion under the 19th section of the 13 & 14 Vict. c. 35. for a reference to the Master to take an account of the debts of a deceased person must be made in court. *In re Harrold*, 20 Law J. Rep. (N.S.) Chanc. 168.

A creditors' suit coming on for further directions, the fund applicable to the payment of the debts being small, a reference back to the Master to apportion it between the creditors was dispensed with, and the apportionment directed to be made by affidavit. *Bear v. Smith*, 21 Law J. Rep. (N.S.) Chanc. 176; 5 De Gex & S. 92.

A bill was filed against trustees, praying that the amount of the trust fund which the trustees "had, or but for their wilful neglect or default might have, received, might be ascertained." At the hearing, the bill was dismissed as against one trustee, and the amount and particulars of the trust fund were directed to be ascertained. Nothing was said about wilful default, nor did the trustee ask that the bill might be dismissed as to wilful default. The Master made his report, which stated certain facts and referred to certain documents, from which it was alleged that it would appear that there had been wilful default. At the hearing upon further directions, a decree was made referring it to the Master to inquire whether the trustee "could with due diligence, and without

wilful neglect or default, have received" more than a particular stated fund, but upon appeal it was held, that the direction as to wilful default should be struck out of the decree. *Coope v. Carter*, 21 Law J. Rep. (N.S.) Chanc. 570; 2 De Gex, M. & G. 292.

As a general rule, in order to obtain a direction for inquiry as to wilful default against an executor or trustee, the bill must allege a case, pray for it, and one case at least must be proved; and, *semble*, that if from admission or proof a suspicion arises whether wilful default has or has not been committed, and it appears likely that further evidence can be obtained, the Court ought to direct an inquiry short of directing wilful default, but in such a way as to call the defendant's attention to it, with the view to ground thereon a new order, at a future stage, directing an inquiry as to wilful default. *Ibid*.

Upon a reference to the Master in an administration suit to take an account of debts and legacies, a claim was carried in for a debt due to a builder; the Master being unable to determine the justice of the demand, an action at law was directed. A petition was now presented that the order directing an action might be discharged, and that the matter might be referred to the Master, with power to call in the assistance of scientific persons:—Held, under the 42nd section of the Masters Abolition Act, that the Court had no right to delegate to the Master the power conferred by that section; but the order for an action was discharged, and the matter was directed to be heard in chambers, when the Judge could avail himself of the machinery of the 42nd section of the act. *Mildmay v. Melhuem*, 22 Law J. Rep. (N.S.) Chanc. 297; 1 Drew. 216.

A testator left certain property to trustees for the benefit of the defendant, an infant, who from evidence appeared to be of weak intellect. The trustees filed a bill to carry the trusts of the will into execution, and moved, under the 16th section of the 15 & 16 Vict. c. 86, for a reference to chambers to inquire into the state of the defendant's mind, the object being to save the expense of a commission of lunacy. The Court, in exercising a discretion given by the 16th section of the act, refused the motion. *Adams v. Smyth*, 22 Law J. Rep. (N.S.) Chanc. 968.

A private estate act enacted that from time to time certain matters relating to the management of the estate should be inquired into before a Master in Chancery. One of the Vice Chancellors having doubted on his jurisdiction to direct the inquiry before the chief clerk in chambers, this Court held, that to do so was within the spirit, if not within the letter, of the act, and directed the same accordingly. *Thornhill v. Thornhill, in re Thornhill's Estate Act*, 22 Law J. Rep. (N.S.) Chanc. 985.

A reference directed to the Master fifteen years since will not be transferred to the Judge at chambers, although the Master certifies that he requires assistance to unravel complicated and voluminous accounts. *Saward v. M'Donnell*, 23 Law J. Rep. (N.S.) Chanc. 880; 19 Beav. 528.

A class of children being interested, the Court, instead of directing the preliminary class inquiry, received the affidavit of the parents proving the class, and then allowed the cause to be heard. *Bush v. Watkins*, 14 Beav. 33.

In an administration suit the Court, upon the certificate of counsel, will authorize a lease without

a reference back to the Master to settle it. *Day v. Croft*, 14 Beav. 219.

Where, in a suit referred to the Master, it is desired to obtain advantage of the new powers conferred upon the Court by the recent statutes, the proper course is to apply for the transfer of the proceedings to the Judge in chambers. The statutes do not give the Court power to authorize the Master to avail himself of their provisions. *Morrell v. Tinkler*, 9 Hare, App. 1.

Reference to the Master, under section 10. of the 15 & 16 Vict. c. 80, of a cause heard since the first day of Michaelmas term, 1852. *Piddocke v. Smith*, 9 Hare, App. lxxxvii.

Inquiries directed by the decree transferred to chambers, upon the Master making a separate report as to part of the matters referred to him, where questions of law arose upon the other matters involved in the reference. *Prichard v. Norris*, 10 Hare, App. lii.

Application to remove into Judge's chambers a reference which had been seventeen years in the Master's office refused. *Wedderburn v. Wedderburn*, 18 Beav. 465.

(b) To Chambers.

Cases in which inquiries in chambers may be prosecuted or made, with or without an order of the Court having been drawn up directing such inquiries. *Kelson v. Kelson*, 9 Hare, App. lxxxvi.

Practice in chambers and in the Master's offices, with regard to requiring copies of verified accounts. *Cannan v. Evans*, 10 Hare, App. ix.

A Judge in chambers is not empowered, under the 26th section of the 15 & 16 Vict. c. 80, to entertain applications with reference to funds paid into court, under the Act for the Relief of Trustees, (10 & 11 Vict. c. 96. and 12 & 13 Vict. c. 74.) such applications must originate in and be founded upon a petition presented to the Court. *In re Hodges*, 4 De Gex, M. & G. 491.

(c) Adjournment from Chambers.

No declaration of rights can be made upon a cause adjourned from chambers, but the Judge may certify the law. *Morgan v. Hatchell*, 24 Law J. Rep. (N.S.) Chanc. 135; 19 Beav. 86.

On an inquiry directed to be prosecuted in chambers, witnesses, who had been examined before the hearing upon interrogatories, were examined again *vis à vis* as to the same matters. *Rogers v. Mort*, 10 Hare, App. liii.

Proceeding by inquiries in chambers and by certificate in a case where the consideration of the result of the evidence was adjourned for argument in court. *Ibid*.

(d) Report.

At the hearing of a cause on further directions, the Court, if requisite, will, without order, adjourn the cause to chambers, for the purpose of investigating, with the assistance of the chief clerk, the correctness of the Master's report, made under the old practice. *Saunders v. Walter*, 22 Law J. Rep. (N.S.) Chanc. 11; 9 Hare, App. v.

The only proper evidence of a purchase under decree, and payment of deposit, is the Master's report, which must be confirmed before a purchaser

can apply to the Court to be discharged from his contract. *M'Culloch v. Gregory*, 23 Law J. Rep. (N.S.) Chanc. 656.

Error in a Master's report which had been continued in a decree, whereby sums in Irish currency had been treated as English money, corrected upon petition. *Ellis v. Maxwell*, 13 Beav. 287.

(EE) EXCEPTIONS.

(a) Answers.

Exceptions for insufficiency were heard before the Court in the first instance, under Sir George Turner's Act (13 & 14 Vict. c. 35, s. 27.); the costs of those allowed were set off against those disallowed. *Willis v. Child*, 13 Beav. 454.

Where exceptions to an answer for insufficiency are overruled, the practice is to overrule them with costs. *Stent v. Wickens*, 5 De Gex & S. 384.

Exceptions for insufficiency of answer to interrogatories as to books and papers under the new practice, generally discouraged. *Law v. the London Indisputable Life Policy Co.*, 10 Hare, App. xx.

Whether a company or corporation answering under their common seal, is a defendant against whom an order may be made under the 18th section of the 15 & 16 Vict. c. 86.—*quære*. *Ibid*.

(b) Reports and Certificates.

Whether exceptions will lie to the Master's certificate of undue delay, under the 8th Order of June 1850—*quære*? *The Attorney General v. the Corporation of Chester*, 14 Beav. 338.

A vendor took an exception which contested the validity of his own title:—Held, that it was irregular. *Bradley v. Mumton*, 15 Beav. 460.

Exceptions will not lie to a Master's report for not stating "special circumstances." *Knott v. Cottee*, 16 Beav. 82.

(c) Scandal and Impertinence.

Where exceptions for scandal and impertinence had been taken by the defendant to a bill filed for an injunction, but he neglected to set them down for hearing, the plaintiff was allowed to set them down. *Coyle v. Alleyne*, 20 Law J. Rep. (N.S.) Chanc. 424; 14 Beav. 171.

Orders of Court do not take away its general jurisdiction. *Ibid*.

(FF) SALES AND PURCHASES UNDER DIRECTION OF THE COURT.

(a) Conduct of Sale.

The plaintiff in a cause held entitled to the conduct of the sale of partnership property, although, according to the contract, if performed without suit, he might not have been entitled to interfere in the sale. *Dale v. Hamilton*, 10 Hare, App. vii.

(b) Opening Biddings.

Leave will not be given to open the biddings until after the Master's report on the purchase. *Lovestock v. Cooper*, 22 Law J. Rep. (N.S.) Chanc. 154; 9 Hare, 279.

When biddings are opened, the purchaser is entitled to interest on his deposit at 4l. per cent. *Banks v. Banks*, 16 Beav. 380.

A party opening biddings must deposit the amount of his advance; but he is not required in the first in-

stance to pay into court the amount of the original deposit. Upon his neglect to make the required payment, the order to open biddings will be discharged with costs, to be paid by him. *Ibid*.

The rule under which the Court permits a stranger to intervene for the purpose of opening biddings on a sale by auction before the Master, has no application to a sale before him by private contract. *Millican v. Vanderplank*, 11 Hare, 136.

Where the Master has in the presence of the parties approved of a sale by private contract, whether under a special reference, or under the 4th General Order of the 16th July 1851, no stranger can intervene to prevent the confirmation of the report, nor will the sale be disturbed by the Court, on the mere ground that a larger price has been offered subsequently, and before such confirmation, unless there be some error or miscarriage in the proceedings, or the contract price be grossly inadequate. *Ibid*.

Where there are grounds upon which the Court would refuse to confirm a sale by private contract approved by the Master, the fact that the purchaser has, after the approval of his contract and before the confirmation of the report, entered upon the property and expended money thereon, or incurred liabilities with respect to it, will not afford any reason for supporting the sale; for such acts before the confirmation of the report are done at the purchaser's own risk, or in his own wrong; but when all the parties interested in the estate have approved of or acquiesced in the contract, and concurred in and encouraged such acts of the purchaser, they may then constitute reasons for not disturbing the sale. *Ibid*.

On a sale under a decree the signature of the certificate of the purchase by the Judge in chambers is equivalent to the order *nisi* to confirm the Master's report under the former practice, and the certificate is liable to be discharged at any time within eight days after such signature. Consequently, an application to open biddings on the usual terms may be made within eight days after the certificate is signed by the Judge. *Bridger v. Penfold*, 1 Kay & J. 28.

Order made, opening the biddings upon an undertaking to abide by the order of the Court, as to the expenses of the re-sale, where the advance was only 9l. more than the probable expenses of such re-sale. *Ibid*.

(c) Purchaser.

A purchaser under the Court, after having obtained his conveyance, ought not to appear upon a petition to obtain the purchase-money out of court, and he will not be allowed his costs of so doing. *Barton v. Latour*, 18 Beav. 526.

After a certificate of purchase under a sale by the Court has become binding, by the lapse of eight days since the signature thereof by the Judge, the purchaser is considered to be so far the absolute owner that he may sell at an advanced price for his own benefit. *Dewell v. Tuffnell*, 1 Kay & J. 324.

(d) Conveyancing Counsel.

When a deed is required to be executed under the direction of the Court, the deed when engrossed is to be marked by the Registrar, and an affidavit filed that the draft has been settled by one of the conveyancing counsel of the Court. An order for its

execution will then be made. *Harvey v. Brook*, 22 Law J. Rep. (N.S.) Chanc. 14; 9 Hare, App. xi.

Where the Court orders a sale, and before the property is sold an offer is made by private contract, the Court has a discretion under the 56th section of the statute 15 & 16 Vict. c. 86. to dispense with the rule that the abstract of title shall be laid before the conveyancing counsel. *Gibson v. Woollard*, 24 Law J. Rep. (N.S.) Chanc. 56; 5 De Gex, M. & G. 835.

A petition praying for the investment of the purchase-money of settled lands taken by a company in the purchase of other lands to be settled to the same uses, must, in the first instance, be referred to chambers. The Court, however, will not, when the petition is in chambers, as a matter of course, refer the title to conveyancing counsel, under the new Chancery Act; but, if satisfied by other means as to it, will approve of it there. *In re Jones's Settled Estates*, 24 Law J. Rep. (N.S.) Chanc. 504.

The deeds, which are settled by the conveyancing counsel of the court, are those which are made for the reinvestment of the monies of incapacitated persons, &c. Deeds for conveyance or transfer of trust property from old to new trustees, &c. are approved by the Judge of the branch of the court to which the cause is attached. *Blaxland v. Blaxland*, 9 Hare, App. lxviii.

(GG) PAYMENT INTO COURT.

After a decree in a cause, a motion that the defendants might pay into court money which, by their answer, they admitted to be in their hands, was refused, with costs. *Wright v. Lukes*, 20 Law J. Rep. (N.S.) Chanc. 32; 13 Beav. 107.

Where a purchaser of property sold under decree is satisfied with the title, the application for the payment of the purchase-money into court is to be made to the Judge at chambers, under the 15 & 16 Vict. c. 80. s. 26. (Masters in Chancery Abolition Act). *Davenport v. Davenport*, 22 Law J. Rep. (N.S.) Chanc. 11; 9 Hare, App. l.

Where the residue of a trust fund under a composition deed has been duly invested by the trustees, and they claim a lien thereon for their costs under the deed, and there is no imputation of misconduct on their part, or of the fund being in danger, the Court will not, on motion by a creditor who was a party to the deed, and had accepted a dividend under it, order the fund to be paid into court. *Chaffers v. Headlam*, 22 Law J. Rep. (N.S.) Chanc. 1038.

The costs of such a motion are costs in the cause. *Ibid.*

In a suit instituted by one of the *cestuis que trust* against the trustees, to administer the trusts of a will, a motion was made by the plaintiff that the trustees might be ordered to bring into court certain sums of stock admitted to form part of the trust funds:—Held, upon the authority of a case decided by *Wigram, V.C.*, that the stock must be paid into court, although there was no allegation of misconduct or want of confidence in the trustees. *Marryat v. Marryat*, 23 Law J. Rep. (N.S.) Chanc. 876.

Held, also, that the remaining *cestuis que trust* were not necessary parties to the suit, and it was not requisite to serve them with notice of this motion. *Ibid.*

Rent was due from the N.-E. Company to the H. & S. Company, and the lessee company gave

the lessor company notice that the money would be paid into court, whereupon the lessor company gave the lessee company notice that unless the amount were paid interest would be claimed, under the 28th section of the statute 3 & 4 Will. 4. c. 42. The money was paid into court, and the lessor company presented a petition for its payment out, and that the lessee company should pay interest thereupon:—Held, affirming an order of one of the Vice Chancellors, that the lessor company were entitled to interest on the amount paid into court, as such payment (which was an abuse of the process of the court) had defeated their right to interest under the statute, the 28th section giving a title to interest in respect of a debt for which an action is brought. *The Hull and Selby Rail. Co. v. the North-Eastern Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 109; 5 De Gex, M. & G. 872.

Where a matter is pressing, the Accountant General will grant his direction to pay money into the Bank *instanter*. *Foley v. Smith*, 13 Beav. 118.

A railway company under pressure paid the purchase-money for lands bought of a corporation to the vendors, instead of paying it into court under the 8 & 9 Vict. c. 18. s. 69. Upon a bill filed by the former, the latter were on motion ordered to pay into court the purchase-money in their hands for the purpose of interim protection. *The London and North-Western Rail. Co. v. the Corporation of Lancaster*, 15 Beav. 22.

A purchaser having bought, under a decree of the Court, property described as *tithe-free*, raised a question on the title, which remained to be decided in the cause, whether the tithes passed under the will of the testator, and applied in the cause for leave to pay the whole of his purchase-money into court, and that he might thereupon be let into possession of the purchased property without prejudice to any application he might thereafter make for compensation in case a title could not ultimately be made to the tithes. The Court, considering that a claim to compensation only was asked to be reserved to the purchaser, made an order accordingly. *Man v. Ricketts*, 5 De Gex & S. 116.

Motion to pay money into court on a certificate of the chief clerk, signed and approved by the Judge, but made before the expiration of the eight days, refused. *Douthwaite v. Spensley*, 18 Beav. 74.

A and B were appointed trustees and A, B, and C, executors of a will. A and C alone proved. B, in his answer, said he declined to act in the trusts; but it appeared that B and his partner were indebted to the testatrix at her death, that her executor had lent them part of the assets, and that they had paid some of her debts. The Court, on motion, ordered B to pay into court the balance due from him and his partner, who was not a party to the suit. *White v. Barton*, 18 Beav. 192.

A motion in the suit of the next-of-kin of a deceased person, whose will is the subject of litigation in the ecclesiastical court, for the payment into this court of money which was in the hands of the executor of the alleged will, refused—no decision either in the ecclesiastical court or at law having been come to on the validity of the will, and the executor insisting upon such validity by his answer, and denying that he was insolvent. *Edwards v. Edwards*, 10 Hare, App. lxiii.

Order to pay money into court at the hearing, without a notice of motion for that purpose. *Isaacs v. Weatherstone*, 10 Hare, App. xxx.

An order may be made for payment of money into court, although some of the persons interested in the money are not before the Court. *Wilton v. Hill*, 2 De Gex, M. & G. 807.

(HH) PAYMENT OUT OF COURT.

Order made that certain sums which had been ordered to be paid into court, but had not been paid in, might, after they were paid in, be paid out to the party entitled to them. *Milne v. Gilbert*, 20 Law J. Rep. (N.S.) Chanc. 213.

The Court will not make an order for payment of money out of court, except upon petition, however small the sum may be. *The Blind School v. Goren*, 21 Law J. Rep. (N.S.) Chanc. 144.

When an alteration in an original order for payment of money out of court is requisite, the Court may alter the terms of the original order, without requiring a supplemental order to be made. *Windson v. Cross*, 22 Law J. Rep. (N.S.) Chanc. 14; 9 Hare, App. xlv.

Where money is asked to be paid out of court to an attorney, under a power of attorney from the party entitled to the money, his signature is not sufficiently attested by the certificates of a notary public under hand and seal and the official seal of the mayor of the foreign city where he resides, but the same must be proved by affidavit. *Salvidge v. Tutton*, 22 Law J. Rep. (N.S.) Chanc. 883.

Where the sum in court payable to a party in the cause exceeds 10*l.*, it will not be ordered to be paid to the solicitor merely because he may be under advances for costs or money advanced, he not having any assignment of or lien upon the sum, or special authority to receive it. *Middleton v. Younger*, 22 Law J. Rep. (N.S.) Chanc. 1005.

A petition by A, resident in a British colony, that a sum of money might be paid to his agent appointed by his power of attorney. A power of attorney to that effect was executed by A in the presence of a notary public resident in the colony, who certified such signature by his official seal:—Held, that such authority was sufficient under the 22nd section of the Chancery Procedure Act. *Armstrong v. Stockham*, 24 Law J. Rep. (N.S.) Chanc. 176.

Where the Court orders payment out of a particular fund it is tantamount to a decision not only that such fund is liable to make such payment, but also the interest directed to be computed thereon. By the decree arrears of maintenance were ordered to be paid out of a fund in court consisting both of corpus and rents of real estate, and it was referred to the Master to calculate interest on the arrears. Upon the matter coming before the Court upon the Master's report,—Held, that it was not then competent for the parties to contend that the arrears and interest were not payable out of the corpus, for the point must be considered settled by the prior decree. *Davis v. Browne*, 14 Beav. 127.

A tenant for life of a fund in court was transported in 1838, and had not since been heard of. Upon an application made in 1852 by the remaindermen for payment, the Court would only direct payment of the dividends to them, and required an undertaking to replace the amount out of the capital, if the tenant

for life should be still alive. *In re Mileham's Trust*, 15 Beav. 507.

A deaf, dumb, and blind person petitioned for payment to herself of 7,000*l.* carried to her separate account:—Held, that she might be a petitioner without a next friend, but the Court declined, without special reasons assigned, to make an order for payment of more than the income for her benefit. *In re Biddulph's and Poole's Trusts*, 5 De Gex & S. 469.

Form of the order. *Ibid.*

The 44th section of 15 & 16 Vict. c. 86. does not apply to paying money out of court. *Rawlins v. M'Mahon*, 1 Drew. 225.

A B, who was entitled to a fund in court, assigned it to C D, who was resident in India. C D appointed E F his attorney in England. On the joint petition of A, B, C, D and E F, the fund was paid out to E F. *Fell v. Jones*, 17 Beav. 521.

Application for payment out of court to legatees of legacies paid in under the Legacy Duty Act (36 Geo. 3. c. 52.) to be made to the Judge in chambers. *In re Bataard*, 9 Hare, App. xliii.

On an application for the payment to creditors, who had come in under a decree, of small sums of money upon powers of attorney of an old date, the Court required to be satisfied, by some late evidence, that the creditors who had executed the powers were still living. *Bird v. Bird*, 9 Hare, App. xlv.

Petitions for the payment out of court of money which has been paid in under the Trustees' Relief Act, must state the affidavit upon which the payment into court was made. *In re Flack's Trust*, 10 Hare, App. xxx.

Petitions for the payment out of court of money which has been paid in under the Trustees' Relief Act must set out enough of the affidavit on which the payment was made to shew the difficulty which occasioned the payment into court, and who are the parties that claim or are interested in the fund, but not necessarily all the details contained in that affidavit. *In re Courtois' Trust*, 10 Hare, App. lxiv.

A female, aged fifty-six, was absolutely entitled to a fund, subject to the contingency of her having children. Payment was ordered on her own recognizances. *Lyddon v. Ellison*, 19 Beav. 565.

Where it is sought to have funds belonging to a domiciled Scotch *feme covert* paid out of court, and any Scotch settlement exists, the Court requires the testimony of a Scotch advocate to shew that it does not affect the fund. *In re Todd, Shand v. Kidd*, 19 Beav. 582.

The Court having ordered certain small leaseholds to be sold, and the proceeds to be distributed, together with a fund in court, among numerous parties, upon the certificate of the chief clerk, in order to save expense, directed the purchasers to be served with a summons to shew cause at chambers why the proceeds should not be distributed pursuant to the order; and no cause being shewn, the proceeds were distributed by the chief clerk. *Thorpe v. Owen*, 2 Sm. & G. App. i.

On a motion that a fund standing to the separate account of a married woman, a foreigner, domiciled abroad, should be paid to her husband, upon affidavit that there was no settlement, and that by the law of the country where the parties were domiciled the husband was entitled to the fund, the Court refused

to make the order without the consent of the wife, taken by commission or an examination. *Schwabacher v. Becker*, 2 Sm. & G. App. iv.

When it is asked that small sums may be paid out of court to the solicitor of the parties entitled, the Court requires the production of their written consent. In a case where the consent was signed by eleven out of twelve of the parties, and the twelfth was in America, the Court dispensed with his signature, on the solicitor's undertaking to pay over the amount. *Staines v. Giffard*, 20 Beav. 484.

The dividends of a fund in court were, by an order made in a cause, directed to be paid to one of the defendants, an unmarried lady, during her life, or until further order, with liberty to apply. The lady having married, she and her husband by petition, stating the marriage and a settlement of the dividends on her to her separate use, prayed an order directing the payment of the dividends to the separate use of the lady; and that the plaintiff might be directed, under the 44th Order of April 1852, to enter on record a statement of the marriage, and the nature and effect of the marriage settlement. The Court held, that an order for payment of the dividends might be made, but declined to give any such direction to the plaintiff as asked. *Langdale v. Gill*, 1 Sm. & G. 24.

In a suit by an executor to administer his testator's estate, where the fund to be administered was divisible in equal shares among many persons ascertained by the Master, the Court ordered the apportionment to be made by affidavit at the hearing. *Roberts v. Collett*, 1 Sm. & G. 138.

Where the share of a married woman was subject to the payment of costs unascertained, which might be expected to reduce it to 200*l.*, or less, the Court, to save further expense, ordered it to be paid to the husband, and dispensed with any examination as to the consent of the wife. *Ibid.*

In support of an application that creditors, whose dividends are less than 10*l.*, may have their shares of a fund in court paid out to their solicitor, there must be produced the written consent of the several creditors, verified by affidavit. *Downing v. Picken*, Kay, App. i.

(II) RECEIVER.

After a verdict upon an issue *devisavit vel non*, the Court appointed a receiver against the party to whom possession of estates had been given by the trustees of the legal estate under an order of this Court, though an order *nisi* had been obtained for a new trial. *Bainbrigge v. Bainbrigge*, 20 Law J. Rep. (n.s.) Chanc. 139.

A receiver ought not to present a petition to be discharged, to come on with the cause on further directions, as the Court would make the order on further directions without any such petition. *Stilwell v. Mellersh*, 20 Law J. Rep. (n.s.) Chanc. 356.

Upon an application by the sheriff, who was no party to this suit, the Court refused to restrain the plaintiff from prosecuting an action at law against him to obtain payment of a sum of money reserved for rent, which the sheriff, upon the stay of the action, offered to pay into court, and which was part of a larger sum of money levied under a writ of *fierti facias* issued upon a judgment obtained in an action at law by a stranger against the tenant of the

estate which the plaintiff in this suit claimed, and over which a receiver had been appointed. *Trye v. Trye*, 20 Law J. Rep. (n.s.) Chanc. 368; 13 Beav. 422.

Where the expenses of attending the passing a receiver's accounts are large, the Court will direct the accounts to be passed once a year only. *Day v. Croft*, 20 Law J. Rep. (n.s.) Chanc. 423; 14 Beav. 29.

A defendant, who is the owner and occupier of an estate subject to a charge which this suit seeks to enforce, will be compelled to attorn to a receiver, and a reference will be directed to the Master to fix an occupation rent. *Everett v. Belding*, 22 Law J. Rep. (n.s.) Chanc. 75.

Form of proceedings for the appointment of a receiver in cases in which there is no opposition. *Blackburrow v. Ravenhill*, 22 Law J. Rep. (n.s.) Chanc. 108.

Money in the hands of a receiver in a foreclosure suit is, in the first instance, to be treated as the plaintiff's fund. *Paynter v. Carew*, 23 Law J. Rep. (n.s.) Chanc. 596; Kay, App. xxxvi.

A receiver will be appointed to collect personal estate in a foreign country, and not only to get in rents, but also to sell the real estates in such foreign country and receive the produce thereof when sold. *Hinton v. Galli*, 24 Law J. Rep. (n.s.) Chanc. 121.

In a suit relating to two annuities secured on real estate, and to which the grantor was not a party, a receiver was appointed "of the incomes of the outstanding trust property in the pleadings mentioned." The receiver entered and continued in possession of the real estate for six years. The Court refused to restrain the grantor by injunction from distraining on the rents. *Crow v. Wood*, 13 Beav. 271.

An order for a receiver ought to state distinctly on the face of it, over what property the receiver is appointed. *Ibid.*

Where, in the lifetime of a receiver, an unascertained balance was found by the Master's report to be due from him, and he died without payment of such balance, the Court ordered upon petition, that his recognizance should be put in suit against his real and personal representatives, and against his sureties. *Ludgater v. Channell*, 3 Mac. & G. 175.

The granting of a receiver is a matter of discretion to be governed by a view of the whole circumstances of the case, one of such circumstances being the probability of the plaintiff being ultimately entitled to a decree. Thus, a receiver was refused in a case where important points arose upon the construction of deeds, that construction being attended with considerable doubt and difficulty. *Owen v. Homan*, 3 Mac. & G. 378.

Where the right to property, which is the subject of litigation, depends on questions to be decided at law, the jurisdiction in equity to grant a receiver is only to be exercised when there is a reasonable probability of success, and the property, the subject of the suit, is in danger. *Bainbrigge v. Baddeley*, 3 Mac. & G. 413; reversing 13 Beav. 355.

A testator executed two wills: one in 1815, and the other in 1818. The plaintiff claimed as devisee under the former will, and impugned the validity of the latter will on the ground of the mental incapacity of the testator: the defendant was in possession under the latter will, which he had established

against the heir-at-law, in a suit to which the plaintiff was not a party. The legal estate being outstanding, the plaintiff filed his bill in this court to remove the impediments to his proceeding at law to set aside the will of 1818. The trial having taken place, and resulting in a verdict for the plaintiff,—Held, that inasmuch as the verdict, unless confirmed by judgment, was of no legal value, and as the defendant was in possession under the sanction of the Court, and such possession was not shewn to have been obtained by violence or wrong, the plaintiff was not entitled to a receiver; and the fact that the legal estate in the property was outstanding in trustees, was immaterial to the question. *Ibid*.

Order for a receiver made before appearance against a defendant, who had absconded to avoid service. *Dowling v. Hudson*, 14 Beav. 423.

It is not necessary to bring to a hearing a suit for the appointment of a receiver *pendente lite*. *Anderson v. Guichard*, 9 Hare, 275.

A receiver will not be appointed without sureties, though not objected to, if persons not competent to consent are interested. * *Tylee v. Tylee*, 17 Beav. 583.

A tenant who had not attorned to the receiver, ordered to pay him the arrears of rent in fourteen days and the costs of the application. *Hobson v. Sherwood*, 19 Beav. 575.

A receiver appointed of real and personal estate where the devise in trust and personal representatives were in Jersey, and therefore out of the jurisdiction. *Smith v. Smith*, 10 Hare, App. lxxi.

A bill was filed by persons claiming to be insurers in a loan and deposit association, and one of whom was the personal representative of a deceased insurer, on whose death a sum of money became payable, against the directors of such association, and who were also the directors of a co-existent association, or insurance society, the funds of both being amalgamated for the purpose of having the affairs of these associations wound up and terminated. On motion for a receiver and manager in the interim,—Held, refusing the application, that a court of equity could not take upon itself the burden of carrying on such an association; and that as the plaintiffs on the record had inconsistent and conflicting interests in the funds of the two associations, and the original shareholders were not represented at all, the frame of such a suit did not warrant the Court in granting a receiver until decree. *Evans v. Coventry*, 3 Drew. 75.

In a suit for determining the right as between the plaintiff and defendants to certain estates, a decree was made declaring the right of the plaintiff and one of the defendants to two-thirds. Owing to a previous partition suit, the decree contained no specific direction that the defendant against whom the decree was, should deliver up possession. The bill did not pray or make a case for a receiver, nor did the decree appoint a receiver. After the decree from which an appeal was pending, the defendant did not deliver possession. There were charges and outgoings to be provided for; and owing to disputes between the parties the tenants refused to pay their rents either to the plaintiff or to the defendants. A receiver was appointed of the lands let to tenants, but not of the mansion-house and land in the personal occupation of the defendant, the Court

expressly refusing to make the appointment of a receiver ancillary to the exclusion of the defendant from possession, and granting it only to provide for the due receipt of the rents, and providing for the preservation of the property and the payment of liabilities and outgoings. *Wright v. Vernon*, 3 Drew. 113.

Special order made by the Lord Chancellor, that instead of the sum payable under the 6th Order of 25th of October 1852, as a further fee for the certificate upon the passing of a receiver's and manager's account, there should be paid such a fee as the Judge to whose court the cause was attached should think reasonable. *Wells v. Wales*, 4 De Gex, M. & G. 816.

In another cause the Lord Chancellor directed the fee under the same order to be paid on each 100*l.* of the net profits of the business over which the receiver and manager had been appointed. *Ibid*.

Where a portion of a trust fund has been lost, that is *prima facie* a breach of trust, and a sufficient ground for the appointment of a receiver on an interlocutory application:—Held, also, that objections to the bill on the ground of misjoinder, multifariousness, or want of parties, were no answer to such an application. *Evans v. Coventry*, 5 De Gex, M. & G. 911; 3 Drew. 75.

On a bill filed by a plaintiff insured in a society (whose funds were liable to pay the insurance money), on behalf of himself and other persons so insured, charging a loss of the fund through the negligence of the directors, and on the answer and affidavits shewing that the secretary had absconded with part of the funds, and that some of the directors were in needy circumstances,—Held, that the plaintiff was entitled to the appointment of a receiver and to an injunction. *Ibid*.

(JJ) INFANTS' SUITS.

Where a bill has been filed on behalf of infants, the Court will not, unless it is perfectly satisfied that there has been some sinister motive leading to the institution of the suit, direct, on motion before the hearing, an inquiry, whether the suit is for the benefit of the infants, and if so, whether the next friend is a proper person to conduct it, or otherwise who is a proper person to be appointed in his place; notwithstanding that the object of the suit might be effected by claim or by petition under the Trustees' Relief Acts. *Smallwood v. Rutter*, 20 Law J. Rep. (n.s.) Chanc. 332; 9 Hare, 24.

Where there was not any imputation upon the character or solvency of the next friend in an infant's suit, but the circumstances under which he was named as next friend were open to some degree of suspicion, a motion for his removal was refused, without costs. *Ibid*.

In a suit by adult plaintiffs and infant plaintiffs, an order was obtained for changing the next friend of the infants. The order was drawn up and entered. The adult plaintiffs obtained at the Rolls an order for changing the solicitor to the suit, and alleged that the order appointing a new next friend had not been drawn up and entered. The new next friend moved to discharge the order obtained at the Rolls:—Held, that the order for changing the solicitor was irregular; but that the motion to discharge ought to have been by the infants by their next

friend, and not by the next friend in his individual capacity. *Pidduck v. Boulbee*, 21 Law J. Rep. (N.S.) Chanc. 786; 2 Sim. N.S. 223.

Application refused, but leave given to amend notice of motion. *Ibid*.

Upon a petition to confirm an agreement for an exchange, on behalf of an infant, it was held, that the case of an exchange, although within the spirit, was not within the words, of the 40th section of the Masters Abolition Act, and consequently there could be no reference to the conveyancing counsel by the Judge at chambers. The matter was referred to the Master. *Thornhill v. Thornhill*, 22 Law J. Rep. (N.S.) Chanc. 715.

In the prosecution of a suit on behalf of an infant plaintiff by his next friend, deeds relating to the plaintiff's title were, by order, upon admissions in the defendant's answer, deposited in court for the purposes of discovery, and before the hearing the plaintiff, having attained his majority, repudiated the suit, whereupon on application by the defendant the deeds were ordered by one of the Vice Chancellors to be delivered back to the defendant, notwithstanding the opposition of the next friend, who claimed to have them retained in court, until the costs incurred on behalf of the plaintiff, while an infant, had been paid. Upon an appeal against this order, supported by affidavits shewing that since the Vice Chancellor's order the deeds had been delivered to the defendant, and by him handed over to the plaintiff, by whom they had been deposited with other persons by way of mortgage for value, the Court refused the appeal motion with costs to be paid by the next friend. *Dunn v. Dunn*, 24 Law J. Rep. (N.S.) Chanc. 581; 3 Drew. 17.

Where an infant on attaining his majority repudiates, before the hearing, a suit instituted on his behalf by his next friend, the repudiation has relation to the commencement of the suit, and deeds deposited in court by an order therein will be ordered to be returned to the party by whom they were deposited, notwithstanding a claim of lien for costs incurred for the infant plaintiff in the suit set up by the next friend and his solicitor. *Ibid*.

(KK) GUARDIAN AD LITEM.

Comparative expenses of the appointment of a guardian *ad litem* for infant defendants on motion in court, by commission, and on their appearance in court. *Carwardine v. Wishlade*, 21 Law J. Rep. (N.S.) Chanc. 464.

Motion for the appointment of a guardian *ad litem* for infant defendants without their appearance in court, no reason being given for their not appearing, refused. *Crabbe v. Moxhay*, 21 Law J. Rep. (N.S.) Chanc. 504; 5 De Gex & Sm. 347; *nom. Crabbe v. Moubery*.

By the 21st section of the statute 15 & 16 Vict. c. 86, the practice of the "Court of issuing commissions to take pleas, answers, disclaimers, and examinations" taken within the jurisdiction is abolished. A guardian *ad litem* to an infant defendant to a suit, who is within the jurisdiction, will be appointed without a commission. *Egremont v. Egremont*, 22 Law J. Rep. (N.S.) Chanc. 108; 2 De Gex, M. & G. 730.

The Court refused to appoint the solicitor of a trustee his guardian *ad litem* to put in an answer to

a bill of complaint filed against him, though, from age and infirmity, he was incapable of transacting business. *Patrick v. Andrews*, 22 Law J. Rep. (N.S.) Chanc. 240.

Where an infant defendant has appeared to a claim, the Court will not, on motion by the plaintiff to appoint a guardian *ad litem*, require an affidavit of service of the writ of summons. *Wood v. Logsdon*, 22 Law J. Rep. (N.S.) Chanc. 257; 9 Hare, App. xxvi.

A party to the cause, not having an adverse interest to that of an infant defendant, is a more proper person than a solicitor or stranger to be appointed guardian *ad litem* to the infant. *Anonymous*, 22 Law J. Rep. (N.S.) Chanc. 288; 9 Hare, App. xxvii.

An application for the appointment of a guardian *ad litem* to an infant defendant, a lunatic, not found so by inquisition, should be made in Chancery, and not in Lunacy. *Pidcock v. Boulbee*, 22 Law J. Rep. (N.S.) Chanc. 611; 2 De Gex, M. & G. 898.

The Court will not appoint, as guardian *ad litem* of an infant defendant, a person unconnected with the infant, and not interested in the suit. *Foster v. Cautley*, 22 Law J. Rep. (N.S.) Chanc. 639; 10 Hare, App. xxiv.

Appointment of the solicitor of the Suitors' Fund as guardian *ad litem* to an infant defendant on the application of the plaintiff, where the infant was not in default either for not appearing or not answering. *Bentley v. Robinson*, 9 Hare, App. lxxvi.

An infant defendant was out of the jurisdiction until after a decree in the cause, directing a reference to the Master to take accounts, which was proceeding when he came within the jurisdiction. The proper course is for the infant, on motion, to obtain an order appointing a guardian; and by a separate order to obtain a reference to the Master to inquire whether it is for the infant's benefit to adopt the proceedings; and, if so, then that the infant adopt them and attend the future proceedings. *Copley v. Smithson*, 5 De Gex & S. 583.

Upon an application to the Court to appoint a specified person to be guardian *ad litem* to an infant defendant, it appearing that from the distance of the infant's place of abode from the residence of any solicitor and from London, it would cost upwards of 9*l*. to obtain the appointment either by a commission or upon the actual appearance of the infant in court, but that the costs of an appointment made on motion would be only 3*l*. 16*s*. 6*d*., the Court, under the circumstances, made the order at once. *Benison v. Wortley*, 5 De Gex & S. 648.

(LL) NEXT FRIEND.

Bill by a feme covert by her next friend:—Held, that an objection, stated in the answer, that the next friend was in needy circumstances, and that security for costs ought to be given, could not be taken at the hearing of the cause. *Monday v. Waghorn*, 21 Law J. Rep. (N.S.) Chanc. 353.

If the next friend of a married woman is changed during the suit, he must not only give his own security for the costs incurred, but find a surety to join him in such amount as the Master in his discretion shall fix. *Payne v. Little*, 22 Law J. Rep. (N.S.) Chanc. 1037; 16 Beav. 563.

A defendant cannot act as next friend of a plaintiff female covert. *Payne v. Little*, 13 Beav. 114.

Petition by feme covert in a suit, not naming a next friend, directed to be amended by inserting a next friend. *Howard v. Prince*, 14 Beav. 28.

Where it appeared that the next friend of a feme covert plaintiff was insolvent, and was in contempt for non-payment of costs, she was discharged from being next friend without prejudice to her liability already incurred; and all proceedings were stayed until a new and sufficient next friend should be appointed, or the plaintiff should have obtained an order to sue *in formâ pauperis* without a next friend. *Wilton v. Hill*, 2 De Gex, M. & G. 807.

(MM) PAUPER.

A party entitled for life to the dividends of a fund paid into court, under the 10 & 11 Vict. c. 96, allowed to apply for payment *in formâ pauperis*. *In re Money*, 20 Law J. Rep. (N.S.) Chanc. 274; 13 Beav. 109.

A married woman was permitted to present a petition, under the statute 2 & 3 Vict. c. 54. (Talfourd's Act) for access to some, and for the custody of others of her children, as a pauper, without the intervention of a next friend, and without payment of the stamp of 1*l.* required by the Orders of the Court. *In re Hakewill*, 22 Law J. Rep. (N.S.) Chanc. 662; 3 De Gex, M. & G. 116.

A married woman, though a pauper, cannot *ex parte* obtain an order for leave to file a bill in respect of her separate estate without the intervention of a next friend, and an order so obtained was discharged for irregularity. *Page v. Page*, 22 Law J. Rep. (N.S.) Chanc. 892; 16 Beav. 588.

Where a party obtained an order to sue *in formâ pauperis*, and the defendant did not seek to discharge the order until three years after,—Held, on appeal, reversing the decision of the Court below, that the defendant had waived his right to object to the order to sue, on the ground of irregularity. *Parkinson v. Hanbury*, 22 Law J. Rep. (N.S.) Chanc. 979; 4 De Gex, M. & G. 508.

A pauper plaintiff, after answer put in and proceedings taken in the suit, dismissed the bill *ex parte*, without costs:—Held, that a pauper plaintiff had no such power. *Ibid.*

A pauper plaintiff, to whom counsel and solicitor had been assigned, gave notice of motion, and appeared in person in support of it:—Held, that a pauper plaintiff so circumstanced, could not appear in person. *Ibid.*

An administratrix having a beneficial interest in the subject-matter of a suit, admitted to sue *in formâ pauperis*. *Parkinson v. Chambers*, 24 Law J. Rep. (N.S.) Chanc. 47.

The application by a husband and wife to defend *in formâ pauperis* in a suit respecting her reversionary estate in land, requires no special motion, and such a motion was dismissed. *Pitt v. Pitt*, 1 Sm. & G. App. xiv.

Liberty given to a married woman to file a bill without a next friend and sue *in formâ pauperis*. *In re Foster*, 18 Beav. 525.

(NN) CREDITORS' SUITS.

The title of a creditor is paramount to that of the testator's heir-at-law:—Held, therefore, on claim filed

by a creditor against the devisees in trust and the heir-at-law of a testator for payment of debts out of the testator's real estate, that the heir-at-law was not entitled to have the claim dismissed as against him, or to an issue *devisavit vel non*. *Spickernell v. Hotham*, 20 Law J. Rep. (N.S.) Chanc. 629; 9 Hare, 73.

As to the right of a creditor to come in under a decree at any time before the fund has been distributed. *Hartwell v. Colvin*, 16 Beav. 140.

After a long delay the Court requires more than the ordinary proof of the debt in the Master's office. *Ibid.*

In 1817 a trust-deed was executed by A B for the benefit of his creditors. The deed was established by the decree in 1842, and an account of debts was directed. The petitioner in 1846 came in under the decree, and claimed in respect of promissory notes, dated in 1816, given by A B to his father who died in 1828. He produced the notes and proved the signature, but gave no proof of the consideration or of anything being then due:—Held, that his claim had been properly rejected by the Master, for after the great lapse of time the notes could not be admitted upon the ordinary proof. *Ibid.*

The 46th Order of August 1841, entitling creditors who prove under a decree, to interest from the date of it is not retrospective. *Gullard v. Watson*, 4 De Gex & S. 139.

(OO) SPECIAL CASE.

An application may be made by an infant for a guardian under the 13 & 14 Vict. c. 35. s. 5. without a next friend. As to signature of counsel to special cases and setting down of special cases for hearing. *Ex parte Craig*, 20 Law J. Rep. (N.S.) Chanc. 136.

After a special case under Sir G. Turner's Act had been set down for hearing, a party interested in the question was born. Practice in such a case as to the amendment of the case and the setting it down again. *Thistlethwayte v. Garmer*, 21 Law J. Rep. (N.S.) Chanc. 16; 5 De Gex & Sm. 73.

A special case is only proper for the purpose of obtaining the opinion of the Court in cases of doubtful construction. It is not similar to a suit or claim, as the Court has no power to bind the rights of parties: and upon this case the Court declined to give any opinion upon two points which involved disputed rights. *Balzev v. Collett*, 23 Law J. Rep. (N.S.) Chanc. 230; 18 Beav. 179.

A party to a special case died after it had been set down; liberty was given to amend by making his representatives parties. *Ainsworth v. Alman*, 14 Beav. 597.

Application for the appointment of a guardian to concur in a special case made in court and not by summons at chambers. *Thornhill v. Copleston*, 10 Hare, App. lxvii.

The affidavit in support of an application for an order to appoint a guardian to concur, on behalf of an infant, in a special case under Sir G. Turner's Act ought to be intitled, "In the matter of the act" and "In the matter of the infant," and not "In the special case." *Star v. Newberry*, 20 Beav. 14.

(PP) JURISDICTION OF THE COURT.

Where several suits for administration are attached to different courts, and a decree is made in one, an

application to stay the other suits ought to be made in the court which has pronounced the decree. *Ladbroke v. Bleadon*, 15 Beav. 457.

Where a will purporting to pass lands, part of which were situate in Ireland and part in England, had been declared invalid as to the Irish estates by the Court of Chancery in Ireland,—Held, that to prevent misconception, an order of the Court of Chancery in England establishing the will, should be expressly limited to the extent of the jurisdiction; and it was declared that as to all the lands and hereditaments of the testator “situate within the jurisdiction of this Court,” the will was well proved, &c. *Boyse v. Colclough*, 1 Kay & J. 502.

J was an annuitant on an estate which had been sold to B, subject to the annuity and other incumbrances. J had also a charge on the purchase-money. B gave notice to put an end to the annuity, and then filed a bill to have it declared that it was at an end, and to have an account taken. The Vice Chancellor directed the Master to inquire what were the incumbrances, and declared the annuity at an end. The Lord Chancellor affirmed this decree. J appealed against the last part of it to the House of Lords, and the decree was reversed; but the cause went on to further litigation on the other point, and a subsequent decree was made. In this decree, which was made on the hearing upon further directions, the Lord Chancellor introduced alterations and additions to the first decree, as to that part of it which was not the subject of appeal:—Held, that he was at liberty to do so; for that the part unappealed against remained as before, and was not rendered final by the decision in the House of Lords on the part which was the subject of appeal. *Birch v. Jay*, 3 H.L. Cas. 565.

(QQ) REHEARING.

The time within which a decree or order of Chancery may be varied on rehearing has never been defined. The practice has been to allow a party to take his chance of success under a decree before the Master, and if unsuccessful, to obtain a rehearing of the decree. A decree was allowed to be reheard twelve and a half years after it had been pronounced, and notwithstanding it had been acted upon during that period by sales, &c. *Morgan v. Morgan*, 14 Beav. 72.

A petition presented in 1851 to rehear a cause disposed of in 1834, dismissed with costs. *Townley v. Bedwell*, 15 Beav. 78.

(RR) APPEAL.

On the hearing of an appeal from the whole order, made at the hearing of a suit by claim, the same rule is followed as to opening as on an appeal from the whole decree made in a suit by bill. *Sims v. Helling*, 21 Law J. Rep. (n.s.) Chanc. 387; 2 De Gex, M. & G. 291.

When an appeal is from part of a decree, the respondents are entitled, without a cross-appeal, to open that part which is not appealed from. *Watts v. Symes*, 21 Law J. Rep. (n.s.) Chanc. 713; 1 De Gex, M. & G. 240.

Where an appeal has been completely heard before the Court of the Lords Justices, and judgment given, it will not permit the case to be reheard before the full Court, although the members of this Court have

differed in opinion. *Blann v. Bell*, 22 Law J. Rep. (n.s.) Chanc. 236; 2 De Gex, M. & G. 775.

There is jurisdiction in the Court of Appeal (under the statute 14 & 15 Vict. c. 83.) to correct an error in an order of the Lord Chancellor. *Attorney General v. the Corporation of Exeter*, 22 Law J. Rep. (n.s.) Chanc. 418.

Mode of proceeding to be adopted where the parties require to take the opinion of the Court of Appeal on a certificate of the Judge's chief clerk. *Rhodes v. Ibbetson*, 23 Law J. Rep. (n.s.) Chanc. 459; 4 De Gex, M. & G. 787.

An appeal may be proceeded with, notwithstanding the decree has not been drawn up. *Jacobs v. Richards*, 23 Law J. Rep. (n.s.) 557; 5 De Gex, M. & G. 55.

If a case has been argued before the Judge himself in chambers, it will not be re-heard in open court, except in cases of mistake or where there are special circumstances. *The York and North-Midland Rail. Co. v. Hudson*, 23 Law J. Rep. (n.s.) Chanc. 695; 18 Beav. 70.

If an appeal from an order made by the Judge himself in chambers is contemplated, the course is to move to set aside or vary the certificate after it has been filed; a formal order in accordance with the certificate will then be made, from which the party may appeal. *Ibid*.

Where an appeal is brought by a defendant against the whole decree, excepting as to costs, the plaintiff begins. *Senhouse v. Hall*, 23 Law J. Rep. (n.s.) Chanc. 837.

Security ordered to be given pending an appeal from an order of the Vice Chancellor, directing the transfer of a sum of money into the name of the Accountant General to the credit of a party to the suit. *Swift v. Grazebrook*, 3 Mac. & G. 6.

Order made by the Lord Chancellor staying proceedings to enforce further answer pending an appeal from the order, by which the defendant's answer was declared insufficient. *Stainton v. Chadwick*, 3 Mac. & G. 343.

When an order is made by a Judge in chambers on hearing the application, it seems the appeal should be direct from that order; and it is neither necessary nor regular that it should be re-heard, even *pro forma* by the Judge who made it. *Saunders v. Druce*, 3 Drew. 139.

As a general rule where a plaintiff's title to equitable relief depends on a legal right, on the establishment of such right, either by an action or an issue, he will be entitled to the costs both at law and in equity. After an issue had been directed and found in favour of the defendant the plaintiff applied for a new trial, which was refused: the case was then brought to a hearing, when the bill was dismissed with costs. The plaintiff then appealed from the decree as well as the order refusing the new trial. On that appeal the bill was retained for a year, with liberty for the plaintiff to bring an action. An action was accordingly brought, and a verdict was found in the plaintiff's favour, but a new trial of the action was subsequently granted on the ground of misdirection of the Judge. The plaintiff having been successful in the second action, the cause was brought before the Vice Chancellor Knight Bruce on the equity reserved, when he made a decree in conformity with the result of the trial at law, but did not think fit to make any order as to costs:—Held,

on an appeal from that decree, that the appeal involved so much of principle as to render it an exception to the ordinary rule, which prohibits an appeal for costs alone. *The Corporation of Rochester v. Lee*, 2 De Gex, M. & G. 427.

Under the circumstances of this case,—Held, that the plaintiff was not entitled to the costs of the issue, nor of the first trial of the action, nor of so much of the costs of the suit as was occasioned by his having brought the case to a hearing without appealing from the order refusing the new trial of the issue, but that he was entitled to all the other costs. *Ibid*.

(SS) ENROLMENT OF DECREE.

Enrolment of a decree by the plaintiff, vacated on the ground that it being the settled practice of the Court that notice is to be given of passing and entering a decree, the omission to give this notice had, under the circumstances of the case, been a surprise on the defendant. *Hargrave v. Hargrave*, 3 Mac. & G. 348.

On a motion under the new orders to enrol a decree after a delay of more than six months, the Court granted the respondents a delay of twenty-eight days. *Sherwin v. Shakespeare*, 18 Beav. 527.

Before a decree made before the Vice Chancellor can be appealed against it is required to be enrolled. The enrolment is the act of the Lord Chancellor:—Held, that the act of enrolment, though performed by a Lord Chancellor disqualified by interest from adjudicating in the cause, was not affected by his disqualification, but was valid for the purpose of bringing up the appeal to the House of Lords. *Dimes v. the Grand Junction Canal Company*, 3 H.L. Cas. 759.

Under the 2nd & 3rd Orders of the 7th of August 1852, with respect to appeals, the Court to which any cause is attached, and not the Lord Chancellor and Lords Justices only, has jurisdiction to extend the time within which a decree may be enrolled beyond the period of six months mentioned in the order. *Butchart v. Dresser*, Kay, App. xxvii.

The party applying for this indulgence is not bound first to pay the costs of an unsuccessful appeal to the Lord Chancellor, but must pay the costs of the application. *Ibid*.

(TT) RECTIFYING PROCEEDINGS.

After a lapse of twenty-four years the Court rectified an error in an order, though the records had been deposited in the Tower. *Ex parte the Justices of the Peace of the County of Essex*, 22 Law J. Rep. (n.s.) Chanc. 328.

The Court, upon being satisfied that a clerical error had arisen in the Master's report, sanctioned an alteration which had been made, and allowed the subsequent proceedings to be rectified in conformity. *Richardson v. Ward*, 20 Law J. Rep. (n.s.) Chanc. 227; 13 Beav. 110.

(UU) ABATEMENT.

When a suit abates the plaintiff's solicitor should certify this fact to the registrar, in order to prevent its coming into the paper. In cases of default the defendants are entitled to the costs of the day. *Saner v. Deavin*, 14 Beav. 646.

An abatement after hearing does not prevent judg-

ment being delivered or the decree being drawn up. *Collinson v. Lister*, 20 Beav. 355.

The plaintiff instituted a creditors' suit against the executor. The estate was accordingly administered, and a decree was made on further directions. The executor afterwards brought actions against the plaintiff for debts alleged to be due from him to the testator, which the Court restrained by injunction. The plaintiff having died, the defendant moved that the suit might be revived by his representatives, or in default, that the injunctions might be dissolved. The proceeding was held irregular, and the motion was refused with costs. *Oldfield v. Cobbett*, 20 Beav. 563.

(VV) REPRESENTATION OF DECEASED DEFENDANT.

On the hearing of a petition relating to the disposition of a trust fund, it appeared that A had an interest in it which might be asserted. A died in the United States, having by his will appointed B his executor, who proved the will there, but not in this country. Counsel appeared for B at the hearing. The Court, at the hearing, under the 15 & 16 Vict. c. 86, appointed B's counsel to represent B's estate. *Hewitson v. Todhunter*, 22 Law J. Rep. (n.s.) Chanc. 76.

The Court will direct a party to appear in a suit and represent the estate of a deceased defendant, who had died intestate, though no letters of administration had been granted. *The Dean and Chapter of Ely v. Edwards*, 22 Law J. Rep. (n.s.) Chanc. 630. See also *The Dean and Chapter of Ely v. Gayford*, 16 Beav. 561.

The 44th section of the Chancery Amendment Act gives the Court a discretionary power of proceeding with a suit in the absence of the personal representative of a deceased defendant, whose interests were identical with those of the plaintiff. *Cox v. Taylor*, 22 Law J. Rep. (n.s.) Chanc. 910.

A bill of foreclosure was filed by a sub-mortgagee; the mortgagee had died, and his representative was not known:—Held, that the Court could not, under the 44th section of the Chancery Amendment Act, direct the suit to proceed in the absence of a representative of the mortgagee, against whose estate a decree was asked. *Bruiton v. Birch*, 22 Law J. Rep. (n.s.) Chanc. 911.

In a foreclosure suit by a first incumbrancer, a decree was made, and afterwards a defendant, a subsequent mortgagee (who was one of eight persons standing in a precisely similar situation, and in respect of whose mortgages there was only one right of redemption given), died, and there being a difficulty in obtaining representation to his estate, the Court ordered that the suit should proceed without any person representing his estate. The Court afterwards made an order under the 44th section of the 15 & 16 Vict. c. 86, appointing a creditor to represent the estate of the deceased. *Long v. Storie*, 23 Law J. Rep. (n.s.) Chanc. 200; Kay, App. xii.

A defendant died, and a contest as to one of his testamentary papers prevented probate being granted. The Court, on motion, appointed the executor named in his will to represent the deceased's estate in the cause under the 15 & 16 Vict. c. 86. s. 44. *Hele v. Lord Bexley*, 15 Beav. 340.

A motion upon notice and an order thereupon pursuant to the 44th section of the 15 & 16 Vict.

c. 86, that a suit by creditors interested in the property comprised in a trust deed made for their benefit, might proceed against the trustees without a personal representative of the deceased debtor, the author of the trust, where no such representative existed, and the estate was insolvent. *Chaffers v. Headlam*, 9 Hare, App. xli.

Case in which the executors of a father, who survived and became the sole next-of-kin of his deceased children, may be appointed by the Court, under the 44th section of the 15 & 16 Vict. c. 86, to represent the estates of the deceased children for the purposes of the suit. *Swallow v. Binns*, 9 Hare, App. xlvii.

The Court will not under the 44th section of the 15 & 16 Vict. c. 86, dispense with the personal representative of a trustee, when such personal representative has necessarily active duties to perform in the execution of the trust. *Fowler v. Bayldon*, 9 Hare, App. lxxviii.

The 9th rule of the 42nd section of the 15 & 16 Vict. c. 86, applies, not only to administration suits, but to all suits where the interest of the *cestui que trust* is represented by, and his powers are vested in, the trustee. *Ibid*.

The 44th section of the 15 & 16 Vict. c. 86, does not apply to the case where the estate to which it is desired to appoint the representative is the estate being administered by the Court. *Silver v. Stein*, 1 Drew. 295.

A died in a colony and made colonial representatives, and bequeathed his residue to B. who afterwards died. B's representative received from A's colonial representatives his residue. The representative of B was also a creditor of A:—Held, that in a creditors' suit, the representative of B could not be compelled to bring the money into court so paid to him by A's colonial representatives. *Ibid*.

One of two executors, co-defendants, who was also a residuary legatee, having died insolvent and without any representative, after an order for accounts and inquiries made upon an ordinary claim,—Held, that the suit might be prosecuted under the 15 & 16 Vict. c. 86, in like manner as if a legal personal representative had been served and had appeared. *Rogers v. Jones*, 1 Sm. & G. 17.

Monies found due to the estate of a deceased person will not be paid over to the representative appointed under the 15 & 16 Vict. c. 86, s. 44, but will be carried over to a separate account. *Byam v. Sutton*, 19 Beav. 646.

(WW) INVESTMENT.

The Court will not, on the application of a tenant for life, except in special cases, order a fund in court to be invested in any other security but that of consols. *Darwin v. Darwin*, 22 Law J. Rep. (N.S.) Chanc. 1007.

(XX) TRANSFER OF STOCK.

Where Bank stock is transferred to the Accountant General with a direction to pay the dividends to the tenant for life only, a per-centage off the dividends is deducted, unless otherwise ordered by the Court. *Dale v. Hayes*, 2 Sm. & G. App. vii.

(YY) INCOME PENDENTE LITE.

An allowance of income *pendente lite* under the 15 & 16 Vict. c. 86, s. 57, will only be made upon

the admission by the executor of assets. *Knight v. Knight*, 16 Beav. 358.

A married woman, having a life interest to her separate use in real estate, with her husband cut timber. A suit was instituted in one branch of the court to carry into effect the trusts of the settlement. In another branch a suit was in existence, in which a claim was made on the married woman's separate use in respect of the timber cut. Held, that in the first suit the Court could not decide the question as to the right to cut the timber; but the married woman securing the value of the timber cut, was allowed her income pending the suit. *Stacey v. Southey*, 1 Drew. 400.

(ZZ) UNDERTAKING.

A railway company, defendants in a cause, entered into an agreement or undertaking with the plaintiff not to do any act contrary to a then pending notice of motion, unless under the authority of parliament, until the hearing of the cause, or the further order of the Court. The company subsequently obtained an act of parliament, which did not by positive enactment, nor, in the opinion of the Court, by necessary conclusion from its provisions, take the case complained of by the plaintiff out of the reach of the undertaking, although it did not prohibit the act, and might have contemplated the act consistently with the provisions of the act of parliament:—Held, on motion by the plaintiff, that the undertaking was binding on the company until the further order of the Court: but that the company, on shewing merits, might have moved to discharge it; and the Court, deeming such merits to have been shewn by the answer, accordingly discharged the undertaking. *Stevens v. the South Devon Railway Co.*, 21 Law J. Rep. (N.S.) Chanc. 816; 9 Hare, 313.

Undertaking, by way of agreement, to answer a possible liability, or to observe the order of the Court, entered into by a stranger to the cause, by signing the registrar's book. *Gurney v. Behrend*, 9 Hare, App. lxxxix.

Where money is ordered to be paid to one on his undertaking to satisfy another, the Court will enforce the undertaking. A sum was ordered to be paid to A B for part maintenance of an infant, on his undertaking to pay the infant's schoolmaster's bill. A B having shewn a disposition not so to apply the money, the Court stayed the payment, and ultimately, on the application of the schoolmaster, ordered payment to him out of the fund. *Sirdefield v. Thackeray*, 18 Beav. 588.

The defendants, a railway company, having entered into an undertaking, to leave certain lands in their then state until the further order of the Court, and the plaintiff having undertaken to bring an action at the then next assizes, the motion of the plaintiff for an injunction was ordered to stand over. The action was brought, and a special jury obtained, but on the jury being called at the trial, ten special jurymen alone attended. Each party declined to pray a tales, and the cause became a remanet. Upon a motion by the defendants that the action should be taken as tried, with a verdict for the defendants, and that the defendants should be discharged from their undertaking,—Held, that it is not a course of the Court to order that an action should

be taken as tried, and it being the fault not of the plaintiff alone that the action was not tried, the Court declined to discharge the defendants from their undertaking, but peremptorily ordered the plaintiff to try the action at the then next assizes. *Bradbury v. Manchester, Sheffield and Lincolnshire Rail. Co.*, 5 De Gex & Sm. 624.

(AAA) COPIES OF PLEADINGS.

The clerk of records and writs is bound to furnish certified copies of Chancery pleadings on application under the 14th section of the 14 & 15 Vict. c. 99. *Reeve v. Hodson*, 22 Law J. Rep. (N.S.) Chanc. 696; 10 Hare, App. xix.

(BBB) IMPERTINENCE.

On the hearing of a petition for the disposition of a sum of money paid into court under the Lands Clauses Act, an objection was made that an affidavit was oppressively long. The Court considered the question, and, being of opinion that it was so, made a direction to the taxing Master in the terms of the 122nd Order of May 8, 1845. *In re Skidmore's Estate*, 24 Law J. Rep. (N.S.) Chanc. 711.

Repetitions in a fourth examination of items contained in former examinations held impertinent; the principle applicable being the same as if the repetition had been contained in the same document. *Alfrey v. Alfrey*, 14 Beav. 235.

It is no defence to an application to strike out impertinent matter to say that it will make the pleading inconsistent, unmeaning or insufficient. *Ibid.*

The repetition of a material statement is impertinent. *Ibid.*

(CCC) IRREGULARITY.

By inadvertence an order referring an answer upon exceptions was directed to Master K, as the Master in rotation, the cause being already in the possession of Master B. The exceptions were argued, on both sides, before Master B, acting for Master K, who, after overruling an objection to the regularity of the order, allowed the exceptions, and gave further time to answer:—Held, upon motion to discharge the order, that the irregularity had been waived by the defendant arguing the exceptions. *Lloyd v. Peers*, 20 Law J. Rep. (N.S.) Chanc. 87.

On taking accounts in an administration suit, it was found that the record had been defective from the beginning. A defendant without notice to the plaintiff filed a bill to remedy the defect. The plaintiff moved to dismiss the bill for irregularity; but the Court, in affirmance of a decision of the Court below, refused the motion, with costs. *Lee v. Lee and Lee v. Lys*, 22 Law J. Rep. (N.S.) Chanc. 862; 4 De Gex, M. & G. 219: affirming 22 Law J. Rep. (N.S.) Chanc. 638; 10 Hare, App. lxxii.

Whether a plaintiff after he has been deprived of the conduct of a cause can apply to the Court in such a way as that, if successful, it would have the effect of bringing back to himself the conduct of the cause—*quære*. *Ibid.*

(DDD) ATTACHMENT.

An attachment for want of answer is issuable against a feme covert who has obtained an order to

answer separately from her husband. *Thicknesse v. Acton*, 21 Law J. Rep. (N.S.) Chanc. 215.

By an order entitled in a cause and in the matter of the Trustee Act, A was ordered to transfer a sum of money into court. The affidavit of service of this order on A was entitled in the cause only. A was committed for contempt for refusing to obey the order. The writ of attachment was discharged for irregularity, on the ground of the difference between the title of the order and the title of the affidavit. *Mackenzie v. Mackenzie*, 21 Law J. Rep. (N.S.) Chanc. 386; 5 De Gex & Sm. 338.

An attachment for want of an answer, returnable immediately, against a defendant resident out of the jurisdiction, is irregular. *Zulueta v. Vincent*, 21 Law J. Rep. (N.S.) Chanc. 414; 15 Beav. 273.

A defendant, having been served with an unstamped copy of a bill and not having appeared, was attached, and, after remaining some time in custody, was released, on giving a bail bond to the sheriff. On motion to discharge the order for attachment, and for delivery up of the bail bond to be cancelled, the Court gave the defendant the option of appearing and having the order for attachment simply discharged, with costs. *Hutton v. Smith*, 24 Law J. Rep. (N.S.) Chanc. 147.

The Lord Chancellor has no jurisdiction under the 17th rule of the 15th section of the act 1 Will. 4. c. 36, to discharge a party in custody for the non-payment of a sum of money ordered to be paid in a suit. *Dev v. Clark*, 3 Mac. & G. 357.

A sequestration having been only partially successful, a motion was made to revive an attachment:—Held, that the order could not be made *ex parte*. *Knott v. Coatee*, 19 Beav. 470.

(EEE) SEQUESTRATION.

The petition of a defendant had been dismissed with costs to the infant plaintiffs. A subpoena and *fi. fa.* was issued, but the defendant was in Paris, and no effects could be taken. A commission of sequestration was then issued, under which the sequestrators obtained monies which, by orders of Court, were paid in the cause to "The Sequestration Account," and were invested in consols. Upon the petition of the infant plaintiffs the stock standing to "The Sequestration Account" was ordered to stand charged with payment to them of the taxed costs and interest from the date of the Master's certificate, unless the defendant should within one month shew cause to the contrary. Service on the defendant's solicitor in England to be good service. *Westby v. Westby*, 5 De Gex & S. 516.

PRACTICE, IN CRIMINAL CASES.

A motion for a new trial cannot be made on behalf of the only defendant in a criminal case, upon whom sentence of transportation has been passed at the assizes, unless the defendant is present in court. *Regina v. Caudwell*, 21 Law J. Rep. (N.S.) M.C. 48.

Semble—That where there are several defendants, all need not be present in court in order to entitle one or more of such defendants to move for a new trial. *Ibid.*

Three prisoners were indicted for murder, and witnesses were called for the defence of one only:—Held, that the counsel for the prosecution was entitled to reply generally on the whole case, and was not to be limited in his reply to the case as against the one prisoner for whom the witnesses were called, although the evidence adduced for the one prisoner did not at all affect the case as it respected the other two prisoners; but if the evidence against two prisoners affect them with different offences, such as larceny and receiving, and one call witnesses, there is no right of reply against both. *Regina v. Blackburn*, 3 Car. & K. 330.

PRE-EMPTION.

A right of pre-emption held limited to the life of the owner of the property. *Semble*—That a right of pre-emption “at all times thereafter” cannot be enforced after the death of the owner of the property. *Stocker v. Dean*, 16 Beav. 161.

PRESCRIPTION.

[See titles CUSTOM AND PRESCRIPTION—EASEMENT—LIGHT.]

PRESUMPTION.

Almost anything will be presumed in favour of a grant made fairly, and under good advice on the part of the grantors, and acted upon for upwards of thirty years. *Delarue v. Church*, 20 Law J. Rep. (N.S.) Chanc. 183.

After a lapse of twenty-eight years, a consent to marriage so as to avoid a forfeiture, was, under the circumstances, presumed. *In re Birch*, 17 Beav. 358.

A legacy was given conditionally on a marriage with the consent of trustees. The marriage took place in 1825, and the party entitled in default never raised any question as to the consent having been given until 1852, after the death of the trustees and of A B:—Held, that everything was to be presumed in favour of the consent, and though there was no distinct proof of consent, yet it was presumed from the conduct of the trustees subsequent to the marriage. *Ibid*.

The presumption of death, after seven years' absence, does not arise where the probability of intelligence is rebutted by circumstances. *Bowden v. Henderson*, 2 Sm. & G. 360.

Where the date of a deed was subsequent by a few days to that of a will, and the testator's heiress had treated the property as having passed by the will, but was not shewn to have been aware of her rights, and forty years had elapsed, but without any adverse possession:—Held, that the Court would not presume a binding contract for purchase to have been entered into by the testator before the date of the will. *Cathrow v. Eade*, 4 De Gex & S. 527.

A left this country on the 9th of November 1829. On the 16th of June 1831 his brother-in-law received a letter from America on behalf of A, describing him as having changed his name to B. Three months after this A's wife sent a letter to him, ad-

dressed to him as B, by the hand of a friend who could not find him. He was not heard of any more, and it did not appear that any other inquiries were made by his family:—Held, that on this state of facts there was not sufficient information to ground presumption of death, still less of the particular period of death. *In re Creed*, 1 Drew. 235.

PRINCIPAL AND AGENT.

- (A) OF THE AGENCY IN GENERAL.
- (B) RIGHTS AND LIABILITIES OF THE PRINCIPAL.
 - (a) *In general.*
 - (b) *On Contracts of the Agent.*
- (C) RIGHTS, DUTIES AND LIABILITIES OF THE AGENT.
 - (a) *As regards his Principal, in general.*
 - (b) *Right to Commission.*
 - (c) *Duty to Account.*
 - (d) *As regards third Persons.*
- (D) POWER AND AUTHORITY OF THE AGENT.

(A) OF THE AGENCY IN GENERAL.

[Ratification of the agency, see *The Eastern Counties Rail. Co. v. Broom*, and *Roe v. the Birkenhead, &c. Rail. Co.*, title COMPANY (G) (1), *ante*, p. 159.]

A declaration stated, that, in consideration that the plaintiff would employ the defendant as a coal-factor to sell certain coals on account of the plaintiff, the defendant promised the plaintiff that he would not sell the said coals *otherwise than for ready money*, and alleged for breach, that the defendant sold the coals otherwise than for ready money, to wit, at two months' credit:—Held, that the action was not sustained by the production of the following letter of instructions given by the plaintiff to the defendant, and by proof of a sale of the coals at 15s. 6d. per ton, at a credit of two months:—“Please sell for me 250 tons of anthracite coal, at such price as will realize me not less than 15s. per ton, net cash, less your commission for such sale.” *Boden v. French*, 20 Law J. Rep. (N.S.) C.P. 143; 10 Com. B. Rep. 886.

(B) RIGHTS AND LIABILITIES OF THE PRINCIPAL.

(a) *In general.*

[See *Thompson v. Bell*, title BANKERS, *ante*, p. 63.]

If a person describes himself in a written contract as an agent for a principal not named, he is liable upon the contract, if proved to be the real principal. But where a charter-party contained a clause, “that this charter-party being concluded by C T J (the defendant) on behalf of another party resident abroad, it is agreed that all liability of C T J ceases as soon as he has shipped the cargo,” evidence that the defendant had bought and paid for the goods in his own name, and that at the port of destination they had been claimed by and delivered to a person who produced an unsigned bill of lading, which the captain had delivered to the defendant, was held insufficient to render the defendant liable to an action

for the freight. *Carr v. Jackson*, 21 Law J. Rep. (N.S.) Exch. 187; 7 Exch. Rep. 382.

In an action for goods sold, there was a plea of payment, and it appeared that both the plaintiff and the defendant employed G as factor. G sold the goods to the defendant, knowing he was the factor. On a balance of accounts, G was indebted to the defendant. The plaintiff, who knew the state of accounts between G and the defendant, petitioned the Court of Bankruptcy to make G bankrupt, and alleged in his affidavit that G owed him a sum of money for goods sold by G, as factor of the plaintiff, to the defendant, and for which he had received payment by means of goods sold by the defendant to G. The plaintiff having afterwards sued the defendant for the price of the goods,—Held, that the statement in the affidavit was not conclusive evidence estopping the plaintiff from denying that the defendant had paid for the goods; the allegation as to payment, so explained, not being an allegation of fact, but of an inference of law drawn by the plaintiff. *Morgan v. Couchman*, 23 Law J. Rep. (N.S.) C.P. 36; 14 Com. B. Rep. 101.

Where counsel at a trial does not ask that a certain point should be submitted to the jury, but gets leave to move reserved, he cannot afterwards ask for a new trial, on the ground that that point was not submitted to the jury. *Ibid*.

Where a contract is entered into by an agent in his own name the principal may sue upon it, even though it is in part to be performed by the agent personally. *Phelps v. Prothero*, 24 Law J. Rep. (N.S.) C.P. 225; 16 Com. B. Rep. 370.

A, the defendant in an action as alien, in consideration of B's withdrawing the record, undertook to pay B certain monies, B undertaking to discharge A from liability to the covenants of the lease, upon his assigning all his interest in the lease:—Held, that the assignment of the lease was not a condition precedent to the discharge; and that, therefore, in an action against B. on the contract, it was not necessary to aver that the defendant had assigned. *Ibid*.

Quære—whether, if the assignment had been a condition precedent, a general averment, under the Common Law Procedure Act, “that the plaintiff had done all things necessary to entitle him to maintain his action,” would have been sufficient. *Ibid*.

(b) On Contracts of the Agent.

Plaintiff, being a widow, but not executrix or administratrix of her former husband, was in possession of furniture which had formerly belonged to him. She afterwards married B, whom she supposed to be a single man, and together with him occupied the house in which the furniture was. In order to raise money to pay off a distress for rent, B sold to the defendant the furniture. The plaintiff actively interfered in this transaction, believing herself to be the wife of B. Shortly afterwards B was convicted of bigamy in marrying the plaintiff. The plaintiff then sued the defendant for the value of the furniture:—Held, that she could not recover, as she had no title to the furniture; and that, even if it were her property, she was bound by her concurrence in the sale of it by B to the defendant. *Waller v. Drakeford*, 22 Law J. Rep. (N.S.) Q.B. 274; 1 E. & B. 749.

C & Co., merchants in London, being requested by their correspondents H, W & Co., merchants in

America, in their own name, and through the medium of a broker, arranged for the purchase from the defendants M & Co., also London merchants, of a bill of exchange, C & Co. having at the time funds of H, W & Co. in their hands for the purpose. The bill was drawn by the defendants M & Co. on a banker at Paris, in the following form:—“A cinq jours de date, payez par cette première de change, la seconde, &c., dix-neuf mille quatre cents soixante dix-huit francs cinq centimes. Valuer de Messieurs Coates & Co., que passerez.” The bill was handed over to C & Co. on one foreign post day, for a price then agreed upon to be paid, according to the custom of merchants in London, on the next foreign post day, and was forwarded to the plaintiffs P P merchants at Paris, to whom H, W & Co. were indebted in more than the amount of the bill, to be collected to the credit of H, W & Co. The plaintiffs acknowledged the receipt of the bill, and stated that they had placed it to the credit of H, W & Co. The bill was not presented until it became due, when it was refused payment by directions of the defendants; C & Co. having failed to pay the price agreed upon. H, W & Co. immediately reimbursed the plaintiffs the amount of the bill and cost of protest, and the defendants were thereupon proceeded against as drawers:—Held, that the plaintiffs were *bond fide* holders of the bill for value, and were entitled to maintain the action, though H, W & Co. were really the parties for whose benefit the action was prosecuted, C & Co. not acting as agents of H, W & Co. in the purchase of the bill, so as to pledge their credit to the defendants for the price. *Poirier v. Morris*, 22 Law J. Rep. (N.S.) Q.B. 313; 2 E. & B. 89.

Where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had not been received, the principal was held not to be responsible, because it was not within the scope of the agent's authority in the course of his employment, to give such a receipt. Confirming *Grant v. Norway* and *Hubbersty v. Ward*. *Coleman v. Riches*, 24 Law J. Rep. (N.S.) C.P. 125; 16 Com. B. Rep. 104.

C was in the habit of buying corn, and directing the vendor to deliver it at R's wharf, to be conveyed by R to X; and R's agent, B, gave receipts for all corn so delivered, and C, on the production of the receipt by the vendor, paid him the price. On one occasion, when C had bought wheat of L, B and L conspired together, and B gave L a receipt for the delivery of the wheat, though it had not been delivered, and L in B's presence gave C the false receipt and received the price of the wheat from him. In an action by C against R, B's principal, for the false representation,—Held, that even if R must be taken to have known that it was the course of business of C to pay the price on the production of B's receipts, he did not contract with C that he should give such receipts, and therefore was not answerable for B's fraud. *Ibid*.

The plaintiffs sold goods to T (an agent of the defendant) in his own name, treating him as principal. The defendant, at a reasonable time after the sale, and not unduly early, *bond fide* paid T sufficient money to enable him to pay the plaintiffs:—Held, that the defendant was liable to the plaintiffs for the

price of the goods. *Heald v. Kenworthy*, 24 Law J. Rep. (N.S.) Exch. 76; 10 Exch. Rep. 739.

A B was authorized by the defendant to make a proposal of sale of some land to the plaintiff, but to be accepted within a week. The plaintiff wrote to A B within that time, accepting the offer, but A B did not communicate the acceptance to the defendant until long after:—Held, that there was a valid contract which was not destroyed by the neglect of A B to communicate the acceptance to the defendant. *Wright v. Bigg*, 15 Beav. 592.

(C) RIGHTS, DUTIES AND LIABILITIES OF THE AGENT.

(a) As regards his Principal, in general.

[See *Jenkins v. Beetham*, title CLERGY (D).]

A broker who had received money for the shippage of goods on account of the owners of the ship, offered to pay it to the captain, who was also managing owner, by a cheque. This the captain declined, preferring that the broker should open a credit for him at a bank in New Brunswick in favour of H, which the broker did. The bank accordingly paid H 250*l.*, for which H gave a bill drawn by him in favour of the bank upon the broker, who accepted and paid it when due. The broker having sued the co-owners for the balance of his account:—Held, that this was a good payment of 250*l.* by the broker, and binding the co-owners. *Anderson v. Hillies*, 21 Law J. Rep. (N.S.) C.P. 150; 12 Com. B. Rep. 499.

The plaintiff, being owner of an estate, employed an agent and receiver, who paid into the defendants' bank the rents of the estate, to an account headed with the name of the estate, to distinguish it from his private account. The receiver's private account being overdrawn, he transferred the balance of the estate account to make up the deficiency due upon his private account. Upon a bill filed by the plaintiff, against the bankers, to refund this balance so transferred, it was held,—that, according to the principles of a court of equity, a person who deals with another knowing him to have in his hands, or under his controul, monies belonging to a third person, must not enter into a transaction with him, the effect of which is that a fraud is committed on the third person; and it appearing upon the evidence that the bankers were aware that the money was the produce of the rents of the plaintiff's estate, a decree was made against the bankers, for repayment of the amount. *Bodenham v. Hoskins*, 21 Law J. Rep. (N.S.) Chanc. 864: affirmed 2 De Gex, M. & G. 903.

A bill for an account by a principal against his agent cannot be sustained in equity where the transaction is a single transaction, and not tainted with fraud, the plaintiff in such case having his remedy by an action at law. *Navulshaw v. Brownrigg*, 21 Law J. Rep. (N.S.) Chanc. 57, 908; 1 Sim. N.S. 573; 2 De Gex, M. & G. 441.

(b) Right to Commission.

An agreement by a factor to sell upon a *del credere* commission need not be in writing, not being a promise to answer for the debt, default or miscarriage of another person, within the 4th section of the Statute of Frauds. *Couturier v. Hastie*, 22 Law J. Rep. (N.S.) Exch. 97; 8 Exch. Rep. 40.

The declaration alleged a contract by the defendants "to employ the plaintiff as their salesman and commission agent, at a salary of 250*l.* a year, payable quarterly on certain specified days; and not to dismiss the plaintiff at any time between any of the said quarterly days of payment without reasonable cause, or otherwise paying to the plaintiff the sum of 62*l.* 10*s.*, as for the current quarter's salary." The evidence was, that the plaintiff had been employed by the defendants as a commission agent, and had been paid by them at the rate of 62*l.* 10*s.* a quarter, "for commission":—Held, that this was not sufficient *per se* to support the contract stated in the declaration. *Butterfield v. Marler*, 3 Car. & K. 163.

A planter in India obtained advances from his agents, who by custom were entitled to a commission on their advances, and on the produce of the sales of the crop. The planter died, and his executors sold the factory, and got in the crops and remitted them to the agents, who sold the latter, and accounted to the executors for the balance, after deducting the amount due to them:—Held, that the executors were entitled to 5*l.* per cent. (Indian commission) on the gross proceeds of the factory and crop. *Matthews v. Bagshaw*, 14 Beav. 123.

If an agent by his own conduct makes it impossible to ascertain the amount of profit realized, he will be disallowed the commission which otherwise, and according to the contract, he would be entitled to claim. *Gray v. Haig*, 20 Beav. 219.

The plaintiffs appointed the defendant their agent for the sale of spirits, at a commission. The defendant had made profits by the sale of the plaintiffs' goods for which he had not given credit; he had also made profits by selling his own spirits mixed with those of his principals, and he had destroyed books of account pending the litigation. The Court disallowed him in taking the accounts 7,000*l.*, the amount of commission which by the contract he would have been entitled to if his conduct had been proper. *Ibid.*

A charge made by an agent for the sale of goods against his principal, for an allowance in respect of warehousemen's salaries, disallowed; no such claim having been made in the accounts for fourteen years. *Ibid.*

The Court deals severely with any irregularities on the part of an agent, and requires him to act strictly in all matters relating to such agency for the benefit of his principal. *Ibid.*

It is imperative upon an agent to preserve correct accounts of all his dealings and transactions, and the loss, and still more the destruction, of such evidence by the agent, falls heavily upon himself. *Ibid.*

(c) Duty to account.

Quære—Whether by the law merchant it is the duty of the broker in all cases to furnish his principal with a correct account of the contracts he has made. *Thom v. Bigland*, 22 Law J. Rep. (N.S.) Exch. 243; 8 Exch. Rep. 725.

The rights of principal and agent to sue in equity for an account between themselves are not correlative; the equity of the principal for such an account arising from the trust and confidence reposed in the agent; but *secus* as to the agent, who does not reciprocate any trust and confidence. *Pudwick v.*

Stanley, 22 Law J. Rep. (n.s.) Chanc. 184; 9 Hare, 627.

The relation of principal and agent is not alone sufficient to entitle an agent to an account in equity, when it can be determined at law. *Padwick v. Hurst*, 23 Law J. Rep. (n.s.) Chanc. 657; 18 Beav. 575.

A bill for an account by a solicitor and agent against his principal, stating the receipt and payment of monies, and also the transaction of various matters of business for the defendant, as well as advances by way of loan and payments made by the plaintiff, and that the defendant had paid to the plaintiff various sums of money, and alleging that the accounts were complex and intricate, and that the plaintiff and defendant were mutually indebted upon an open and running account, cannot be maintained when the facts disclose a case of set-off, without shewing any difficulty in taking the accounts at law; and a demurrer to such a bill was allowed. *Ibid.*

(d) As regards third Persons.

[See *Holt v. Ely*, title MONEY HAD AND RECEIVED.]

Declaration on a charter-party, alleging it to be made "between the defendant therein described as the owner of the good ship or vessel called, &c. of the one part, and the plaintiff, merchant and freighter, of the other part." The defendant pleaded *non assumptis*. The charter-party, produced at the trial, was expressed to be made between the defendant of the one part, and the plaintiff "as agent of the freighter," of the other part, and amongst other things stipulated that, "being concluded on behalf of another party, it is agreed that all responsibility on the part of S (the plaintiff) cease as soon as the cargo is shipped." No principal was named in the charter-party, and it appeared from other evidence, that the plaintiff was in point of fact himself the real freighter, and not merely an agent in the matter:—Held, that the plaintiff was entitled to sue as principal for a breach of the charter-party, notwithstanding he had contracted as agent, and that the above stipulation, applying only to his character of agent, had not the effect of limiting his responsibility as principal. *Schmalz v. Avery*, 20 Law J. Rep. (n.s.) Q.B. 228; 16 Q.B. Rep. 655.

Deeds of the plaintiff were placed by A in the hands of the defendant, her attorney, and, upon application, A declined to give any information about them, unless upon payment of a sum of money which she claimed to be due to her from the person who had devised to the plaintiff's wife the property to which the deeds related, and ultimately referred the plaintiff to the defendant. He also refused to give them up, and the plaintiff, in order to obtain them, paid the amount claimed, saying, at the same time, to the defendant, "You shall hear of this again:—"Held, that this was not a voluntary payment, and that the amount so paid was recoverable in an action for money had and received. *Oates v. Hudson*, 20 Law J. Rep. (n.s.) Exch. 284; 6 Exch. Rep. 346.

A sale of certain property seized by the assignees of a bankrupt, being about to take place, the plaintiff gave notice to the assignees of a claim to a portion of the property under a bill of sale by way of

mortgage, and thereupon the defendants, who were the attorneys of the assignees, on the 26th of August wrote to the plaintiff's attorney a letter, stating that in consideration of the plaintiff consenting to the sale, they thereby on behalf of the assignees consented that the net proceeds of the effects included in the bill of sale, should be paid over to the plaintiff to the extent of the balance due for principal and interest. This letter was written by the authority of the trade assignee, who had the management of the sale of the bankrupt's effects, but without the authority of the official assignee. In answer, the plaintiff's attorney, the next day, wrote, saying "that in compliance with the undertaking given by you herein," he, on behalf of the plaintiff, consented to the sale. The sale took place, and on the 2nd of December, the defendants wrote again to the plaintiff's attorney, referring to the former letter of the 26th, and stating that unless informed within two days of the course the plaintiff intended to pursue, "we shall consider ourselves absolved from our promise, and shall contest the validity of the bill of sale:—"Held, first, that as the letter of the 26th and 27th of August constituted a complete contract, the subsequent letter of the 2nd of December could not be looked at in construing such contract, and that the contract upon the face of it shewed that the defendants contracted merely as agents. Secondly, that the defendants had no authority to bind the official assignee to the undertaking. Thirdly, that although the defendants had no such authority, still they were not liable to be sued in an action upon the contract as principals. *Lewis v. Nicholson*, 21 Law J. Rep. (n.s.) Q.B. 311.

A written contract expressed to be between V, a foreigner resident abroad, and the plaintiff, resident in London, whereby the plaintiff engaged to serve V abroad for a certain period, was signed in London by the defendant expressly for V:—Held, that the defendant was not liable for V's breach of the contract in wrongfully dismissing the plaintiff from his service. *Mahony v. Keele*, 23 Law J. Rep. (n.s.) C.P. 54; 14 Com. B. Rep. 390.

By a written memorandum made between the defendant for and on the part of N of the first part, and the plaintiff of the second part, the defendant, on the part of N, agreed to let, and the plaintiff agreed to take, certain premises for a term of years, paying rent to the defendant, for the use of N; and it was also agreed that no auction should be committed on the said premises without the licence, in writing, of the defendant on the part of N, and that the plaintiff should take a lease and execute a counterpart thereof when called upon to do so by the defendant on the part of N. The memorandum was signed by the defendant in his own name without any reference to N:—Held, that the defendant was personally liable to be sued upon this agreement. *Tanner v. Christian*, 24 Law J. Rep. (n.s.) Q.B. 91; 4 E. & B. 591.

By a charter-party between the plaintiff and the defendants, described as of London, merchants, it was agreed that the plaintiff's ship should proceed to Torreveja, and there load a full cargo, at merchants' risk and expense, which the said merchants thereby bound themselves to ship, and being so loaded should proceed to Memel and deliver her cargo, being paid freight, half to be paid in cash on

unloading and delivery, and remainder by good bills in London. Thirty running days to be allowed the said merchants for loading at Torrevieja and discharging at Memel. At the foot of the charter-party were the words "By authority of and as agents for M. A. H. Schwedersky, of Memel," followed by the signatures of the plaintiff and the defendants:—Held, that the defendants were personally liable for a breach of the charter-party. *Lennard v. Robinson*, 24 Law J. Rep. (N.S.) Q.B. 275.

A, who lived at Liverpool, brought to a bank at Liverpool a bill of exchange, appearing to have been drawn by B, and to have been accepted by C, who both lived in Yorkshire, and stated that he was agent for B, and inquired of the manager of the bank whether he would discount the bill for B, without requiring him, A, to indorse it. The manager agreed to discount the bill without an indorsement by A, and the bill was discounted accordingly, and the money was paid to A. It appeared afterwards that the signature of C had been forged by B, and the bill proved to be worthless. It was assumed that A was innocent, and had no knowledge of the forgery. A became a bankrupt. The bank tendered a proof against his estate in respect of the bill, which was allowed by the Commissioner, but no inquiry was then made whether the money had passed from A to B:—Held, on appeal from the decision of the Commissioner, first, that the bank had no claim against A in respect of the forgery of the bill; and, secondly, that the bank had a right to an inquiry as to the relations of A and B after the discounting of the bill, with reference to the money paid to A. *Ex parte Bird, in re Bourne*, 20 Law J. Rep. (N.S.) Bankr. 16; 4 De Gex & S. 273.

An agent is liable to account only to his principal, and the case of a charity forms no exception to the rule. The trustee of a charity managed its affairs by an agent, who received the income, and had the title-deeds in his possession. The agent was made a party to an information for an account and a scheme. Held, on demurrer, that he was not a proper party. *The Attorney General v. the Earl of Chesterfield*, 18 Beav. 596.

In a case where A had agreed to remit certain consignments to B, and B had agreed to account with A for the proceeds of such consignments:—Held, that it was not competent at any time afterwards for B to assert a paramount title to the proceeds of such consignments. *Zulueta v. Vincent*, 1 De Gex, M. & G. 315.

(D) POWER AND AUTHORITY OF THE AGENT.

[See *Morgan v. Marquis*, title BANKRUPTCY, ante, p. 77.]

An agent appointed to represent a party on a reference to arbitration, and to conduct the reference on his behalf, though not an attorney, has authority to bind his principal by waiving an objection to an improper appointment of an umpire by lot. *Backhouse v. Taylor*, 20 Law J. Rep. (N.S.) Q.B. 233; 2 L. M. & P. P.C. 70.

The plaintiff consigned pearls to a Liverpool merchant for sale, and drew bills upon him to an amount greater than the value of the pearls, which bills he accepted. The Liverpool merchant then handed the pearls to his London agent to be sold, and drew bills upon him, as an advance, upon ac-

count of the pearls. The London agent accepted the bills, having notice that the pearls had been consigned by the plaintiff for sale. The Liverpool merchant became insolvent, and the bills drawn upon him by the plaintiff were not paid. The London agent sold the goods to recoup himself the bills drawn upon him by the Liverpool merchant. Upon bill by the consignor alleging fraud and collusion, and praying that the London agent might be decreed to pay him the amount produced by the sale of the pearls,—Held, affirming the decree of the Court below, that the pledge was valid within the 5 & 6 Vict. c. 39, as made *bonâ fide* and in the ordinary course of business. *Navulshaw v. Brownrigg*, 21 Law J. Rep. (N.S.) Chanc. 908; 2 De Gex, M. & G. 441: affirming 21 Law J. Rep. (N.S.) Chanc. 57; 1 Sim. N.S. 573.

Notice to the pledgee of the fact that the goods were transmitted to the consignee, with directions to sell simply, will not vitiate the pledge; *secus*, if the pledgee had notice that the consignee was prohibited from pledging. *Ibid*.

The vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness, and if it turns out that the name of one of the parties is forged and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. *Gurney v. Womersley*, 24 Law J. Rep. (N.S.) Q.B. 46; 4 E. & B. 133.

The defendants, bill-brokers, having received from A a bill of exchange drawn and indorsed by A, for the purposes of being discounted, took it to the plaintiffs, who were money-lenders, with whom the defendants had previously had similar dealings, and acting as principals, the defendants procured the bill to be discounted by the plaintiffs, without, however, indorsing or guaranteeing it, though asked by the plaintiffs to do so. The rate of discount charged by the defendants to A exceeded that charged by the plaintiffs to the defendants. The acceptance to the bill turned out to have been forged by A, and the bill proved valueless:—Held, that the plaintiffs were entitled to recover the sum paid to the defendants upon the discount of the bill as upon a failure of consideration. *Ibid*.

A contracted with the plaintiff that he should endeavour to sell a picture belonging to A, and if he succeeded A should pay him 100*l*. A died. The plaintiff endeavoured to sell the picture, and after A's death succeeded in selling it, and brought an action against A's administratrix. The declaration set out these facts, and alleged that the defendant confirmed the sale as administratrix, and the plaintiff claimed the 100*l*. from the defendant as administratrix:—Held, that the declaration was bad. That the defendant was not liable as administratrix, or personally, for the 100*l*., the original authority having been revoked by A's death. *Campanari v. Woodburn*, 24 Law J. Rep. (N.S.) C.P. 13; 15 Com. B. Rep. 400.

Semble—that the defendant might be liable personally to the plaintiff, on the confirmation of the sale, for a *quantum meruit*, as on a fresh employment by her to sell. *Ibid*.

A power to a land-agent to "manage and superintend estates" authorizes him, on behalf of his principal, to enter into an agreement for the usual and customary leases, according to the nature and

locality of the property. *Peers v. Sneyd*, 17 Beav. 151.

An agent employed to purchase cannot buy his own goods for his principal; neither can an agent employed to sell purchase for himself his principal's goods. Principals may either repudiate such transactions altogether, or adopt and take the benefit of them. *Bentley v. Craven*, 18 Beav. 75.

The same rule applies to the case of trustee and *cestui que trust* and to other relations, and even though the transaction be perfectly *bond fide*. *Ibid*.

PRINCIPAL AND SURETY.

[See **BILLS AND NOTES—BOND—GUARANTIE.**]

A and B entered into a joint and several bond, conditioned for the payment of all monies due by B to a bank. After the making of the bond the bank, without the privity or consent of B, executed a deed, whereby they in terms released B from all actions, &c., with a proviso that nothing therein contained was to extend to prevent the bank from suing any other person than B, who might be liable to make good to the bank any money due from B, or as being jointly or severally bound with B in any bond, &c. as if the deed had not been executed, it being understood and agreed that, as regards any such suits, the deed should not operate or be pleaded in bar or as a release:—Held, first, that this deed operated only as a covenant not to sue B, and not as a release. Secondly, that A was not discharged by the execution of that deed without his consent; the effect of a covenant not to sue the principal debtor qualified by a reserve of the remedies against a surety being to allow the surety to retain all his remedies over against the principal, and the covenant not to sue operating only so far as the rights of the surety may not be affected. *Price v. Barker*, 24 Law J. Rep. (n.s.) Q.B. 130; 4 E. & B. 760.

F & Co. bankers, were creditors of the firm of H, B & Co., which consisted of M A H and J B. S H, who was a married woman, with separate property, joined as surety with J B in several promissory notes and bills of exchange to F & Co., to secure a debt due to them from the firm of H, B & Co. The firm of H, B & Co. being then greatly indebted to F & Co. dissolved partnership, and thereupon articles of agreement were entered into between M A H and J B and F & Co., which provided that J B should carry on the business alone; that J B should take upon himself all the partnership liabilities, and should pay the debt due to F & Co. by monthly instalments, and should give a bond to F & Co. as an additional or collateral security only, but not as a release or extinguishment of the partnership debt. F & Co. agreed not to sue M A H for the partnership debt, or if that should be necessary for the sake of conformity, not to levy execution against M A H; and also not to sue J B so long as the monthly instalments were duly paid; but the remedies against the sureties for the partnership debt were expressly reserved. J B becoming bankrupt, the bill was filed by F & Co. against S H and her trustees, to make her separate estate available in respect of the notes and bills in which she had joined as surety. The Court below, on motion, made an order for a receiver:—Held, upon appeal,

that the case upon the whole record presented too much doubt as to the creditor's rights against the surety to warrant the possession of the property being disturbed; and the order for a receiver was discharged. *Owen v. Homan*, 20 Law J. Rep. (n.s.) Chanc. 314; 3 Mac. & G. 378: affirmed 4 H.L. Cas. 997.

Quære—whether in a case where there is no communication between the creditor and the surety, the creditor is affected by fraudulent representations made by the principal debtor to the surety with a view to induce the latter to join in the security. *Ibid*.

Quære—whether a creditor by agreeing not to sue his principal debtor so long as certain instalments of the debt are duly paid, has thereby discharged the surety. *Ibid*.

Semble—where a creditor accepts, from one of two joint debtors by simple contract, a bond for the whole debt, with a proviso that the bond shall not operate to extinguish the debt, the simple contract debt is nevertheless merged in the specialty, and the proviso is void as repugnant to the deed. *Ibid*.

J W joined in a bond as surety, and the creditor subsequently took a promissory note from the principal debtor, payable at two months, for the balance due upon the bond. The principal debtor becoming insolvent, and the note being unpaid, the creditor sued J W on the bond, who thereupon filed his bill for an injunction. It was proved that at the time of taking the note there was a general understanding between the principal debtor and the creditor that the remedies upon the bond should not be thereby affected:—Held, that this general understanding amounted to a stipulation between the parties preventing the legal consequences that would have otherwise flowed from the transaction, and that the surety was not released. *Wylde v. Rogers*, 21 Law J. Rep. (n.s.) Chanc. 611; 1 De Gex, M. & G. 408.

An agreement that a dealing between the creditor and principal debtor shall not operate as a discharge of the surety may be proved by parol evidence. *Ibid*.

A sum of money was borrowed from an insurance company, and a bond was given to secure the repayment of the money. The borrower at the same time insured his life as a further security; and the bond extended to the payment of the premiums for keeping up the policy. The insurance company having ceased to carry on business was dissolved, and the affairs being wound up, the company transferred, amongst other things, this bond and policy to another insurance company. No premiums were paid to the second company, and the policy was allowed to drop. The surety in the bond died, and the second insurance company claimed to be creditors against his estate for the amount of premiums unpaid, on the ground that the policies ought to be kept on foot until the money due upon the bond had been paid:—Held, as regarded the premiums, that this was not such a contract as the assignees of the first insurance company could enforce, although they had a good claim against the estate of the surety, *quoad* the amount secured by the bond. *Atkinson v. Gylby*, 21 Law J. Rep. (n.s.) Chanc. 848.

The right of a surety to sue for his discharge does not arise until the principal is in a condition to enforce his rights in respect of their joint liability, and

then only in cases where the principal or creditor refuses to sue the debtor. *Padwick v. Stanley*, 22 Law J. Rep. (N.S.) Chanc. 184; 9 Hare, 627.

A surety, in answer to a letter informing him that proceedings were contemplated against him and his principal, stated, through his solicitor, that he would in a post or two pay the amount and interest due on the joint security. The surety died, and the creditor sued the administratrix of the surety, and it was held at the Rolls that the letter was a promise to pay, for which the forbearance to sue was a sufficient consideration: but on appeal,—Held, that the surety had, neither at law nor in equity, rendered himself severally liable. *Jones v. Beach*, 22 Law J. Rep. (N.S.) Chanc. 425; 2 De Gex, M. & G. 886; reversing 21 Law J. Rep. (N.S.) Chanc. 543.

Upon the taking of a guarantee for the repayment of advances to a customer, a bank took from the customer a warrant of attorney to secure the debt, and entered into an agreement with the surety that the bank would, at any time when requested by the surety, enter up judgment and levy execution against the customer, the principal debtor, on the warrant of attorney. The surety made a request to that effect, and the bank took the goods of the customer in execution to an amount sufficient to satisfy the debt. On the bankruptcy of the customer, the assignees brought an action against the bank for the goods, and they succeeded, the bank having neglected to comply with the requirements of the Bankrupt Law Consolidation Act, by not filing the original warrant of attorney or a true copy in proper time:—Held, affirming a decree of the Court below, that the neglect of the bank operated as a discharge of the liability of the surety. As to the costs, the plaintiff in equity having pleaded and so put the defendant in equity to needless expense, as plaintiff at law, the Court in dismissing the appeal ordered the plaintiff in equity to pay the costs at law subsequent to the declaration, and gave him the deposit only. *Watson v. Alcock*, 22 Law J. Rep. (N.S.) Chanc. 858; 4 De Gex, M. & G. 242; 1 Sm. & G. 319.

A bond was given by two sureties for the faithful discharge of his duties by an official assignee in bankruptcy. Immediately upon his death, by the examination of his books, he was found to be a defaulter to a very large amount. Actions were commenced on the bond against the sureties. One of the sureties sought to restrain the action on the ground of the negligence of the officials whose duty it was to examine the assignee's accounts, &c. There did not, however, appear to have been any want of compliance with the rules and regulations in bankruptcy by these parties, and the motion for an injunction was refused. *Dawson v. Lucas*, 23 Law J. Rep. (N.S.) Chanc. 434; Kay, 280.

To discharge a surety for the due performance of duties there must be on the part of the obligee an act of connivance or gross negligence amounting to a wilful shutting of the eyes to the fraud, or something approximating to it. *Ibid.*

Two persons entered into partnership, and one gave to the other the joint and several bond of himself and of another person as his surety, indemnifying the other partner from all loss from the partnership business. By the articles of partnership, it was to continue for five years, and it was agreed that if either partner should retire and the other continue the busi-

ness, the latter might take the former's share of the assets at a valuation; and it was also agreed that if at the end of the partnership either partner should wish to carry on the business, and should not take the share of the other at the before-mentioned valuation, the assets should be realized, the debts paid, and the surplus divided between them. The partnership expired by effluxion of time, neither partner having retired. At the end of the term, the partners continued the partnership for a year and a half or more. The surety never was consulted on this proceeding, although he was cognizant that the concern had not been wound up at the end of the term. The partner (the obligee in the bond) retired, leaving the whole assets in the hands of the other to wind up the concern, and the partner, the obligor, three months afterwards, became bankrupt and absconded with part of the assets, and the obligee partner paid off all the liabilities. The surety died, and the obligee partner sued his executor on the bond, and a bill was filed to restrain the action:—Held, (overruling the decision of one of the Vice Chancellors, who had dismissed the bill, with costs,) that as the partnership affairs had not been wound up at the end of the five years pursuant to the stipulations of the deed, the surety and his estate were discharged from all liability on the bond, and a perpetual injunction was ordered to restrain all proceedings upon it as against the surety. *Small v. Currie*, 23 Law J. Rep. (N.S.) Chanc. 746; 5 De Gex, M. & G. 141; 2 Drew. 102.

The surety in a bond having died, a creditors' suit was instituted to administer his estate, and the obligee was declared a creditor for the amount due upon the bond. After the decree, the obligee brought an action against the principal in the bond, and took a judgment by arrangement for payment of the debt by instalments:—Held, that this dealing with the principal did not take away the right of the creditor against the surety which had been established by the decree in the suit. *Jenkins v. Robertson*, 23 Law J. Rep. (N.S.) Chanc. 816; 2 Drew. 351.

A principal debtor joined with a surety in a joint and several promissory note to a creditor of the principal debtor, for securing the debt. The principal afterwards executed an assignment of property for the benefit of his creditors, containing a release by the creditors, but no reservation was contained of the creditor's rights against the surety. The creditor to whom the promissory note was given, executed the deed with the privy of the surety, and on the understanding, as shewn upon the evidence, that his rights against the surety were not to be prejudiced thereby. The creditor to whom the note was given and two other creditors were the trustees of the deed, and those three persons were the only creditors of the principal who executed the deed. The principal debtor was adjudicated bankrupt, the act of bankruptcy being the execution of the deed. The surety had before committed an act of bankruptcy, and had been adjudged bankrupt. The Commissioner refused to permit the holder of the note and trustee of the deed to prove against the estate of the surety; but upon appeal,—Held, that he was so entitled, and the Commissioner's decision was reversed. *Ex parte Harvey, in re Blakely*, and *Ex parte Springfield, in re the same*, 23 Law J. Rep. (N.S.) Bankr. 26; 4 De Gex, M. & G. 881.

A bank lent money to two brothers on condition

that a third brother should join in giving security. The three brothers drew and signed a cheque, and the money was paid to them. The third brother died, and the other two being unable to pay, a bill was filed against the executors of the deceased brother:—Held, that the liability created by the three brothers was not joint and several. *Other v. Iveson*, 24 Law J. Rep. (N.S.) Chanc. 654; 3 Drew. 177.

A B, who being one of several sureties had been obliged to pay a large sum for the principal debtor, filed a bill against his co-sureties for contribution. It was held, that, one co-surety being insolvent, the other sureties must pay the whole amount equally between them, and that the co-sureties must also pay interest to A B on their shares which had been paid by him. *Hitchman v. Stewart*, 24 Law J. Rep. (N.S.) Chanc. 690; 3 Drew. 271.

It was further held, that the principal debtor and the insolvent surety were properly made parties to the suit; and all parties were ordered to pay their own costs. *Ibid*.

Two owners of two reversionary shares of a fund in court assigned their shares to a creditor for securing 1,000*l*. A, one of the two owners, was principal, and B, the other, a surety. C, the creditor, obtained a stop-order, and subsequently assigned his mortgage to D and E, the trustees of his marriage settlement, who did not obtain any fresh stop-order nor give notice of their assignment to B, the surety. The solicitor of C, the original creditor, presented a petition in the name of A, the principal debtor, for the payment out of court of A's share, falsely alleging therein that he had paid 500*l*, part of the debt, and without any authority, the same solicitor instructed counsel to appear and consent on behalf of B, the surety, and C, the original creditor, and upon this petition A's share was paid out of court without the knowledge of B or C or D or E. B, the surety, filed his bill praying that C, the original creditor, and his trustees, and all claiming under the settlement, might be held bound by the statements in the petition, and that the money of A, the principal debtor, received by the solicitor of C, ought to be treated as received for C, or for the trustees of his marriage settlement. One of the Vice Chancellors decided that as the primary fund was lost by reason of the neglect of the trustees in not obtaining a stop-order, the creditors could not have recourse to the fund secondarily liable, and that the share of the surety was not liable to the debt:—Held, upon appeal, first, that it is not necessary to give a surety notice of an assignment of a debt, and that the share of the surety was not discharged by the want of notice; secondly, that the omission of the trustees to obtain a fresh stop-order on the occasion of the assignment to them gave the surety no right or equity; thirdly, that neither the principal nor the surety were bound by the allegations in the petition, the solicitor not being authorized to make them or to act in the matter; fourthly, that the share of the surety was liable to make good any deficiency of the share of the principal debtor not occasioned by the default of the original creditor, although the principal security was lost through an order of the Court. *Wheatley v. Bastow*, 24 Law J. Rep. (N.S.) Chanc. 727.

The solicitor was ordered to shew cause why he should not be struck off the roll. *Ibid*.

A party, relying on his ignorance of facts, must shew, not only that he had not the information, but that he could not with due diligence obtain it. *Wason v. Wareing*, 15 Beav. 151.

The plaintiff, a surety, sought to set aside a deed, executed in 1848, on the ground that he had been released by a transaction between the principals in 1842, of which he was ignorant in 1848. It appeared that he had made inquiries in 1845, and was referred to persons who could give him the information, but neglected to do so until the end of 1849, when he obtained it:—Held, that having in 1845 the means of acquiring the knowledge, he must be deemed to have had it in 1848, and his bill was dismissed. *Ibid*.

A necessary consequence of a reservation in a composition deed of a creditor's remedy against a surety, is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. *Close v. Close*, 4 De Gex, M. & G. 176.

Therefore, where one of the creditors, who acceded to a composition deed, was also a residuary legatee of a surety for the compounding debtors to another creditor, and one of the compounding debtors happened to be the surety's executor,—Held, that the residuary legatee's accession must be taken to have been in respect of his direct debt only, and did not preclude him from insisting on the surety's estate being indemnified by the debtors. *Ibid*.

One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal died, having appointed the surety his executor, and the surety received the insurance money:—Held, that to the extent to which it was not required for indemnifying the surety, it ought to be applied in payment of the debt. *Lea v. Hinton*, 5 De Gex, M. & G. 823; 19 Beav. 324.

In a suit by A against B and C, a conveyance of an estate by A to B was declared void and set aside for fraud, except as to an intermediate mortgage of the estate, made by B to D to secure a sum of money lent by D to B, and for which C had joined B, as his surety in a bond and covenant to D; and the decree also directed B to redeem the estate and procure its reconveyance to A, and if he did not do so, gave A the right to redeem, and to use the name of B for that purpose, and to recover from B the money which A should pay to D for such reconveyance; and the bill was dismissed against C. A afterwards procured an assignment of D's mortgage to a trustee, and, in the name of the mortgagees, brought an action against C on his covenant and bond:—Held, that if A had redeemed D, the debt would have gone as against C; that C, as the surety of B, would, on payment of the mortgage-debt, be entitled to the benefit of the security held by D, such security not having been disturbed by the decree; that the charge of participation by C in the fraud, whereby B had been enabled to create the mortgage on the estate, was not a ground for depriving C of such right; and that C was therefore, in a suit for an injunction to restrain A from suing him on the bond and covenant, entitled to such relief. *Yonge v. Reynell*, 9 Hare, 809.

The circumstance of the dismissal, as against C, of the bill brought by A against B and C, which prayed that the mortgage-debt might be paid by B and C, was material to the case, though it was not alone conclusive, as it might well be that there might be no equity to compel C to pay the debt, though C might have no equity to be relieved from his legal liability to pay it. *Ibid.*

The right of a surety to the benefit of the security held by the creditor is derived from the obligation of the principal debtor to indemnify his surety—*semble*. *Ibid.*

The contract of suretyship entitles the surety to require that his position shall not be altered by any arrangement between the creditor and the principal debtor from that in which he stood at the time of the contract, and it therefore entitles him absolutely to the benefit of all the securities for the debt which the creditor held at the time of the contract; it also entitles the surety at any time to require that the creditor shall enforce against the principal debtor, not only all his remedies and all the securities for the debt which he had at the time of the contract, but also any securities for the debt which the creditor may have acquired subsequently to the contract, and which he holds at the time that the surety requires him to proceed. And as a person paying off a debt for which he is liable is entitled in equity to stand in the place of the creditor, and to have the benefit of the securities held by the creditor for such debt, so the surety, on paying off the debt of the principal debtor, is entitled to require from the creditor the benefit, not only of the securities for the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he holds at the time he is paid off. But there is no implied duty in the contract of suretyship which requires the creditor to retain for the benefit of the surety securities for the debt which he might subsequently receive from the principal debtor, and which, whilst the creditor holds them, the surety does not call upon him to enforce. And a creditor who, after the contract of suretyship, having taken a further security from the principal debtor, subsequently parts with that security, does not thereby, either wholly or *pro tanto*, release the surety. *Newton v. Chorlton*, 10 Hare, 646.

A, B and C contracted with a company to execute certain works on given terms; D and E gave a bond as their sureties for the performance of the contract; A and B retired from the partnership, and F was substituted. Afterwards disputes arose between the company and C and F as to the conduct of the works, and various transactions took place, by which the terms of the contract were varied, and during which the company paid to C and F certain monies which it had been agreed originally should be paid to A, B and C. D and E, the sureties, were no parties to these transactions, and gave no express consent; but they had been the solicitors of A, B and C in the original contract, knew of all the subsequent transactions, and acted as the solicitors of C and F; and, as such solicitors, prepared many of the documents required for such transactions. The company having brought an action on the bond against the sureties for breach of contract, they filed this bill to restrain the action:—Held, that the sureties were not discharged, and that the action could not be

stopped. *Woodcock v. the Oxford and Worcester Rail. Co.*, 1 Drew. 521.

A creditor, whose debt was secured by the bond of the principal debtor and a surety, took, after the date of the transaction, further security from the principal debtor, and afterwards gave up that further security:—Held, that this did not discharge the surety. *Newton v. Chorlton*, 2 Drew. 333.

PRISONER.

Case against the keeper of the Queen's Prison for not having the body of a debtor before the Exchequer pursuant to a writ of *habeas corpus ad satisfaciendum*. Plea, not guilty by statute. The defendant had in his custody a debtor, detained at the suit of the plaintiff on a *ca. sa.* from the Palace Court. The debtor subsequently petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110. s. 35. On the 7th of January, the vesting order was made. On the 27th of March the plaintiff sued out a *habeas corpus ad satisfaciendum*, returnable on the 15th of April, to charge the defendant in execution. On the 8th of April the Insolvent Court ordered the debtor to be discharged *forthwith* as to debts due on the 7th of January, excepting a debt due from the plaintiff, and as to that that he should be discharged as soon as he should have been in custody at the suit of the plaintiff for three months *to be computed from the time of the vesting order*. The warrant, dated the 9th of April, directed the discharge of the debtor in conformity with the terms of the vesting order, and on that day the prisoner was discharged. The defendant, on the 15th of April, returned to the writ of *habeas* that the debtor was discharged by a warrant of the Insolvent Court:—Held, first, that the defendant was entitled to give the act and the special matter in evidence under the plea of not guilty by statute, pursuant to the 1 & 2 Vict. c. 110. s. 110.—*Quere*.—If the defence was open to the defendant under the plea of not guilty. Held, secondly, that the defendant was bound to discharge the debtor; that he had no power to detain him until the return of the writ, or to take bail for his appearance thereto, or to retake him after his discharge. Thirdly, that the warrant was not void, its meaning being that the debtor was to be discharged *forthwith*. *Harvey v. Hudson*, 20 Law J. Rep. (n.s.) Exch. 11; 5 Exch. Rep. 845.

PRODUCTION AND INSPECTION OF DOCUMENTS.

[See PRACTICE IN EQUITY.]

- (A) IN GENERAL.
- (B) IRRESPECTIVE OF THE STATUTE.
- (C) UNDER THE STATUTE.

(A) IN GENERAL.

Action by the assignee of the reversion on a covenant in a lease. The deed of assignment of the reversion to the plaintiffs was subject to certain "mortgage debts." The defendant, in order to prove that the legal estate was out of the plaintiffs, called the

attorney of a person to whom the mortgage (subject to which the assignment had been made) had been transferred, to produce the mortgage deed under a *subpoena duces tecum*. The attorney refused to produce it, and said that his client had instructed him not to produce it. Another witness was then called to give secondary evidence of the contents of the deed, by means of a draft; and in order to identify the deed with the draft, the Judge ordered the attorney to produce the deed, and to allow the second witness to look at the indorsement; upon which the witness identified it as the deed of which the draft was a copy, and thereupon secondary evidence was received of the contents of the deed:—Held, first, that the privilege of the client was not violated by requiring the attorney to shew the indorsement on the deed. Secondly, that the omission to subpoena the client was, under the circumstances, no ground for excluding secondary evidence of the contents of the deed. Thirdly, by *Crompton, J.*, and *semble*, by *Coleridge, J.*, *Wightman, J.* and *Erle, J.*, that if the privilege of the client had been violated, the party to the action against whom the evidence was admitted, could not make it a ground of application for a new trial. *Phelps v. Prew*, 23 Law J. Rep. (n.s.) Q.B. 140; 3 E. & B. 430.

The plaintiffs, who were assignees of a bankrupt firm at Tenerife, filed their bill against the defendants, three brothers, one of whom managed the business of the Tenerife firm, for an account of certain remittances forwarded by the manager of the Tenerife firm to his brother, as agent in London. The defendant, the London agent, set up as a defence certain proceedings in the Lord Mayor's Court, instituted by the third defendant as executor of his father, under which the money in the hands of the agent of the Tenerife firm was attached for a debt alleged to be due to the estate of the father. Upon motion for production of documents, it was held, that letters which had passed between the London agent and his solicitors with reference to the litigation in this suit were privileged. That letters which had passed between such solicitors and the attorney acting in the proceedings in the Lord Mayor's Court were also privileged; but that the letters from the defendant, the manager of the Tenerife firm, to the co-defendant, the agent in London, for the purpose of being communicated to his solicitors, with a view to the litigation in this suit, were not privileged. *Goodall v. Little*, 20 Law J. Rep. (n.s.) Chanc. 132; 1 Sim. N.S. 155.

The plaintiff filed his bill, alleging that during the time his subjects were in a state of rebellion, certain money had been taken from the royal treasury and had been sent over by the provisional government to the defendants, as their agents in this country, for the purchase of a steam-ship. The plaintiff, having been reinstated in his government, filed this bill for the purpose of obtaining possession of the ship so purchased by the defendants, and it prayed production of documents relating to the matters. The defendants alleged that the money expended in the purchase of the ship had not been taken from the treasury, but had been contributed by many thousand persons in Sicily. They admitted possession of the documents, but refused production in the absence of the persons for whom they were agents, and alleged that some of the documents, if produced,

would render themselves and the persons from whom they had received the money, subject to criminal prosecution, punishment, and penalties in Sicily:—Held, upon motion, that the documents must be produced. *The King of the Two Sicilies v. Willcox*, 20 Law J. Rep. (n.s.) Chanc. 417; 1 Sim. N.S. 301.

Production of maps, plans, and other documents made by land agents in the course of their employment, and to facilitate them in letting the farms, and in computing the rents, and also the fines to be paid by copyhold tenants, will be ordered, though it was alleged that they were made for private use, and were not paid for by the principal, and that the cost was not covered by the poundage which it had been agreed the agents should receive. *Lady Beresford v. Driver*, 20 Law J. Rep. (n.s.) Chanc. 476; 14 Beav. 387.

Upon a bill filed against three directors, who were also treasurers and trustees of a public company, the defendants were required to produce documents which, by their answer, they stated to be at the office of the company, but not otherwise in their possession, custody or power. The defendants, previously to the motion for production, had ceased to be treasurers and trustees:—Held, that the defendants could not be compelled to produce documents which were not in their exclusive possession, but only in their possession jointly with the other directors of the company. *Penny v. Goode*, 22 Law J. Rep. (n.s.) Chanc. 371; 1 Drew. 474.

Land agents paid by commission will be directed to deliver up such maps, plans and other documents relating to the estates as were made or collected by them in the course of their employment, even though it is alleged that they were made for their own private use. *Lady Beresford v. Driver*, 22 Law J. Rep. (n.s.) Chanc. 407; 16 Beav. 134.

The question in the suit being whether, upon the construction of certain words in a will, an estate tail or an estate in fee was limited, it became necessary for the plaintiff to prove his pedigree. The plaintiff moved for production of documents in the defendant's possession, consisting of deeds shewing the precise nature and extent of the property; copies of pedigrees furnished to counsel to defend an action of ejectment brought against the defendant by the plaintiff; extracts from parish registries of births, deaths and marriages; and a pedigree from the Heralds' College procured by the defendant for his defence to the action:—Held, that the extracts from parish registries and the pedigree from the Heralds' College must be produced, but none of the other documents required. *Wright v. Vernon*, 22 Law J. Rep. (n.s.) Chanc. 447; 1 Drew. 344.

Professional communications made with a view to secure the title of the client against all claimants are privileged from production, although made *ante litem motam*. *Manser v. Dix*, 24 Law J. Rep. (n.s.) Chanc. 497; 1 Kay & J. 451.

Where a solicitor is privileged from disclosing professional communications that have passed between his client and himself, the client will be also protected from disclosing them, the privilege being the privilege of the client, and not of the solicitor. *Ibid*.

Where it is sworn that documents are confidential communications relating to the particular suit, or to

another suit, which though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit. *Thompson v. Falk*, 1 Drew. 21.

The plaintiff impeached a certain deed in the defendant's possession, and stated in his bill that this deed had been left with the defendant as a security for a loan of money which had been since repaid. The defendant in his answer admitted the possession and relevancy of the impeached deed, and stated that it was a *bonâ fide* conveyance to him for valuable consideration, and denied that it had ever been so deposited with him as in the bill mentioned:—Held, that as the defendant denied that he was a mortgagee, the plaintiff's whole statement that there had been such a mortgage, and that it was paid off must be regarded, and that the plaintiff was entitled to the production of the deed; *secus*, if the defendant had claimed the privilege of a mortgagee to refuse production of the deed. *Jones v. Jones*, Kay, App. vi.

If a title deed in the possession of the defendant be impeached, all subsequent documents which depend upon and proceed from it may be required to be produced, as well as the deed itself; and, therefore, in a suit to set aside a conveyance of an equity of redemption to the defendant, a receipt for the mortgage money obtained by him after the date of the deed must be produced. *Ibid*.

(B) IRRESPECTIVE OF THE STATUTE.

The defendant had a freehold interest in certain premises, and was also assignee of the lease of other adjoining premises, the reversion of which was in the lessor of the plaintiff. The defendant for some time previous to, and until the end of the term, occupied the freehold and leasehold premises together, and, as the lessor of the plaintiff stated, had obliterated the boundaries between them. On the expiration of the lease, the lessor of the plaintiff brought ejectment to recover a portion of the land, which he claimed as parcel of the leasehold, and alleged that the defendant claimed as his freehold; and he prayed to be permitted to inspect the lease, the assignment of the lease to the defendant, and the conveyance of the freehold to the latter, alleging that he believed that the parcels in the lease and in the conveyance of the freehold would help to make out his case. Held, that he was entitled to inspect the lease (if he had no counterpart) and also the assignment, but not the conveyance of the freehold, as that deed did not prove any part of the plaintiff's title to the land he sought to recover. *Doe d. Avery v. Langford*, 21 Law J. Rep. (N.S.) Q.B. 217; 1 Bail C.C. 37.

The plaintiff having declared on a guarantee contained in a letter by the defendant, who stated in his affidavit his belief that the letter, if produced, would establish his defence to the action, and that he was advised and believed that it was necessary for his attorney to be informed of its true purport and effect, in order to prepare his defence to the action, —Held, that the defendant was entitled, irrespective of the 14 & 15 Vict. c. 99. s. 6, to an inspection and copy of the letter. *Bluck v. Gompertz*, 21 Law J. Rep. (N.S.) Exch. 25; 7 Exch. Rep. 67.

Wherever an action is brought upon an instrument in which the defendant has an interest, the Court has a common law jurisdiction to order the

plaintiff to allow the defendant to inspect it. Ejectment was brought to recover a house upon the ground of a forfeiture by reason of breaches of covenant contained in two leases comprising the house in question. W, the tenant in possession of the house, took out a summons to inspect these leases. Before the Judge, it was alleged that W was in lawful occupation of the house. The attorney for the lessors of the plaintiff, neither admitting nor denying that this was so, objected to the order on the ground that the leases were part of his title deeds, which W had no right to inspect. The Judge considered the statement of W to be true, as it was not denied, and made the order to inspect:—Held, that this order was properly made under the common law jurisdiction of the Court. *Doe d. Child v. Roe*, 22 Law J. Rep. (N.S.) Q.B. 102; 1 E. & B. 279.

(C) UNDER THE STATUTE.

The statute 14 & 15 Vict. c. 99. s. 6. does not enable a party to an action to call upon his opponent to answer, by affidavit, whether he has any document in his possession relating to the matters in question in the action, and, if any, to specify what they are; but it entitles him to have an inspection of all documents in the possession of the other party, material and relevant to the proof of the case on which the applicant relies. *Rayner v. Althausen*, 21 Law J. Rep. (N.S.) Q.B. 68.

The statute 14 & 15 Vict. c. 99. s. 6. does not enable a party to an action to search generally his opponent's books and papers with a view of detecting a flaw in his opponent's case, but entitles him to inspect those documents, and those only, in his opponent's possession which are relevant to the case on which the applicant relies. The applicant cannot, by alleging that his opponent is in possession of documents material to the issues to be maintained by the former, compel the latter to make affidavits in answer, to discover whether he has any such documents in his possession, and to specify what they are. *Galsworthy v. Norman*, 21 Law J. Rep. (N.S.) Q.B. 70.

Where an application is made for inspection of documents under the 14 & 15 Vict. c. 99. s. 6, a place for the inspection should be named. Issue need not be joined before the order is applied for. *Rogers v. Turner*, 21 Law J. Rep. (N.S.) Exch. 8.

In an action against the directors of a joint-stock company to recover money alleged to be due to the plaintiff for services as secretary to the company, the plaintiff made an affidavit that there was, as he believed, in the possession of the company and of the directors thereof a book or books containing minutes of the resolutions, orders and proceedings of directors and provisional directors of the company and of the committees thereof; and that he was advised that it might be necessary that the said minutes or some parts thereof should be adduced on the trial of the cause as evidence on his part; and that without an inspection and copy thereof he could not safely proceed to trial; and that he had no copy of the said minutes in his possession or controul, or any certain information as to the contents thereof or any part thereof:—Held, that this affidavit was not sufficient to entitle him to an order for inspection of any of the documents. *Pepper v. Chambers*, 21 Law J. Rep. (N.S.) Exch. 31; 7 Exch. Rep. 226.

The books kept by the keeper of a lunatic asylum, under 8 & 9 Vict. c. 100, are not privileged from production, and therefore in an action for alleged neglect and improper treatment of the plaintiff by the defendant as keeper of an asylum, an order was made, under the 14 & 15 Vict. c. 99. s. 6, for the inspection by the plaintiff of the book of admissions, the medical visitation book, the case book, the visitors' book, &c. so far as they related to him. *Hill v. Philp*, 21 Law J. Rep. (N.S.) Exch. 82; 7 Exch. Rep. 232.

An order was also made as to letters written by the wife of the plaintiff to the defendant, and also by the Commissioners of Lunacy to the defendant. *Ibid*.

The costs of obtaining an order of inspection are costs in the cause, but the costs of the actual inspection are payable by the party inspecting. *Ibid*.

The power to order an inspection of documents given by the 14 & 15 Vict. c. 99. s. 6. is not a power of compelling the discovery of documents in the possession of the opposite party. To obtain such inspection, it must be shewn that an action or legal proceeding is pending; that there are circumstances sufficient to establish a *prima facie* case that the documents are in the possession or under the controul of the opposite party, and that they relate to such action or legal proceeding; and that the applicant would by a bill of discovery or other proceeding in equity obtain an inspection. *Hunt v. Hewitt*, 21 Law J. Rep. (N.S.) Exch. 210; 7 Exch. Rep. 236.

The right of a plaintiff in equity to a discovery is limited to a question in the cause, and to such material documents as relate to the proof of the applicant's case on the trial, and does not extend to the discovery of the manner in which the opponent's case is to be established, or to evidence which relates exclusively to his case. Under this statute, the applicant must therefore shew the nature of the question to be tried, and state with sufficient distinctness the reason of the application and the nature of the documents, in order to satisfy the Court or Judge that the documents are desired to enable the party to support his own case, and not to find a flaw in the case of his opponent; and also that the opponent may admit or deny the possession of the documents, or excuse their production on the ground that they relate exclusively to his own case or that he is privileged from producing them. *Ibid*.

Where, therefore, to an action by an architect for the commission due for superintending certain buildings for the defendant, the affidavit in support of a rule for inspecting the plaintiff's journal or day-book alleged that the work was never done; that, if done, it was charged at too high a rate, and also that it was done upon the credit of another, but the authority of that other to pledge the defendant's credit was not negatived,—Held, that although the affidavit was defective in this respect, yet that the defendant was entitled to the inspection, to see if there were any entries relating to the work, and what prices were charged. *Ibid*.

In an action by a share-broker in respect of the purchase of stock, in which the bill of particulars alleged several credits, the defendant applied under the 14 & 15 Vict. c. 99. s. 6. for leave to inspect the books, documents, &c. in the possession of the plaintiff, upon an affidavit of his attorney, which stated that upon the purchase of the stock the plain-

tiff received, as the deponent was informed and verily believed, divers bonds, representing the security for the said stock, which securities remained in the hands of the plaintiff, the particulars of which he neglected to furnish to the defendant, &c.; and also divers books, papers, writings, entries, accounts and other documents in relation to the said stock, &c.; and that it was material and necessary in order to enable the defendant to defend the action, and to arrive at a just and proper conclusion as to the state of the accounts between him and the plaintiff, that the deponent or the defendant should inspect and take copies of all such bonds, books, &c., which the deponent verily believed were in the possession or under the controul of the plaintiff, that the plaintiff had delivered to the defendant two accounts relating to the matters in question; and that the deponent verily believed that neither the particulars of demand nor those accounts set forth the true state of the accounts between the parties, &c.; and that the application was made *bond fide*, &c.:—Held, that no ground was shewn for an order to inspect under the statute. *Sneider v. Mangino*, 21 Law J. Rep. (N.S.) Exch. 121; 7 Exch. Rep. 229.

Where it reasonably appears upon affidavit that a document in the possession of one party, is material in support of the case of the other party, or to contradict the case set up in answer, an inspection of such documents will be granted. *Scott v. Walker*, 22 Law J. Rep. (N.S.) Q.B. 404; 2 E. & B. 555.

Detinue to recover a mortgage-deed made between P of the one part and the plaintiff of the other part. Plea, first, *non detinet*; second, that the deed was not the property of the plaintiff; third, a lien for work done by the defendant as attorney for the plaintiff. A bill of particulars of the alleged lien was delivered to the plaintiff, and consisted of the defendant's bill of costs in an action and reference between the said P and the Great Western Railway Company. In support of a rule for an inspection of the defendant's day-books, &c., during a stated period, relating to the particulars of lien, the plaintiff's affidavit stated that he had not retained the defendant in the said action and reference, and that he was not indebted in respect of the said bill of costs, and that the defendant's day-books, &c. from which the said bill of costs had been made, would, as he verily believed, shew that the said P and not the plaintiff was the real debtor to the defendant, and that he verily believed that all or some one of the said books would furnish material evidence in support of his case, and that an inspection of such books was material and necessary for the support of the action. On the other hand, the defendant made an affidavit stating that the deed in question was a deed whereby P assigned to the plaintiff all claims and demands due to P from the G. W. R. C. for which an action had been brought, which was made the subject of a reference to the arbitration then pending; that after the date of the deed the defendant acted as the attorney for the plaintiff in connexion with the reference, and at the commencement of the suit had a lien on the deed for his costs and charges so incurred, and for fees paid to counsel for and on account of the plaintiff:—Held, that it was to be assumed that there were entries in books from which the bill of particulars had been made out, which might be good evidence for the plaintiff

to rebut the defendant's case, and therefore that the plaintiff was entitled under the 14 & 15 Vict. c. 99. to an inspection of the entries in the defendant's books relating to the bill of particulars. *Ibid*.

A feigned issue was brought under the Inclosure Act (8 & 9 Vict. c. 118.), the question being whether the plaintiff, as lord of the manor of L, was interested in the soil of certain lands proposed to be inclosed, in right of the manor, so as to be entitled to dissent from the inclosure. The case of the defendants was, that by an agreement made in 1800, between A, the then lord of the manor, and all the persons entitled to rights of common, and an award made thereunder, 146 acres were allotted to the lord in lieu of his manorial rights, and that certain leases and agreements for leases of part of the land so allotted had been subsequently granted by the lords of the manor:—Held, that, under the 14 & 15 Vict. c. 99. s. 6, the defendants were entitled to have inspection of the following documents:—1. Certain deeds of conveyance of the manor to A, and by A to the present plaintiff; these, although title deeds, being capable of being used for the purpose of substantiating the defendant's case, and not merely of negating that of the plaintiff. 2. The leases, and agreements for leases alleged to have been made under the agreement of 1800, (which was not in the possession of the plaintiff); as these might be material to shew that the lords of the manor had acted as owners in severalty of the lands in question, and not in virtue of their ordinary manorial rights. *Riccard v. the Inclosure Commissioners for England and Wales*, 24 Law J. Rep. (n.s.) Q.B. 49; 4 E. & B. 329.

In order to support an application to inspect, it is sufficient if the party applying shews that the documents sought to be inspected are in the possession, custody, or controul of the other party, and are material to substantiate his own case; the effect of the evidence to prove that case being a matter to be decided upon the trial, and forming no ground for determining whether the inspection should or should not be ordered. *Ibid*.

Where upon an examination on interrogatories, under sect. 51. of the Common Law Procedure Act, 1854, a party admits that documents material to the issues are in his possession, but declines to set forth copies or the contents of them, the opposite party cannot compel an inspection and delivery of copies of such documents under the same section, but must for this purpose apply to the Court or a Judge under the 50th section. *Scott v. Zygomalas*, 24 Law J. Rep. (n.s.) Q.B. 129; 4 E. & B. 483.

The Court refused leave to the defendant to inspect an account book of the plaintiff's believed to contain an entry of a sum of 200l., stated by the plaintiff, immediately after the death of the defendant's wife, to have been lent to her by the plaintiff, such entry forming no part of the defendant's case. *Wright v. Morrey*, 24 Law J. Rep. (n.s.) Exch. 259.

PROHIBITION.

[See INFERIOR COURTS.]

Where an inferior Court has no jurisdiction to entertain a suit, it is not necessary to entitle a party to a prohibition that he should have there pleaded to the jurisdiction, and that the plea should have

been overruled. *De Haber v. the Queen of Portugal*, 20 Law J. Rep. (n.s.) Q.B. 488; 17 Q.B. Rep. 171.

The Court is bound to grant a prohibition where a Court has no jurisdiction, upon the application of a stranger as well as of a party to the proceedings. *Ibid*.

The Vice Chancellor and heads of the colleges in the University of Cambridge have authority to make a decree that every tradesman with whom any person *in statu pupillari* should contract a debt exceeding 5l. should be required to send notice thereof at the end of every quarter to the college tutor of the person so indebted, on pain of being punished by discommuning or otherwise as to the Vice Chancellor and heads of colleges should seem fit. *Ex parte Death*, 21 Law J. Rep. (n.s.) Q.B. 337.

Where a tradesman resident in Cambridge who has violated this decree is summoned to appear before the Vice Chancellor and heads of houses to answer the complaint, he is not entitled to appear by counsel or attorney as upon a judicial proceeding. *Ibid*.

Upon proof that the tradesman had violated the above decree it was ordered by the Vice Chancellor and heads of colleges, that no person *in statu pupillari* should contract, &c. or have any tradings or dealings with the said tradesman, and that if any person *in statu pupillari* should disobey this decree he should be punished by suspension, rustication or expulsion as the case should appear to the Vice Chancellor and heads of colleges to require:—Held, that there was no ground for a prohibition of the proceedings. *Ibid*.

In August 1850, a party was cited to appear in the Consistorial Court to answer his wife in a suit for restitution of conjugal rights. He duly appeared, and was heard. On the 26th of April 1851, he received a notice from the wife's proctor that the Court would be moved on the 30th for an order to take his wife home, and also that he should be pronounced in contempt for disobeying two monitions for payment of alimony. On his attending the court, the application made against him related to alimony only. On the 9th of June two decrees, ordering him to receive his wife home, and to pay alimony, were made in his absence and without his knowledge, no notice thereof having been given to him till the 2nd of September:—Held, that no ground was shewn for a prohibition; and that as the ecclesiastical court had jurisdiction, and the matter related to the practice of that court, the remedy was by appeal, or by application to that court. *Ex parte Story*, 22 Law J. Rep. (n.s.) Exch. 33; 8 Exch. Rep. 195.

Pending an action by the shipowner against the charterer for freight, a monition issued from the Court of Admiralty, at the suit of the holder of a bottomry bond, against the defendant, by which he was directed to bring the freight into court, which was accordingly done. The freight was more than the sum claimed under the bottomry bond. This Court refused to grant a prohibition, although it was suggested by affidavit that the suit in the Admiralty Court was brought by collusion with the defendant to defeat the plaintiff's action for the freight. *In re Place*, 22 Law J. Rep. (n.s.) Exch. 241; 8 Exch. Rep. 704.

Prohibition may issue, after judgment in a county court, for an excess of jurisdiction not appearing on the face of the proceedings there. *In re Marsden v. Wardle*, 23 Law J. Rep. (n.s.) Q.B. 263; 3 E. & B. 695.

Where the parties to a plaint in the county court appeared before the Judge, and consented to a reference, without objecting to the want of jurisdiction, but one of them, during the progress of the reference, objected to the jurisdiction of the arbitrators, on the ground that title to land came in question and the arbitrators proceeded with the reference.—Held, that he was, nevertheless, entitled to a prohibition. *In re Knowles v. Holden*, 24 Law J. Rep. (N.S.) Exch. 223.

PUBLIC ENTERTAINMENTS.

The defendant kept a room which was used as a supper-room and place of general refreshment, there being at the end of it a raised platform, on which stood a piano, and where songs were constantly sung. Programmes of the performance were laid about in different parts of the room. The company was respectable, and no money was paid for admission, nor any extra charge made for the articles consumed there. An action having been brought for a penalty under the 25 Geo. 2. c. 36. relating to public dancing, music, &c., the Judge directed the jury to say whether the room was used for the purpose of supplying refreshments in the manner of an hotel, the music and singing being incidental merely, or whether it was used principally for musical performances; and ultimately he directed them to consider whether the room was used for both purposes, in which latter case the plaintiff would be entitled to the verdict. The jury found that the room was used for the purposes of an hotel, and found a verdict for the defendant:—Held, that although the verdict might be against the evidence, there was no misdirection. *Hall v. Green*, 23 Law J. Rep. (N.S.) M.C. 15.

Held, also, (*dissentiente Martin, B.*) that it would have been a misdirection in the Judge to state that the question was, whether the keeping of the room as an hotel was the principal or secondary object. *Ibid.*

PUBLIC HEALTH.

The 6 Geo. 4. c. cxxxi., for regulating the markets in the town of Burslem, Staffordshire, created trustees for carrying out its objects, vested certain property in them, and gave them power to levy tolls and rates and to borrow money on mortgage of such tolls and rates. Then, by section 91. it was provided, that out of the first monies received under the act, the trustees should, in the first place pay the costs and expenses of passing the act, and apply the remainder thereof "at the discretion of the said trustees" in payment of certain rents and fines, and in certain purchases and other expenditure pointed out by the section, including the payment of "the salary to the organist of Burslem Church," and the several principal sums of money and interest borrowed on mortgage by virtue of the act:—Held, in an action on the case, by the organist of Burslem Church against the local board of health, for a breach of duty in simply refusing to pay his salary, that the plaintiff and the board stood in the relation to each other of trustee and *cestui que trust*; and as the board had not in the exercise of their discretion specifically appropriated an amount as payable to the plaintiff, no action could be main-

tained against them for the recovery of the salary. *Edwards v. Lowndes*, 22 Law J. Rep. (N.S.) Q.B. 104; 1 E. & B. 81.

The defendant, a proprietor and director of the Margate Pier Company, established under the 52 Geo. 3. c. clxxxvi., was elected a member of a local board of health, under the General Public Health Act, 11 & 12 Vict. c. 63; and he voted as such on a resolution affecting the interests of the pier company. The plaintiff, who was an inhabitant and rate-payer entitled to vote for members of the local board of health, and was in the habit of using the Margate pier, sued the defendant for a penalty of 50*l.*, under the 19th section of the 11 & 12 Vict. c. 63, for so voting on the resolution; but he had not the consent of the Attorney General to his suing:—Held, that as the plaintiff was not otherwise aggrieved than as one of the public, he was not entitled to sue under the 133rd section, which prevents any person, other than a party grieved, from suing without the consent of the Attorney General. *Boyce v. Higgins*, 23 Law J. Rep. (N.S.) C.P. 5; 14 Com. B. Rep. 1.

Quære.—Whether the 19th section of the act, which provides that a proprietor in a water company, or in a company for carrying on works of a public nature, shall not be disabled from acting as a member of a local board, but shall not vote upon any question in which the company is interested, renders a member so voting liable to the penalty imposed in that section on a disqualified or disabled person who acts as such member. *Ibid.*

Where a local board of health had made a sewer through A's land, in respect of which he claimed a specified sum for compensation, which the local board refused to pay, upon the ground that A. had sustained no damage from the making the sewer, but shewed no other reason for disputing their liability, this is a dispute as to the amount of damage, and not as to the liability of the local board to make any compensation, and therefore is the subject of a reference to arbitration, under section 144. of the 11 & 12 Vict. c. 63. *In re Bradby*, 24 Law J. Rep. (N.S.) Q.B. 239.

Upon a petition presented by the Llanelly Local Board of Health, it was held, that the local board was not a body corporate under the Public Health Act, 11 & 12 Vict. c. 63; and must sue in the name of their clerk, as directed by the 138th section. *Ex parte the Local Board of Health of Llanelly*, 22 Law J. Rep. (N.S.) Chanc. 419.

Under the 45th, 46th and 145th sections of the "Public Health Act, 1848," providing that the local boards may make necessary sewers through or under any lands whatever, and cause them to be emptied into such places as may be fit and necessary, provided that nothing in the act shall authorize the boards to use, injure or interfere with any water-course, stream, river, &c. in which the owner of any lands may be interested, without the consent of such owner:—Held, first, that persons having a right to watering-places in a river adjoining their lands, for the use of their cattle, are interested in the river within the meaning of the proviso, but would not be able to maintain an action for an interference with their rights, unless they were injured by such interference. Secondly, that works of a local board of health, producing an outfall of the sewage of a

town above such a watering-place, was such an interference as to cause injury to the landowners; but that whether this was established or not, it ought (if not consented to by them) to be restrained by injunction, being the act of a public body exceeding its powers. Thirdly, by *Cresswell, J. and Williams, J., dubitante Turner, L.J.*, that a right of fishing is within the term "land" according to the interpretation clause of the Public Health Act, 1848. *Oldaker v. Hurst*, 6 De Gex, M. & G. 376; 19 Beav. 485.

QUO WARRANTO.

By the 9 & 10 Vict. c. 95, s. 18, it shall be lawful for the Lord Chancellor, or, where the whole district is within the duchy of Lancaster, for the Chancellor of the said duchy, if he shall think fit, to remove for inability or misbehaviour any Judge already appointed or hereafter to be appointed. By an instrument under the hand and seal of the Chancellor of the duchy, W R was removed from his office of county court Judge on the ground of inability or misbehaviour:—Held, that this instrument was not absolutely conclusive, but that it was open to the party removed to shew that he had no notice of the charges against him, or no opportunity of being heard in his defence, or that no evidence was adduced to support the charges, or that the complaints against him were not of such a nature as amounted to inability or misbehaviour within the meaning of the act; but where he had a fair opportunity of being heard, and where the charges, if true, amounted to inability or misbehaviour in his office, and evidence had been given in support of them, the Chancellor was held to be the sole Judge of the weight of the evidence, and this Court would not question the appointment of a successor by *quo warranto*. *Ex parte Ramshay*, 21 Law J. Rep. (n.s.) Q.B. 238; 18 Q.B. Rep. 173.

An instrument removing a county court Judge from office need not set out all the proceedings instituted in order to the removal, with the specific charges shewing inability or misbehaviour, or the evidence adduced to support those charges. *Ibid.*

If it be drawn up in the words of the act of parliament it will be presumed, until the contrary is proved, that the Chancellor has duly exercised his jurisdiction. *Ibid.*

Where a person has been elected to the office of councillor of a borough for which he was a candidate, and has acted in such office, and afterwards, upon a rule *nisi* for a *quo warranto* information being obtained against him, declined to shew cause, and submitted to resign, and, if necessary, formally to disclaim, the Court will make the rule absolute without imposing any terms upon the relator as to the costs of any subsequent proceedings. *Regina v. Earnshaw*, 22 Law J. Rep. (n.s.) Q.B. 174.

RAILWAY.

Case against a railway company for constructing a portion of their works upon a part of the bed of the navigable river Ouse, so as to prevent its flowing in its usual and accustomed channel, and to hinder

the plaintiffs from passing and navigating their barges, as they otherwise might and would have done. Plea, that the defendants had acted under their special act, the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act; that plans and sections and books of reference had been deposited with the clerk of the peace, and that, subject to the provisions in the above acts, the defendants were empowered to construct their railway in the line and upon the lands delineated and described in the said plans and books of reference; that the said part of the river was in the line and among the lands so delineated and described; and that the defendants did, for the purpose and under the powers mentioned in the said acts, construct a part of their railway upon the bed of the said river, the same being necessary for the purpose of making and maintaining the said railway, as they lawfully might, &c. Replication, *de injuriâ*:—Held, that the defendants by their plea were not required to prove that they had taken all the preliminary steps necessary to vest in them the ownership in the bed of the part of the river in question, as in the ordinary case of lands purchased. *Abraham v. the Great Northern Rail. Co.*, 20 Law J. Rep. (n.s.) Q.B. 322; 16 Q.B. Rep. 586.

Held, also, on motion for judgment *non obstante veredicto*, first, that as against the plaintiffs, who had no interest in the soil of the bed of the river, it was not necessary for the defendants to aver and prove that such preliminary steps had been taken. Secondly, that the first clause in the 16th section of the Railways Clauses Consolidation Act, applies to navigable rivers as well as rivers not navigable, and empowered the defendants to do the act complained of. *Ibid.*

A declaration against a railway company stated that the plaintiffs, at the defendants' request, delivered, and the defendants received certain horses to be carried and conveyed for the plaintiffs by the defendants, in their carriages upon and along their railway, for reward to them in that behalf, from H to S; that after such delivery and acceptance the said horses were placed in certain carriages of the defendants to be so carried and conveyed; that after the said horses had left H, and whilst they were being conveyed along the railway, and whilst the said carriages and the locomotive power thereof were under the management of the defendants, one of the wheels of the said carriages caught fire, of which the defendants had due notice, and were afterwards at a convenient time and place, to wit, at the next station, requested by the plaintiffs not to persist in conveying the said horses in the said carriage further, which the defendants refused to do, and in spite of such request did continue to convey the said horses in the said carriage; that afterwards the wheel again took fire by and for want of due precaution against friction, and in consequence thereof the said carriage was thrown out of its proper position on the railway and the said horses injured. Plea, amongst others, traversing the delivery and acceptance of the said horses to be carried *modo et formâ*. At the trial, the defendants put in evidence a ticket signed by one of the plaintiffs on the occasion of the horses being received and placed upon the railway, in which was a memorandum stating that the ticket was issued subject to the owner

undertaking all risk of injury by conveyance and other contingencies, and his seeing to the efficiency of the carriage before the horses were put therein, the charge being for the use of the carriages and locomotive power only; and that the company would not be responsible for any alleged defects in their carriages or trucks, unless complained of at the time of booking, or before the same left the station, nor for any damage whatever to horses, &c. travelling upon their railway in their vehicles:—Held, that the special terms of the memorandum disproved the bailment alleged in the declaration, which was material to the breach, and therefore that the defendants were entitled to the verdict on the above plea. *Austin v. the Manchester, Sheffield and Lincolnshire Rail. Co.*, 20 Law J. Rep. (n.s.) Q.B. 335; 16 Q.B. Rep. 600.

An order of Justices, made under 8 Vict. c. 20, s. 58, directing a railway company to repair damage done by them to a road, need not specify the particulars of the damage done or of the repairs ordered, if it states the length of road injured, and directs the damage so done to be made good. *The London and North-Western Rail. Co. v. Wetherall*, 20 Law J. Rep. (n.s.) Q.B. 337.

Such an order as well as a conviction adjudging a penalty for its disobedience may include several roads situate in the same parish. *Ibid.*

The conviction purported to be made by virtue of the Railways Clauses Consolidation Act:—Held, sufficient. *Ibid.*

Where within the prescribed period the promoters of a railway company gave notice to a landowner on the intended line of railway, that they required to purchase his lands, and the landowner served them with a notice to treat, and demanded that the amount of compensation should be settled by a jury, and no further steps were taken to complete the purchase until after the expiration of the period prescribed for the exercise of the powers of the company for the compulsory purchase and letting of lands:—Held, that the company might, on the application of the landowner, notwithstanding the lapse of time, be compelled by mandamus to issue their warrant to the sheriff to summon a jury to assess the amount of compensation. *The Birmingham and Oxford Junction Rail. Co. v. Regina* (in error), 20 Law J. Rep. (n.s.) Q.B. 304; 15 Q.B. Rep. 634.

A mandamus reciting that a railway crossed a certain public highway not on a level by means of a trench or cutting, in which the permanent way of the railway had been laid down, whereby the highway was rendered impassable for carriages and passengers, commanded the company to cause the said public highway to be carried over the railway by means of a bridge in conformity with the regulations of the Railways Clauses Consolidation Act, 1848. The mandamus was held bad, on the ground that, by the Railways Clauses Consolidation Act, s. 46, where the railway crossed a public highway not on a level, the company had an option either to carry the road over the railway or the railway over the road, and that it did not appear sufficiently on the mandamus that the company had determined that option, so as to render it imperative on them to adopt the one alternative commanded by the mandamus, as although the company might have intended that the rails as laid down should be the permanent way,

they were at liberty to take them up and lay them down in a different manner. *The South-Eastern Rail. Co. v. Regina* (in error), 20 Law J. Rep. (n.s.) Q.B. 428; 15 Q.B. Rep. 313.

A railway company having opened their main line for traffic, but not having completed the stations and works, are entitled under the Railways Clauses Act, 8 Vict. c. 20, s. 16, to take compulsorily, within the time for completing the railway and works, any lands situate within the limits of deviation for the purpose of making a branch railway. *Sadd v. the Maldon, Witham and Braintree Rail. Co.*, 20 Law J. Rep. (n.s.) Exch. 102; 6 Exch. Rep. 143.

The words "turnpike road" in the Railways Clauses Consolidation Act, section 50, mean a road which is repaired by tolls payable by passengers for the use of the road. *Regina v. the East and West India Docks and Birmingham Junction Rail. Co.*, 22 Law J. Rep. (n.s.) Q.B. 380; 2 E. & B. 466.

A mandamus suggested that a railway company had constructed a bridge to carry over their line a street alleged to be a turnpike road, and had made the ascent of the bridge greater than 1 in 30 feet, and also that they had deviated from the levels of the railway to an extent exceeding two feet at the point where the bridge was erected, and that the said street was affected by such deviation, and commanded them to make the ascent of the bridge as by law they were bound to do, and also to make the levels of the railway, and any deviation therefrom in conformity with the regulations of the Railways Clauses Consolidation Act. Upon the trial of issues raised upon a return, it was found that the street in question was a public highway, but not a turnpike road; that this level of the railway was deviated from more than two feet at the point where the bridge crossed the line; and that in consequence of such deviation it was necessary to raise the bridge much higher than would have been otherwise necessary, and by reason thereof the said street was rendered more steep and inconvenient to the public; and also that the ascent of the bridge was greater than 1 in 30 feet, but did not exceed 1 in 20 feet as permitted in the case of an ordinary highway:—Held, that as the first part of the writ could not be supported, no peremptory mandamus at all could be awarded; and that a mandamus directing the defendants simply to lower the level of their railway would be useless, as it would not oblige them to alter the height of the bridge. *Ibid.*

The provision in section 26. of the Railways Clauses Consolidation Act, that in the exercise of their powers the company shall do as little damage as may be, and shall make satisfaction to all parties interested for all damages sustained by them, applies only to cases of damage to individuals for which compensation may be made, and does not controul the enactment in section 50. as to the ascent of bridges over the line. *Ibid.*

Under the 13th, 14th, and 15th sections of the Railways Clauses Consolidation Act, 1849, 8 & 9 Vict. c. 20, where a tunnel is marked on the deposited plans of a railway, the line cannot be deviated within the limits of deviation, but the tunnel must be made on the place indicated, unless there be an agreement, or a provision in the special act, to the contrary. But if the railway be wrongfully deviated where a tunnel is laid down, the railway company

is not bound to make a tunnel on the line so deviated. *Little v. the Newport, Abergavenny and Hereford Rail. Co.*, 22 Law J. Rep. (N.S.) C.P. 39; 12 Com. B. Rep. 752.

Two railway companies entered into a *bond fide* contract by deed, by which it was provided that the defendants might for twenty-one years pass over the railways of the plaintiffs and have free use of their works and conveniences for the purpose of carrying coal upon payment of certain tolls and under certain conditions, that is to say, when the quantity of coal carried over any part of the plaintiffs' railways to the defendants' railway and thence south of Doncaster, together with the quantity of coal carried over the plaintiffs' railways by or for the defendants, or by any arrangement with them, to any other railway for transit to the south of Sheffield or Rotherham should not amount to 125,000 tons in the period of six calendar months, then the defendants should pay to the plaintiffs such toll for such period of six calendar months as would with any clear profit which might be made by the plaintiffs for the same period after payment of all annual and half-yearly charges for interest and outgoings and all expenses of management or otherwise be sufficient to enable the plaintiffs to pay such dividends as might become payable in respect of any guaranteed or preference stock of the plaintiffs already issued or hereafter to be issued with the consent of the defendants, and also a clear net dividend at the rate of 3l. per cent. per annum for such period of six calendar months, upon the ordinary capital stock for the time being of the plaintiffs then called up or thereafter to be called up with the consent of the defendants; and when the quantity of coal for any such period of six calendar months should exceed 125,000 tons and not 150,000 tons, such sum as would make up in manner before mentioned the dividend upon the preference stock, and 3l. 5s. per cent. upon the ordinary stock, and when the quantity of coal, during the like period of six calendar months, should exceed 150,000 tons, and not 175,000 tons, such sum as would make up in the like manner the dividend upon the preference stock, and 3l. 10s. per cent. upon the ordinary stock, and so on progressively up to the carriage of upwards of 400,000 tons during any such period of six calendar months, in which case the defendants were to pay the plaintiffs such sum as, together with the clear profits made by the plaintiffs during the same period, would pay the dividend upon the preference stock, and 6l. per cent. upon the ordinary stock. It was also provided that if the payment made by the defendants for any period of six months once made up 4l. 10s. per cent. on the ordinary stock of the plaintiffs, it should never afterwards recede:—Held, in an action to recover the sum payable under the contract, *per Parke, B. and Platt, B. (Pollock, C.B. dubitante, and Martin, B. dissentiente)*, that this was a legal contract, and not beyond the powers of the respective companies, the payments to be made being within the meaning of the word "tolls" in the 87th section of the Railways Clauses Consolidation Act, 8 Vict. c. 20. *The South Yorkshire Rail. and River Dun Co. v. the Great Northern Rail. Co.*, 22 Law J. Rep. (N.S.) Exch. 305; 9 Exch. Rep. 55.

By the 14th section of the 13 & 14 Vict. c. lxi., the Great Northern Railway Act, the company were

empowered to demand for any parcel not exceeding 500 pounds weight any sum they might think fit. "Provided always, that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages":—Held, that the defendants were not entitled to charge the plaintiff, for the carriage of packages containing small parcels, a larger sum than they charged to other persons. *Crouch v. the Great Northern Rail. Co.*, 23 Law J. Rep. (N.S.) Exch. 418; 9 Exch. Rep. 556.

The Shrewsbury and Chester Railway Company were, by various acts of parliament, empowered to make several railways, and also to build wharfs and warehouses for the purposes of the traffic of the company on the banks of the River Dee, the conservancy of which was vested in other persons. The railway company brought a bill into parliament to preserve and improve the navigation of the river, though it had no power to apply any of the capital of the company for that purpose. Upon a bill filed by one shareholder,—Held, that the directors of the railway company could not legally apply any of the railway capital in payment of the expenses of preparing, prosecuting or promoting the bill in parliament, or for any other purpose not authorized by the acts of the railway company, and an injunction was granted to restrain them from so doing. *Munt v. the Shrewsbury and Chester Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 169.

The E. C. Railway Company had a bill before parliament for making a railway from W to S, with a line diverging from the main line to N. One of the objections to the bill was, that the diverging line would cross another railway line. When the bill was in committee it was ascertained that this objection would be removed, if the company were to obtain an estate which stood settled on A for life, with remainders over, which estate, however, by their bill they would not be authorized to buy. An agreement was entered into between the company and A, by which the company agreed to purchase this estate from A, and to perform all such acts as might enable A to sell the estate. The bill was passed, without obtaining any powers to purchase A's estate, and omitting the diverging line. The line from W to S and everything connected with it were afterwards abandoned by the company. In a suit by A against the company for a specific performance of the agreement,—Held, that they were bound to perform it. *Hawkes v. the Eastern Counties Rail. Co.*, 20 Law J. Rep. (N.S.) Chanc. 243.

The W. W. W. Railway Company was alleged to have obtained its act of incorporation by fraud, with the assistance of the S. W. Company, and through an illegal subscription for shares; and by similar means, and by the use of illegal votes, to have carried on the W. W. W. Company against the wishes and votes of the *bond fide* shareholders. Finally, the S. W. Company obtained an act of parliament to sanction as alleged the subscription to the W. W. W. Railway Company, and to appoint directors of the S. W. Company to be directors of the W. W. W. Company, but from the difficulties of the W. W. W. Railway Company, it was finally resolved to make a part of the line only, and a bill to obtain parlia-

mentary sanction for that purpose was withdrawn upon a resolution to wind up the affairs of the W. W. W. Company:—Held, as the directors had resolved to wind up the affairs of the company, and had withdrawn the bill to obtain parliamentary sanction to make a part of the line, that an application for an injunction had become unnecessary, and it was refused, but liberty was given to apply upon a resumption of works. *Logan v. Earl Courtown*, 20 Law J. Rep. (n.s.) Chanc. 347; 13 Beav. 22.

Held, further, notwithstanding the subscription of the S. W. Railway Company to the W. W. W. Railway Company was originally illegal, yet after an act of parliament to authorize the S. W. Railway Company to subscribe to the W. W. W. Company, notwithstanding the construction of the act was doubtful, that the Court, as the money of the S. W. Railway Company was at stake, would not restrain the directors of the S. W. Railway Company, acting as directors of the W. W. W. Railway Company, from interfering in its affairs. *Ibid*.

Held, also, though the acts of the directors of the W. W. W. Railway Company appeared to have been improper, that the Court would not restrain the W. W. W. Railway Company from enforcing the payment of calls, as it was possible that there were legal obligations to answer, and an injunction was refused, but without costs. *Ibid*.

Though a shareholder in a railway company has an equity to have an injunction to restrain the directors from applying the funds of the company in the completion of a part only of the line with a view to the abandonment of the remainder, yet where the shareholder, with the knowledge of the intention to abandon the greater part of the line, remained passive for eighteen months, while the directors were expending large sums in the completion of the remainder, the Court refused to interfere by injunction. *Graham v. the Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, 20 Law J. Rep. (n.s.) Chanc. 445.

The M. Railway and Canal Company obtained several acts of parliament for improving their existing canal and railways, and for making a new railway, but from want of funds they failed to complete the whole of the works within the time specified by their acts. Upon a bill filed by a shareholder to restrain the company from making a dividend out of the income arising from that portion of the property which was worked,—Held, that general demurrers filed on merely formal and technical causes were to be disapproved of; that the jurisdiction of the Court had been usefully exercised in cases arising from a combination of illegal acts, breaches of contract with the public or the shareholders, and erroneous acts which shareholders could not rectify; that it could not safely be laid down that in no case ought joint-stock companies to be allowed to divide any profits or receive any tolls until all their works were complete; that it was necessary to distinguish between the duty which the governing body had to perform to the public and to the shareholders; that the Court did not attempt to direct the performance of all the duties which a governing body owed to the shareholders, but left shareholders to enforce the duties to themselves arising out of internal arrangement; that it was imprudent to treat income as profit while the works and the contract with the

public were incomplete; that the Court had not jurisdiction to interfere, on the ground that this was a violation of a duty to the public, and because the misapplication of income was the subject of internal regulations; and the demurrer was allowed, but without costs. *Brown v. the Monmouthshire Rail. and Canal Co.*, 20 Law J. Rep. (n.s.) Chanc. 497; 13 Beav. 32.

A railway company, incorporated by act of parliament, contracted unconditionally with a landowner, in consideration of his having withdrawn his opposition to their bill in parliament, to purchase certain of his land for the formation of their railway. The undertaking was afterwards abandoned, and the time for its completion, limited by the company's act, had expired:—Held, on claim filed by the landowner, that the company was bound to complete the contract. *Webb v. the Direct London and Portsmouth Rail. Co.*, 20 Law J. Rep. (n.s.) Chanc. 566; 9 Hare, 129.

The Court of Chancery will withhold its interference when called upon by either party to act in aid of an agreement, attempting to carry into effect without the intervention of parliament what cannot be lawfully done except by parliament, in the exercise of its discretion with reference to the interests of the public. *The Great Northern Rail. Co. v. the Eastern Counties Rail. Co.*, 21 Law J. Rep. (n.s.) Chanc. 837; 9 Hare, 306.

Whether railways are public highways—*quere*. *Ibid*.

A local railway act enacted that the whole of certain ground in a seaport town, conveyed to the company, should be used solely for the purposes of the railway and the buildings connected therewith, except for coke ovens or any purposes (other than the necessary purposes of the railway), which might cause nuisance or damage to the vendor's other property:—Held, not to restrain the company from allowing part of the building to be used as the Custom-house, for passing the luggage of passengers and travellers and other Custom-house duties. *The Warden and Assistants of the Harbour of Dover v. the South-Eastern Rail. Co.*, 21 Law J. Rep. (n.s.) Chanc. 886; 9 Hare, 489.

Whether part of the buildings could be used as sleeping rooms in connexion with an hotel built by the company on the adjoining ground—*quere*. *Ibid*.

A railway company contracted with another that the first should have the use of the line of the latter for a term certain at stated tolls, according to the tonnage carried; and it was agreed that these tolls should be charged on the tolls and dues of the company who had the use of the line, and that upon non-payment the other company might take and impound such tolls and dues, and deal with the same in the same way as with distresses for rent. On a bill filed to restrain the company who had the use of the line from dividing their funds among their shareholders, by way of dividend, until the debts alleged to be due to the other company were paid:—Held, that the Court would not interfere by way of injunction, but left the plaintiffs to proceed by action or distress as they might be advised, the remedy of the plaintiffs being at law. *The South Yorkshire Rail. and River Durn Co. v. the Great Northern Rail. Co.*, 22 Law J. Rep. (n.s.) Chanc. 761; 3 De Gex, M. & G. 576; 1 Sm. & G. 324.

Semble.—That a railway company cannot legally or equitably mortgage its undertaking without the authority of parliament. *Ibid*.

Semble.—That such an agreement is not a contract for the use of a line, nor for an apportionment of tolls within the 87th section of the Railways Clauses Consolidation Act, 8 Vict. c. 20. *Ibid*.

A nobleman, through whose estate the lines of two projected and competing railway companies contemplated passing, agreed with the provisional directors of one of the companies to withdraw his opposition to its bill in parliament, and to oppose the other company upon certain terms, one of which was, that the company which he supported, if incorporated, should construct a certain station, at which all trains should stop for the accommodation of passengers, &c. It was also stipulated, that if the two companies should become amalgamated, the agreement between the parties should be binding upon the amalgamated company. The two companies ultimately became amalgamated, and the station constructed, at which all trains, except express trains, duly stopped:—Held, upon motion for an injunction to restrain any trains from passing without stopping at the station, that the agreement was binding upon the amalgamated company, and an injunction was granted in the terms of the notice of motion. *The Earl of Lindsey v. the Great Northern Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 995; 10 Hare, 664.

The Court will, on motion by mortgagees, appoint a receiver of the rents and tolls of a railway company, notwithstanding the company is a parliamentary corporation, and compellable by mandamus to do all things which it ought to do, and restrainable by indictment from acting unlawfully, and notwithstanding the act of incorporation has appointed a receiver and manager. *Frapp v. the Chard Rail. Co.*; *Same v. the Bridgewater and Taunton Canal and Rail. Co.*, 22 Law J. Rep. (N.S.) Chanc. 1084; 11 Hare, 241.

A railway company held not bound by a contract entered into by the projectors prior to their incorporation. *Preston v. the Liverpool, Manchester and Newcastle-upon-Tyne Junction Rail. Co.*, 17 Beav. 114.

The projectors of a railway company entered into a contract with a landowner for the purchase of the land required. Subsequently the act passed establishing and incorporating the company. The company abandoned the undertaking, without having done anything to adopt the contract, except by staking out the intended line:—Held, that the company were not bound, the contract not being under the corporate seal, and there being no sufficient adoption of it. *Ibid*.

A railway company having applied for an act to extend their line was opposed by a landowner; whereupon an agreement was entered into between the solicitor of the company and the landowner, that the latter should withdraw his opposition, and, if the act passed, that the company should purchase his land on certain terms. Neither the appointment of the agent nor the agreement was under the seal of the corporation. The act passed, but the company did not take the land. The Court, considering that the company had done no act to take the benefit of the contract, refused a decree for specific performance, and declined to order the company to admit the va-

lidity of the contract, in order to enable the plaintiff to try his right at law. *Gooday v. the Colchester, &c., Rail. Co.*, 17 Beav. 132.

Upon one of the sections of a railway deposited with the clerk of the peace, and referred to by an act (afterwards passed) authorizing the formation of a line, there was a note to the effect that a particular road therein delineated was to be stopped up, and another therein also delineated was to be a substituted road for it:—Held, that the public and the landowners were not thereby affected with notice, so as, upon the ground of acquiescence, to be precluded from obtaining an injunction, upwards of four years afterwards, on the company's proceeding to stop up the road. *Attorney General v. the Great Northern Rail. Co.*, 4 De Gex & Sm. 75.

2. The works for stopping up the above-mentioned road were commenced in October 1849, but the road was not rendered entirely impassable till February 1850:—Held, that an application for an injunction in February 1850 was not too late. *Ibid*.

3. The provisions of the Railways Clauses Consolidation Act, 1845, requiring a substituted road to be made in certain cases:—Held, not to be satisfied by an existing road, which was alleged to be as convenient as any new substituted road could be. *Ibid*.

4. A bill stated that a railway company was interfering with a public road by digging a trench and lowering the level of it, and causing a permanent and complete obstruction. The bill prayed for an injunction restraining the company from obstructing the road, or rendering the same less convenient for the passage of carriages, &c., than it had previously been, until they had made a proper substituted road. An injunction to that effect was granted. The company then changed their plan, and instead of lowering the road, carried the railway across it on the level with posts and gates, which were closed only during a few short and ascertained periods in the day, when trains crossed:—Held, that the general terms of the injunction were not restricted by reference to the particular nature of the injury complained of, but that it had in spirit as well as terms been violated. A sequestration was ordered to issue for the contempt, and was only stayed upon appeal, upon the defendants paying all the costs, and undertaking to construct a road in conformity with the provisions of the Railways Clauses Consolidation Act, and in the mean time to provide and maintain a free passage at all times. *Ibid*.

5. When an injunction was granted in May against a railway company, and a sequestration was directed to issue in November for a breach of it, the Court refused to suspend the latter order, pending an appeal from both orders, although the result of the sequestration would be to compel the defendants to construct a bridge (which would become unnecessary if the order should be reversed), and to stop the traffic on the line in the mean time. *Ibid*.

A railway company was constituted in 1846 for the purpose of making a railway from A to B, with a diverging line to C. In June 1851, the line of railway from A to B was nearly completed, but no steps had been taken to construct the diverging line. An information was then filed by the Attorney General, at the relation of certain parties claiming to be interested in the diverging line, to restrain the company from opening the line from A to B, except

with the intention of completing also the diverging line:—Held, upon demurrer, that the neglect by the company to complete the whole line could not be regarded in the light of a public injury, so as to warrant the interference of the Attorney General. *The Attorney General v. the Birmingham and Oxford Junction Rail. Co.*, 3 Mac. & G. 453.

The 7th section of the Railways Clauses Act, providing a mode of correcting “any omission, misstatement, or erroneous description of any lands described on the plan or books of reference,” is intended to meet the case of any omission of land in the plan, or of description of any owner of it in the books of reference, or the omission of the number, or the misstatement of the acreage, or a mistake in the name of the owners, &c., as from an error in copying or the like; but this section was not intended to apply to the case of the names of intermediate lessees for a long term being entirely omitted from the book of reference. Therefore, where such a mistake as last mentioned had occurred, and the intermediate lessees had not been made aware of the intention to take their land until a notice to meet was given them after the company had obtained their special act, and such special act incorporated the Lands Clauses and Railways Clauses Acts, and after reciting that plans and sections had been made and deposited, enacted that the line should be made upon the lands delineated in the plan and described in the book of reference,—it was held, that the description there referred to was not meant to be a description entirely accurate in all respects, and therefore that the inaccuracy which had occurred did not disentitle the company to take the land under their compulsory powers. *Kemp v. the West of London and Crystal Palace Co.*, 1 Kay & J. 681.

The object of the 87th section of the Railways Clauses Consolidation Act, 8 Vict. c. 20, is to enable one railway company to contract for the passing their trains to the limits of the railway of another company, with the incidents which ordinarily attach to such power of passing, including that of stopping at the stations on the line and carrying passengers and goods to and from such stations. But it does not enable one railway company, under colour of passing over the line of another company, to carry the whole of the traffic of the other railway over which they may agree to pass. *Simpson v. Denison*, 10 Hare, 51.

An agreement by one railway company for the payment to another of such an amount as will after answering all expenses and liabilities furnish a certain dividend on the paid-up capital of such other company, is not an agreement for the payment of a toll within the meaning of the 87th section of the Railways Clauses Consolidation Act. *Ibid.*

Tolls within the meaning of the Railways Clauses Consolidation Act, should be fixed with reference to the number of carriages of one railway company which pass over the line of another railway company, under the terms of the agreement between the two railway companies—*semble*. *Simpson v. Denison*, 10 Hare, 60.

The Court will enforce by injunction the provisions of the 115th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, that no engine, or other description of moving power, shall be brought or used upon a railway, unless the same shall have been approved by the railway company as therein

mentioned, notwithstanding the practice of railway companies has been to rely on each other with respect to the fitness of their respective engines, and not to enforce the provision of the act; and, notwithstanding also, that to enforce such right of inspection would occasion great inconvenience to the public traffic; and although it may appear, that the provision is sought to be enforced, not from any apprehension of the use of improper engines, but for the purpose of impeding the traffic over their line of a competing railway. *The Midland Rail. Co. v. the Ambergate, Nottingham and Boston, and Eastern Junction Rail. Co.*, 10 Hare, 359.

Although the expression “the railway” is, by the interpretation clause of the Railways Clauses Consolidation Act (s. 3), defined to mean “the railway and the works by the special act authorized to be constructed,” and these have been construed to include a station, yet it is very doubtful whether the power reserved to the public by the Railways Clauses Consolidation Act (s. 92), to use “the railway” with engines and carriages upon payment of tolls, which are calculated at a certain rate per mile, includes the power also of using the stations of the company. *Ibid.*

An interpretation clause in an act of parliament should be understood to define the meaning of the word thereby interpreted, in cases as to which there is nothing else in the act opposed to, or inconsistent with, that interpretation. *Ibid.*

The Court refused to restrain one railway company from using the station of another, under an agreement which was made between the two companies before a connexion had been established between the company using the station and a third company which brought such third company into competition with the company to whom the station belonged, it not being clear that the right of the defendants to use the station was not intended to be given by their special act. The agreement being open to the construction, that the extent and terms of the station accommodation were from time to time to form the subject of reference to arbitration, and there being no award specifying the time at which it should determine the rival or competing company, having also been in existence at the time the agreement was made, and the plaintiffs being therefore at that time aware of the possibility of the competition afterwards arising, and, supposing the question to be doubtful, the balance of convenience preponderating against granting the injunction. *Ibid.*

A railway company were building an embankment more than five feet above the level, according to the 11th and 12th sections of the Railways Clauses Consolidation Act. They had not given the notice required by the 12th section, but had obtained the consent required by the 11th. The Court put them on terms to take the opinion of the Board of Trade, submitting to such order as this Court should thereafter make, otherwise an injunction would go to restrain the company from proceeding with the embankment. *Pearce v. Wycombe Rail. Co.*, 1 Drew. 244.

A railway company had power “to make and maintain the railway and works on the line, and upon the plans delineated in the parliamentary plan and described in the books of reference, and to enter upon, take, and use the said lands, or such of them

as should be necessary for that purpose," but they were not to enter upon, take, or use any of the land or property of a certain pre-existing railway company, or in any manner to alter, vary, or interfere with that railway, or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorized in manner in the said act authorized and not otherwise, one of the clauses of the act giving certain powers to the company for effecting a junction with the pre-existing railway. *Oxford, Worcester, and Wolverhampton Rail. Co. v. South Staffordshire Rail. Co.*, 1 Drew. 255.

Held, that there being nothing to shew that it was absolutely necessary for the company, in order to effect the junction, it had no power to take as owners certain lands over which the line of the pre-existing railway actually passed, but there was a right to enter upon such lands, by way of easement, for the purpose of effecting the junction. *Ibid.*

An incorporated railway company having powers within a fixed time to complete a branch line communication, afterwards, by a vote of the proprietary, suspended for a time the works. Before their powers expired, the works, on a resolution of the shareholders, were resumed and actively prosecuted. After a lapse of nearly a year, the powers having then expired, and the branch railway still being unfinished, two shareholders, on behalf of themselves and the other shareholders, filed a bill to restrain the further prosecution of the works. On a motion for an injunction,—Held, that the plaintiffs having been aware of the intention to construct the line, and not having applied with diligence, the Court would not grant the injunction. *Ffooks v. the South-Western Rail. Co.*, 1 Sm. & G. 142.

A shareholder who had acquiesced in the commencement of the works, afterwards sold his shares to a purchaser who objected to the further prosecution of the works,—Held, that the purchaser was bound by the acquiescence of his vendor. *Ibid.*

Semble—where it is established that on pretence of serving the interests of one company, a member of a rival company procures shares in order to oppose the company into which he has intruded, the Court, at the instance of such shareholder, will not ordinarily interfere. *Ibid.*

Semble—the mere expiration of the parliamentary period for the completion of a railway begun before the powers expired, is not enough to stamp with illegality the proceeding to complete such railway. *Ibid.*

RAMSGATE HARBOUR DUTIES.

The Ramsgate Harbour Act (34 Geo. 3. c. 74.), by section 8, imposes a duty not exceeding 3*d.* per ton, to be paid by the master or owner, for every ship of the burthen of 20 tons or upwards and not exceeding 300 tons, passing from, to, or by Ramsgate, or coming into the harbour there (other than and except ships laden with coals or stone), not having a receipt testifying his payment before on that voyage; and for every ship exceeding 300 tons burthen a duty not exceeding 1*d.* per ton (except ships laden with coals or stone), and for every chaldron of coals or ton of stone a rate not exceeding 1½*d.*; the said duties to be paid every time such ship

shall sail from, &c., or pass by Ramsgate (except as hereinafter mentioned). Section 14. provides, that no coasting vessel shall pay duty oftener than once in any one year, nor shall any collier returning in ballast from the French coast, producing a certificate of having paid the duty on the outward voyage for her cargo of coals, be liable to the payment of such duty on her inward voyage. There are also sections exempting from duty vessels belonging to certain ports:—Held, that section 8. applies to vessels laden with coals, with an exception in favour of coasters, which are provided for by section 14, and that a collier employed solely in the coasting trade in carrying coals from Sunderland to the ports on the south coast of England, and passing by Ramsgate on her outward and homeward voyages, is liable to pay duty once only in each year, and that such duty is to be calculated upon the cargo laden on board in her first voyage and not upon her tonnage. *Moore v. Shepherd*, 22 Law J. Rep. (N.S.) Q.B. 377; 2 E. & B. 382.

Colliers employed solely in the coasting trade in carrying coals from Sunderland and other places to the ports on the south coast of England, and passing by Ramsgate, are liable to pay Ramsgate harbour duty once only in each year. *Sharp v. Shepherd*, and *Moore v. Shepherd*, 24 Law J. Rep. (N.S.) Exch. 29; 10 Exch. Rep. 424.

RAPE.

The prisoner got into the bed of a married woman, intending, if he could, to have connexion with her by passing for her husband, but not by force. She, supposing him to be her husband, allowed him to have connexion with her:—Held, that the prisoner was not guilty of rape. *Regina v. Clarke*, 24 Law J. Rep. (N.S.) M.C. 25; 1 Dears. C.C. 397.

RATE.

(A) POOR RATE.

- (a) *Validity of.*
- (b) *Persons and Property rateable.*
 - (1) *In general.*
 - (2) *Exemption under 6 & 7 Vict. c. 36.*
- (c) *Rateable Value and Principle of Assessment.*
- (d) *Appeal against.*

(B) CHURCH RATE.

(C) COUNTY RATE.

(D) BOROUGH RATE.

(E) HIGHWAY RATE.

(F) LIGHTING, WATCHING, AND PAVING RATES.

(G) SEWERS RATE.

(H) DISTRESS FOR RATES.

(A) POOR RATE.

- (a) *Validity of.*

The Poor Law Commissioners, in 1837, by an order, directed nine parishes, townships, and places to be formed into an union, called the Pateley Bridge

Union, for the administration of the poor laws, and amongst them Bewerley and Dacre, which they treated as two distinct townships. They then directed them to contribute to a common fund, for the purpose of providing a workhouse, &c., and afterwards fixed the proportions payable by each township or place, together with the number of guardians to be appointed for each. In 1848, the chairman and guardians of this union made an order on the plaintiff and three others, as overseers of the parish of Dacre cum Bewerley (treating the two as one township), for payment of 500*l.* by way of contribution towards the relief of the poor, &c. This order having been disobeyed, the defendants, who were magistrates, issued their summons to the plaintiff and the other overseers, as overseers of Dacre cum Bewerley, and afterwards issued a warrant of distress, under which the plaintiff's goods were taken. The defendants tendered evidence that the two places had, from time immemorial, formed one township only. The Judge rejected that evidence, and directed the jury that the order of the chairman and guardians was not valid, on the ground that the order of the Poor Law Commissioners, until removed by *certiorari* and quashed, was final as regarded persons acting under it:—Held, first, that the 2 & 3 Vict. c. 84. s. 1. gave to the magistrates a power similar to that exercised by them in enforcing a legal poor-rate. That the existence of a legal obligation to pay the contribution was a necessary preliminary condition to their having any authority to enforce payment; and that, if no such obligation existed the magistrates had acted without jurisdiction and were liable in trespass. Held, secondly, *dubitante Alderson, B.*, that although the order of the Commissioners would have been wrong in ordering three guardians to be elected for Bewerley and two for Dacre, instead of five for the entire township if those places constituted one township, still that the order, until removed by *certiorari* and quashed, was valid *ad interim*, by virtue of the 4 & 5 Will. 4. c. 76. s. 105, and that the acts of the guardians and the order made by them were valid. *Newbould v. Coltman*, 20 Law J. Rep. (N.S.) M.C. 149; 6 Exch. Rep. 189.

A poor-rate for the parish of M was appealed against, on the ground that it consisted of two distinct parishes, M. St. Peter and M. St. Mary, each of which separately maintained its own poor. It appeared that, so far as evidence went (up to about 1700), there had always been a single rate for the relief of the poor and maintenance of the highways in both districts, and one constable and one set of overseers. In early times there were two rectories of St. Mary and St. Peter, which were distinct for ecclesiastical purposes; and other ancient documents shewed that there were originally two churches. There was also other evidence of ancient records, which left it ambiguous whether they were one parish or two. Upon a case, giving the Court power to draw inferences of fact,—Held, that there was evidence that these districts were reputed as one parish at the time of the 43 Eliz. c. 2; and that being so, the rate was good, even if the parishes had been in fact immemorially distinct. But, *semble*, that there was strong evidence that this had always been one parish with two churches. *Sharpley v. Mablethorpe*, 24 Law J. Rep. (N.S.) M.C. 35; 3 E. & B. 906.

(b) *Persons and Property rateable.*

(1) *In general.*

Under an act, 4 Vict. c. xvi, Commissioners were appointed for the improvement of H, within certain limits, containing parts of several townships; and the property in all the public wells or springs of medicinal or mineral waters, within the said limits, was vested in the said Commissioners, and they were empowered to add to or alter the existing erections over the said springs, and to erect a pump-room over the sulphur water springs. The act also gave them special powers with reference to the maintaining of footways, the obstruction, cleansing and lighting of the streets, the removal of dirt and rubbish from houses and premises, the preventing of nuisances, the providing a proper market, and further empowered them to make annual rates upon the owners of property within the limits of the act; the money arising therefrom, as also all other monies received under the act, to be applied entirely in paying off all monies borrowed on the rates, and defraying the expenses incurred in carrying out the purposes of the act. A pump-room was afterwards built, under the power for that purpose given by the act, which was open to, and used by the public generally, subject only to a small payment to the Commissioners, and certain other regulations imposed by the act:—Held, that the Commissioners were properly rated as occupiers and owners of such pump-room, to the relief of the poor of one of the townships in part within the limits of the act, the purposes for which they were appointed not being for the public advantage only. *Regina v. the Commissioners of High and Low Harrogate*, 20 Law J. Rep. (N.S.) M.C. 25; 15 Q.B. Rep. 1012.

The Southampton Dock Company's premises consisted in part of the Custom-house, rented and occupied by Her Majesty's Commissioners of Customs, and a manufactory and several workshops, rented and occupied by the West India Mail Packet Company, and J W. The company under the 188th section of the Dock Act, which empowered them to build or provide out of their income, steam-tugs for towing vessels into or out of the docks, from or to Southampton, or to any part of the British Channel, had actually in use a steam-tug, which offered considerable advantage to those who used the docks, and was conducive to the general profits of the dock business. It was not, however, indispensable, as other steamboats might have been hired at Southampton for the same purpose, but at less advantage and convenience both to the company and those using the docks. Attached to the freehold and essential to the business of the company, was certain fixed plant, consisting of cranes, steam-engines, shears, derricks, dolphins and other like ponderous machinery; which, however, were capable of being detached, as easily and with as little injury to the freehold, as tenants' fixtures put up for the purposes of trade and business, and usually valued as between incoming and outgoing tenants:—Held, upon a case stated as to the extent of the company's liability to be rated to the relief of the poor—First, that the 25th section of the 13 Geo. 3. c. 50. "for the better regulating the poor, &c. of Southampton," and which provided that every person, whether the landlord or tenant, who should let out his house in separate

apartments, or ready-furnished to lodgers, should for the purposes of the act be deemed the occupier and liable to be rated, did not apply to the part of the company's premises of which they were not the occupiers. Secondly, that the steam-tug must be taken as ancillary to the docks, and a part of the floating capital, and that the expense of it was a proper deduction to be made, in estimating the amount of the company's assessment to the rate. Thirdly, that as an allowance to directors for management, another proper deduction to be made was a reasonable amount of remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the company in managing the affairs of the docks, independently of the profit on capital employed by him. Fourthly, that the cranes, steam-engines and other ponderous machinery, were properly included in estimating the rateable value of the company's premises. Fifthly, that no deduction could be made for income-tax, in respect of the estimated profit of a supposed tenant of the docks, that not being a tax upon the subject-matter rated, but upon the net income of the tenant after paying the rent of the premises. *Regina v. the Southampton Dock Co.*, 20 Law J. Rep. (N.S.) M.C. 155; 17 Q.B. Rep. 83.

Commissioners had constructed a reservoir in the township of K across an existing stream upon land purchased by them under a local act, for the purpose of affording a more regular supply of water to the mills upon the stream, and of cleansing the stream, and promoting the health of the persons residing on its banks. The water flowed from the reservoir along the ancient bed of the stream, and the result obtained was an increased regularity in the motive power of the mills, whereby they were enabled to continue working at times when they would otherwise be stopped. None of the mills benefited by the supply of water were situate in K, but in other townships lower down the stream. The Commissioners were empowered to levy rates upon the mills, to be applied in paying interest upon the money borrowed for constructing the reservoir, and the necessary charges of its maintenance, and the forming a reserve fund to meet any extraordinary contingency, or for paying off the principal borrowed. The Commissioners were rated to the relief of the poor of K, in respect of the reservoir, at a sum which was admitted to be a proper assessment on the occupiers of the reservoir, if the works constructed and carried on by the Commissioners had been a private undertaking of persons who had increased the available supply of water to the mill-owners as was done by the reservoir, and who at pleasure could allow or refuse the mill-owners the benefit of such increased supply:—Held, first, that the Commissioners were liable to be rated in K for the reservoir; and, secondly, that the amount of the assessment was correct. *Regina v. Kentmere*, 21 Law J. Rep. (N.S.) M.C. 13; 17 Q.B. Rep. 551.

By virtue of a local act the corporation of Manchester, in consideration of annual payments, purchased all the estate, &c., stock-in-trade and property of an incorporated water company. By that act the corporation were required to supply water for domestic purposes to the inhabitants of the borough, for which they were to receive no water rents or other payments, but were to be deemed to be fully

paid by the rates authorized to be levied. They were enabled to levy a "domestic" water-rate on the occupiers of all dwellings, and a "public" water-rate on the owners of all houses, &c. within the borough. The council had also, in exercise of other powers in the act, entered into agreements with persons occupying premises in the borough for supplying them with water for other than domestic purposes, and for which they were paid by water rents. They also, in consideration of a fixed annual payment, agreed to supply the borough of Salford with water. The whole of the proceeds of the works and water supplied and sold had been absorbed by the payment of the annual sums to the water company. The corporation were rated to the relief of the poor of the township of Manchester, which is comprised in, but not co-extensive with, the borough:—Held, that they were liable to be rated there. *Regina v. the Mayor, &c. of Manchester*, 21 Law J. Rep. (N.S.) M.C. 160.

It is not of itself a ground for exemption from poor-rates, that the occupiers of land are trustees incorporated under acts of parliament for public purposes. It must appear from the provisions of the acts to have been the intention of the legislature that the funds derivable from their occupation should not be applied to the payment of poor-rates. *Regina v. the Birkenhead Docks*, 21 Law J. Rep. (N.S.) M.C. 209; 2 E. & B. 148.

The trustees of the Birkenhead Docks were empowered by the acts incorporating them and providing for the construction of the docks, &c., to borrow a certain sum on the credit of the rates and tolls granted by the said acts, and of any property thereby vested in them, and, if necessary, to mortgage the same. The maximum tolls and dues to be demanded and received by the trustees were stated in the acts, but the trustees were at liberty to fix and determine the tolls to be taken, provided they did not exceed the amount stated in the act, and from time to time to reduce or alter and again to raise such tolls. The acts further provided that all sums received from the rates and tolls, and all sums arising from the sale of any lands or the rents thereof, should be applied by the trustees in keeping in repair and maintaining the docks and other works made under the authority of the acts, and of paying officers and servants, and otherwise carrying the acts into execution, and also to the payment of interest and repaying the principal borrowed, under such regulations and conditions as the trustees might, from time to time, think reasonable:—Held, assuming all the purposes to which the trustees were directed to apply the sums received by them to be public purposes, that as there was nothing in the acts to shew that the trustees might not lawfully raise from the rates and tolls a sum sufficient to meet such purposes and pay poor-rates and other charges, they were liable to be rated to the poor-rate in respect of buildings upon the land vested by the acts in the trustees. *Ibid.*

The 43 Geo. 3. c. cxxviii. (local and personal), for improving the town of Bedford, enacts, section 59, that 1s. shall be assessed upon all *gaols*, chapels, meeting-houses, schools, almshouses, and other *public buildings*, churchyards, chapel-yards, and meeting-house yards, within the said town, for every yard, running measure, of the length *in front* of such

halls, gaols, &c. The Gaol Act, 4 Geo. 4. c. 64. s. 48, enacts, that every gaol for any county or town, &c. having exclusive jurisdiction of felonies and misdemeanours, which shall be situate within the limits of any other county or town, shall be taken to be part of the county or town for which it shall be used as a gaol, so long as it shall be so used. The county gaol of Bedfordshire is situate within the town of Bedford, and the front and part of the sides and the back part, the latter consisting of a boundary wall, abut upon public roads of the town. The Commissioners under the local act assessed the county Justices for the frontage of the fore part, of the back part, and of part of the sides of the gaol, measured in running yards:—Held, that the gaol was not exempt from rating by reason of the 4 Geo. 4. c. 64. s. 48, as that section related merely to jurisdiction. *The Justices of Bedfordshire v. the Bedford Improvement Commissioners*, 21 Law J. Rep. (n.s.) M.C. 224; 7 Exch. Rep. 650.

The houses of the governor and warders of a county gaol were built outside a wall inclosing an area, within which the gaol stood. The front door of the governor's house opened into the public street. There was an outlet through the back wall of the house to the area. The houses of the warders were similarly situated, but did not communicate by the back wall with the area. The governor and warders had the occupation of three houses only in respect of their being such officers, and the accommodation of their houses was not more than was proper and convenient for persons having their duties to perform; and their constant residence in their houses was an important part of their duties:—Held, that they were not liable to be rated. *Ibid.*

An union workhouse was erected by an incorporation of guardians, under the 34 Geo. 3. c. 98, the 19th section of which enacts "that all buildings to be erected by virtue of that act shall be free from all parliamentary and parochial taxes, except such and to such amount as they were assessed to at the time they were first taken and applied." It was afterwards rented by the guardians of a poor-law union, formed under the 4 & 5 Will. 4. c. 76:—Held, that the workhouse was a "public building" within the meaning of the above local act, and that it was liable to be rated under that act, the rate in question not being a "parliamentary or parochial tax" within the meaning of the 34 Geo. 3. c. 98. *Ibid.*

An infirmary is a "public building" within the meaning of the local act. *Ibid.*

In all the above cases, and the other subject-matters of rating mentioned in the local act, the rate ought to be imposed upon so much of the frontage of the several buildings and ground as abuts upon a public carriage-road or public footway. *Ibid.*

In a special case, stated under the 12 & 13 Vict. c. 45, the parties supporting the affirmative (the respondents in the present cases) are entitled to begin. *Ibid.*

A company was empowered by act of parliament to establish a ferry over the river Tyne, where it is public, tidal and navigable, and to make landing-places on each side of the river, and to take certain tolls from persons passing over the ferry. The bed of the river below low-water mark was in the parish of N, and the landing-places in the respective town-

ships of N S and S S. The ferry-boats worked by steam did not always pursue the same track in crossing, and were, while afloat, in the parish of N. The tolls were collected at the landing-place in S S. The company were rated as occupiers of "a ferry, landing and tolls" in N S at half the net annual profit of the tolls, after making proper deductions:—Held, first, that the tolls could not be rated directly as appurtenant to the landing-places, or indirectly as a profit earned by the use of the landing-places. Secondly, that the rate ought properly to be laid on the landing-place in N S according to its value as enhanced by being available for the purpose of earning the toll. Thirdly, that the mileage principle was not applicable, and that a proportion of the profits could not be assessed on the two landing-places according to the proportion which their dimensions bore to the length of the transit over the river. *Regina v. the North and South Shields Ferry Co.*, 22 Law J. Rep. (n.s.) M.C. 9; 1 E. & B. 140.

Certain persons, under a lease for years from the lord of the manor, were in the occupation and receipt of the tolls and duties payable at the market and fairs of Aylesbury, in respect of things sold at the said market and fairs; and also of the stallage, piggage and all other profits incident to the said market and fairs, together with the market-house and premises used for the purposes of the market and fairs. Tolls were paid and collected in the market-house, and throughout the market in respect of horses, cattle, corn and other articles brought into the market and fairs and actually sold. Over part of the Market Square and at the sides of some streets stalls were placed, but not in any way affixed to the soil, upon which goods were exposed for sale; and in respect of these stallage dues were paid. The lessees were rated to the relief of the poor as occupiers in respect of the market-house, and the land upon which the market and fairs were held, and of the stallage and all the tolls received by them from the sale of goods at the market and fairs:—Held, that stallage was a payment made in respect of the exclusive use and occupation of the soil, for a time, and was, therefore, properly included in the rate. But that the market tolls on things sold in the market and fairs, having no connexion with the exclusive use of the soil, were not rateable. *Roberts v. Aylesbury*, 22 Law J. Rep. (n.s.) M.C. 34; 1 E. & B. 423.

Certain lands, buildings, and premises purchased by the Lords Commissioners of the Treasury, on behalf of the Lords of the Committee of Council on Education, were fitted up and used as a normal and model school for the training of masters of schools for pauper and criminal children, and all the expenses of the institution were defrayed by the said Committee out of the money voted by Parliament for the promotion of public education. The officers of the institution were a principal, vice-principal, and masters, appointed and paid by the said Committee of Council, and who held their offices at the pleasure of the Crown. These officers were entitled to their meals at a common table, and were provided with sitting and sleeping apartments in the institution, and the principal had the privilege of supplying himself with fruit and vegetables from the garden. The pasturage of a portion of the land was let, and the proceeds carried towards the

expenses of the institution. The students were required to pay 30*l.* per annum, with the exception of those who obtained the highest exhibitions, and the money so received was applied to the general expenses of the institution. In one of the rooms, a school was held for practice in elementary instruction, which was attended by poor children in the neighbourhood, who were required to pay a weekly sum for their education, and were allowed to purchase books from the principal. The funds derived from the same were entirely expended in the maintenance and improvement of the school:—Held, that there was no substantial difference between this institution and any other establishment in which cheap education was offered through the bounty of the founder, and that the premises generally were rateable to the relief of the poor. *Regina v. Temple*, 22 Law J. Rep. (n.s.) M.C. 129; 2 E. & B. 160.

A building used exclusively as a county court under the 9 & 10 Vict. c. 95, is not rateable to the relief of the poor, as there is no beneficial occupation of it, nor any profit derived from its use by any specific class of persons. *Regina v. the Township of Manchester*, 23 Law J. Rep. (n.s.) M.C. 48; 3 E. & B. 336.

Land and buildings in Dartmoor were rented of the Government and the Duchy of Cornwall by the directors of convict prisons, and were used for the purpose of a convict establishment and of reclaiming and cultivating the land by the labour of the prisoners. The produce of the land was consumed in the establishment or sold, the proceeds of the sale being applied entirely in reduction of the convict estimates. A house within the precincts of the prison, with a small garden, was assigned as quarters to the governor of the prison, together with a coach-house and stabling. There were also quarters occupied by the deputy-governor and other officers of the prison within the prison walls. All these quarters were occupied rent free. At a distance from the prison, and not connected with it by a boundary wall or otherwise, were houses and cottages, assigned to and occupied by others of the prison officers, some of whom paid rent for them and others received less wages in proportion to the value of the premises occupied by them. All sums received for rent were applied in reduction of the prison expenditure. No more rooms were occupied by the governor, deputy-governor, or any of the other officers (either within or without the prison walls) than were necessary for the proper discharge of their duties and for the adequate accommodation of the families of such of them as were married. But the coach-house and stabling of the governor were not necessary to enable him properly to discharge his duties. A part of the building in the prison was occupied as a canteen for the sale of beer to the prison officers, no profit being derived therefrom beyond what was sufficient to pay the wages of the man who supplied the beer. Part of the buildings outside the prison walls was occupied by a grocer, who carried on his business there, supplying goods to the residents in the establishment and others. There was a farm at the distance of half a mile from the prison, in the cultivation of which the convicts of the establishment were employed, and its proceeds were wholly applied for the benefit of the establishment:—Held, that the prison itself was not rateable; that the canteen and

grocer's shop were rateable; that the quarters occupied by the governor and other officers within the prison in discharge of their duties were not rateable; that the coach-house and stables of the governor were rateable; that the farm was profitably occupied, and was rateable:—Held, also (*dissentiente Coleridge, J.*), that the residences occupied by the officers of the prison outside the prison walls were rateable. *Gambier v. Lydford*, 23 Law J. Rep. (n.s.) M.C. 69; 3 E. & B. 346.

The corporation of H were constituted the Local Board of Health of the borough, and were by section 117. of the Public Health Act (11 & 12 Vict. c. 63.) made surveyors of highways within the district. They rented and occupied a yard within the district as a place of deposit for stones and other materials for the repair of the highways. This yard was situate in the parish of S, which was partly within and partly without the limits of the district:—Held, that the local board of health occupied the yard as trustees, not for the public at large, but for the inhabitants of the district, who were charged with the obligation of repairing the highways, and that they were, therefore, rateable in respect of it to the relief of the poor of S. *Regina v. Cooper*, 23 Law J. Rep. (n.s.) M.C. 183.

The Museum of Practical Geology was erected out of monies voted by parliament upon ground forming part of the hereditary possessions of the Crown, and was established for the purpose of bringing science to bear practically upon geology, and professors were appointed and paid salaries out of monies annually voted by parliament for the purpose. The lectures of the professors were delivered in the rooms of the Museum, but they had no greater occupation than was necessary for the purpose of delivering such lectures. The students paid certain sums for the instruction received, a proportion of which, after deducting the expenses of the institution, was divided among the professors. There were also laboratories in the Museum which were occasionally used for the purpose of making analyses for members or the public, the fees for which were fixed by government, and were retained by the professors who made the analyses. No person resided on the premises except a housekeeper appointed by the Board of Trade, but who had no occupation further than was necessary for keeping and taking care of the building. The building itself was in the department of the Commissioners of Works and Public Buildings, by whom it was kept in repair. The expenses of the institution were defrayed by the Treasury out of money granted by parliament for the purpose. The Lords of the Treasury had the general controul of the institution, and appointed all the officers who held at the pleasure of the Crown. Every part of the building, and all the collections, laboratories, &c. attached to the Museum were used, and were necessary for the purposes of the school of geology:—Held, that no part of the premises was rateable, on the ground that the whole were in the exclusive possession of the Crown for public purposes. *De la Beeche v. St. James's, Westminster*, 24 Law J. Rep. (n.s.) M.C. 74; 4 E. & B. 385.

The Electric Telegraph Company, incorporated by act of parliament, constructed, fixed and laid down, with the consent of a railway company, posts, wires, and apparatus along the line of railway; and,

in consideration of their being so fixed and maintained on the lands and premises of the railway company, the telegraph company maintained and worked two of the wires for the exclusive use of the railway company. The posts on which the wires rested were fixed in the ground, but were subject to removal at the option of the railway company, if found inconvenient, to some unobjectionable spot:—Held, that the telegraph company was liable to be rated to the relief of the poor in respect of the telegraph wires, posts and land in which the same were fixed. *Electric Telegraph Co. v. Salford*, 24 Law J. Rep. (N.S.) M.C. 143; 11 Exch. Rep. 181.

(2) *Exemption under 6 & 7 Vict. c. 36.*

A building was erected by a society of persons for the purpose of being used, and was used, as a library and news-room by the members of the society for the time being who had paid their subscriptions and conformed to the rules of the society. There were 400 shareholders, who could transfer their shares, and each of whom paid a subscription and had then the full benefit of the institution. The institution consisted of a library for general reference and circulation among the subscribers, and comprising standard works on scientific subjects as well as general literature; a reading-room supplied with periodicals, pamphlets, &c., and a news-room where newspapers, the *London Gazette*, and reports of the markets were provided, and where advertisements of sales were occasionally laid upon the table by individual subscribers. The commercial and general directories were also kept in the library for the purpose of reference. The books and newspapers were purchased by the annual subscriptions of the members. The institution was supported in part by annual voluntary subscriptions, and did not, and by its laws could not make any dividend, &c. in money to any of its members:—Held, that this institution was not entitled to be exempted from rates by 6 & 7 Vict. c. 36. as a society established exclusively for the purposes of science, literature, or the fine arts, its primary object being for the private benefit and convenience of the subscribers only. *Regina v. Gas-kill*, 20 Law J. Rep. (N.S.) M.C. 29; 16 Q.B. Rep. 472.

The "Royal Manchester Institution" was built by the Society of that name from funds subscribed by shareholders, and held in trust to be used as a museum or place of exhibition for works of art and science, antiquities and specimens of natural history, and for the delivery of public lectures on subjects of science, literature, or the arts, and otherwise for the imparting and diffusing of education and knowledge consistent with the general purposes of the Institution. To the lectures given on literary and scientific subjects, either gratuitously or upon payment by the Society, the members had free admission; and officers, literary and scientific persons, artists and strangers were admitted gratuitously. To the conversazioni, soirées, or other meetings of the members, the chairman and person reading the paper could invite a certain number of friends; and the leading literary and scientific persons of the neighbourhood had free admission. Paintings and works of art were exhibited free to members; but upon the payment of an entrance fee by strangers. The cost of the carriage of the paintings of local artists to and

from the exhibition was defrayed by the society. Books of the names and addresses of the artists and the prices of the pictures were placed in the room, and when any picture was sold the purchase-money was received by an officer of the society and handed by him to the artist, after deducting, in the case of pictures brought from a distance, 5*l.* per cent. for the expense of carriage, which went into the general fund, and did not cover the whole expense of carriage. Besides this and the annual voluntary subscriptions of its members, the society's general funds were increased by rent received for rooms and cellars let to tenants, who however were rated separately. Power also was reserved to the trustees by the deed of settlement to let off any part of the building not required for the uses of the society; and in case of the regular dissolution of the society, to sell all the property belonging to the society, and, after payment of the costs of the sale, to pay the residue of the purchase-money to the council, to be by them divided amongst the then hereditary and life governors of the Institution, in certain proportionate shares. It was expressly provided by a rule of the society that no dividend, gift, or bonus in money should at any time, or under any circumstances, be made to or between the governors or members of the Institution, and it did not appear that any such had ever been made:—Held, that the society was entitled to exemption from poor-rates in respect of the Institution, under the 6 & 7 Vict. c. 36. s. 1. *Regina v. the Overseers of Manchester*, 20 Law J. Rep. (N.S.) M.C. 113; 16 Q.B. Rep. 449.

The Manchester Concert Hall was built by a society, partly from funds subscribed by eighty individuals who were among its first subscribers, and was held in trust to pay off that amount, and subject thereto in trust for the society. The number of subscribers of five guineas each annually to the society was six hundred, and besides these there was another class called *quasi* members, who paid an annual subscription of two guineas and a half each, and all were admitted by ballot. The annual subscriptions, amounting to about 3,000*l.*, went to pay off the above debt and interest, and to meet the current expenses of furnishing the Concert Hall, and supporting the society generally. The Concert Hall was used by the society for concerts and musical entertainments open to subscribers, and parties admitted by tickets to subscribers; at which music of a high class was generally practised and performed; and for the general business of the society; except on one occasion, in 1848, when the use of the hall was given gratuitously by the society for the charitable purpose of a public concert, on behalf of the funds of the Manchester Royal Infirmary. Each subscriber was entitled to tickets of admission to every public and private concert, which were transferable to ladies generally, and to gentlemen and *quasi* subscribers subject to certain restrictions. Each subscriber might also give orders for the admission of four persons to the private or undress concerts. The *quasi* subscribers were each entitled to admission, without ticket, to the private or undress concerts. Most of the vocal and instrumental performers were paid out of the amount subscribed, which was also expended in the purchase of music for the society's use. A highly skilled professor of

music was induced to settle and remain in Manchester, solely because of the existence of the society, the tendency of which had been to promote and improve the science and practice of music in Manchester and the neighbourhood. No dividend or bonus in money had ever been made to any of the members, and the rules of the society provided that in the event of a dissolution, the funds, after payment of all debts, should be applied to the promotion and encouragement of music:—Held, that the society could be regarded only as a musical club, the primary object of which was the gratification and amusement of the members and their families, and therefore was not entitled to an exemption from poor-rates, as a society instituted for the purposes of the fine arts exclusively, within the 6 & 7 Vict. c. 36; also, that had the society been otherwise entitled to the exemption, the accidental use of the hall for the benefit of the Infirmary in 1848, would not have affected the right to exemption. *Regina v. Brandt*, 20 Law J. Rep. (N.S.) M.C. 119; 16 Q.B. Rep. 462.

A society, called the London Library, established for the purpose of lending to members books of a superior description, and to which the members contributed a yearly subscription, was held to be a society for the purposes of literature, supported by voluntary contributions, under the 6 & 7 Vict. c. 36, s. 1, and being certified as such under section 2, would be exempt from local rates in respect of premises occupied for the purposes of the society. The London Library, however, had let portions of its premises to three other scientific societies, and it was held that this was not an occupation for the purposes of the society, and that the premises, therefore, were not exempt from the rates. *Clarendon v. St. James's, Westminster*, 20 Law J. Rep. (N.S.) M.C. 213; 10 Com. B. Rep. 806.

Where, upon an appeal to the Quarter Sessions, a cause is stated for the opinion of a superior court, under the 12 & 13 Vict. c. 45, s. 11, the practice is to give costs as between party and party. *Ibid*.

The "United Service Institution" comprised in part a museum of natural history, curiosities, and armour, a library, lecture-room, and rooms for meetings of the members and council of management on the business of the institution. By the deed of trust founding the Institution, and by the laws, it was declared to be instituted as a central repository of objects of professional art, science, and natural history, and for books and documents relating to those studies, or of general information and the delivery of lectures on appropriate subjects. By the same deed the trustees were to stand possessed of all land, &c., monies transferred to them, and all books, specimens, models, and other articles belonging to the Institution, in trust for the Institution, and it was expressly provided by a law of the Institution, that no dividend, gift, or bonus in money should be made unto or between any of its members, and that the whole of its property should be exclusively applied for carrying into effect its design as a central repository for objects of professional art, science, and natural history, and for books and documents relating to those studies, or of general information, and for the delivery of lectures on appropriate subjects. The ordinary membership was limited to military and naval officers and certain civil functionaries and

candidates for commissions in the army. Foreigners of distinction, eminent individuals, benefactors to the institution (including ladies), and the *corps diplomatique* might be admitted as honorary members, and foreign naval and military officers as corresponding members. The members had the privilege of introducing visitors to all the rooms of the Institution, except the library:—Held, that the Institution could not be considered as "established exclusively for the purposes of science, literature, or the fine arts," and therefore was not exempt under 6 & 7 Vict. c. 36, from being rated in respect of the part described. *Regina v. St. Martin-in-the-Fields*, 21 Law J. Rep. (N.S.) M.C. 53; 17 Q.B. Rep. 149.

The Russell Institution comprises a library, theatre or lecture-room and a news-room, and was founded in 1808 for the purposes of, first, the formation of a library consisting of the most useful works in ancient and modern literature; secondly, the establishment of a reading-room, provided with the best foreign and English journals and other periodical publications; thirdly, for lectures on literary and scientific subjects. The funds for purchasing the building and supporting the institution were raised in the first instance by transferable shares. Persons might become annual subscribers to the Institution and be entitled to the privileges of proprietors. There were about 400 shareholders and subscribers and the privileges of the Institution, except as to admission to the lectures, were confined to them. The library contained about 18,000 volumes, and the principal reviews, magazines, daily and weekly papers, and other periodicals, and directories and other books of reference, and the mining and railway journals and railway time-tables. Some of the newspapers taken in were filed, and the rest sold for the benefit of the institution. The lectures on subjects connected with science, literature and the arts the public were invited to attend upon payment of an admission fee. The whole income of the Institution, derived in part from the rent of baths, wine-cellars and annual subscriptions, was applied in defraying the expenses of the Institution, and a rule of the Institution provided that no dividend, gift, division or bonus in money or otherwise could be made to or between the members:—Held, that the Institution could not be considered as "a society instituted for the purposes of science, literature, or the fine arts exclusively," and was therefore liable to parochial rates. *The Russell Institution v. St. Giles-in-the-Fields and St. George, Bloomsbury*, 23 Law J. Rep. (N.S.) M.C. 65; 3 E. & B. 416.

Quære—whether it could be considered as "a society supported in part by annual voluntary contributions," within the meaning of 6 & 7 Vict. c. 36, s. 1. *Ibid*.

The Zoological Society of London was incorporated for the advancement of zoology and animal physiology and the introduction of new and curious subjects of the animal kingdom. The society's lands and buildings are used for housing animals, and as a green-house, and a museum for stuffed birds and animals. A portion of the buildings is used as a residence for the keepers, and there is also a porter's lodge. Subscriptions to the society are made by the fellows and annual subscribers, and they, as well as the honorary, foreign, and corresponding members of the society, are entitled to a copy of the scientific

proceedings of the society gratis, and to purchase the other publications of the society 25l. per cent. less than the public; and an annual payment of 1l. 1s. entitles them to admit a member of their families and a companion, daily, to the museum and gardens. Each fellow may visit the gardens daily, with two companions, and has the privilege of giving written orders and tickets of admission to friends. The public is admitted daily except Sunday, to the museum and gardens, upon payment of a fee; confectionary and other refreshments are sold in the gardens by a person, who makes an annual payment to the society for the right to do so. By permission of the society a room was built in the gardens and a collection of humming birds exhibited in it, each person, except the fellows, being charged 6d. extra for admission during the first year, and not afterwards. The society sells skins to the amount of several hundred pounds annually, and publishes its own proceedings for sale to the public. Out of the funds of the society tea and coffee are provided for the fellows at fortnightly meetings. A band plays in the gardens on certain days in June, July and August, and this and other matters of attraction are advertised by the society. About three acres of the society's land forms a flower garden, which is kept up at a considerable expense:—Held, that the society could not be considered, either as a society for the purposes of science exclusively, or as supported by voluntary contributions, within the meaning of the 6 & 7 Vict. c. 36, and was, therefore, not exempt from the payment of poor-rates. *Regina v. the Zoological Society of London*, 23 Law J. Rep. (n.s.) M.C. 139: nom. *Marylebone Vestry v. the Zoological Society of London*, 3 E. & B. 807.

The Linnean Society of London was incorporated for the cultivation of the science of natural history, and every kind of improvement in the arts and sciences. The society was managed by a president and some of the fellows. At the society's meetings, papers on natural history were read and discussed, and some of them printed in the society's Transactions. Copies of the Transactions were circulated amongst the fellows, and given to other institutions, and copies were also sold for the purpose of defraying the cost of printing and publication. The society was supported in part by annual contributions paid by some of the fellows, and sums paid by others of the fellows in lieu of annual contributions. Two of the rooms occupied by the society were used as a dwelling for the clerk, librarian and housekeeper of the society, and the porter of the society also resided on the premises. These officers paid no rent, but the value of the use of their rooms was taken into account in the amount of their salaries. The remainder of the apartments were entirely appropriated to a museum, library and other rooms suitable and necessary for the purposes of the society. The society's premises were part only of what had formerly been occupied as one house, and then rated as No. 32, Soho Square. Part of the house was situate in Dean Street, and this part afterwards made distinct from the rest, and numbered 17. in the said street, and was, together with some of the rooms in the other part of the house, No. 32, Soho Square, underlet by the society to B. The society was assessed to the poor-rate in respect of the whole of the premises No. 32, Soho Square, their tenant B being assessed

in respect only of the distinct portion of the premises, numbered 17, Dean Street:—Held, first, that the society was established for the purpose of science exclusively. Secondly, that it was a society supported in part by voluntary contributions, and, therefore, within the exemption from liability to poor-rates provided by 6 & 7 Vict. c. 36. Thirdly, that the residence of the librarian, &c. and porter on the premises being subsidiary and necessary for the purposes of the society, did not deprive the society of exemption from rateability. Fourthly, that the mere circumstance of the society underletting part of the premises did not deprive them of such exemption. That the society could not be considered as occupying the part of the premises, No. 32, Soho Square, underlet to B, but that it was to be taken as part of the house, No. 17, Dean Street, for which B. and not the society was liable to be rated. *The Linnean Society of London v. St. Anne's, Westminster*, 23 Law J. Rep. (n.s.) M.C. 148; 3 E. & B. 793.

The Cambridge Philosophical Society was established by charter for the promotion of philosophy and natural history among graduates of the University, and occupied a building, part of which consisted of a library, chiefly of scientific books, rooms for holding meetings of the society, at which scientific papers were read, and a museum of objects of natural history, and the residue of a reading-room and apartments for the curator. Every fellow of the society paid a guinea by way of annual subscription to the society. In addition to the bye-laws regulating the society, there were certain reading-room regulations under which every fellow of the society, elected before 1822, was entitled to become a member of the reading-room on payment of the reading-room subscription, and those elected since 1822 were necessarily members of it. The annual subscription to the reading-room was 1l. 6s., to be payable during residence. The reading-room was supplied with reviews, magazines, and periodicals (some of which only were of a scientific character), and with the ordinary daily and other newspapers. It was open every week-day from 8 a.m. to 11 p.m., and strangers might be introduced to it, and non-resident fellows of the society visiting Cambridge were entitled to use it. The scientific meetings of the society did not exceed twelve in any year. The funds of the society consisted principally of the subscriptions of the members, and it had not made, and could not lawfully make any dividend, gift, or bonus to any of its members. The subscriptions to the reading-room exceeded the subscriptions to the society, and the amount disbursed for newspapers was double that paid for books:—Held, that the society was not entitled to be exempted from rateability under the 6 & 7 Vict. c. 36, as the premises were not occupied for the purposes of science, literature or the fine arts exclusively; and that the reading-room could not be separated for the purpose of exemption from the rest of the building. *Purshas v. the Holy Sepulchre, Cambridge*, 24 Law J. Rep. (n.s.) M.C. 9; 4 E. & B. 156.

(c) Rateable Value and Principle of Assessment.

The legal principle of rating sanctioned by the Courts and recognized by the Parochial Assessments Act (6 & 7 Will. 4. c. 96.) is applicable to all cases where a company or an individual occupies in differ-

ent parishes land forming one entire property; and the value which the land occupied in each parish produces, after the proper allowances have been made, is that upon which the occupier must be rated in each. *Regina v. the London, Brighton and South-Coast Rail. Co.*, and *Regina v. the South-Eastern Rail. Co.*, and *Regina v. the Midland Rail. Co.*, 20 Law J. Rep. (N.S.) M.C. 124; 15 Q.B. Rep. 313.

The occupation of a railway company does not in its broad principles differ from that of a canal company; and as the 6 & 7 Will. 4. c. 96. provides but one rule, and is intended to secure uniformity of rating, the same principle of assessment must be applied to both cases. Therefore, a rate is to be imposed upon a railway company upon the ordinary principle of ascertaining the actual rateable value of the land occupied by the company in each parish through which it passes, by the rules which are applicable to any other land occupied by other bodies or persons for other purposes. *Ibid.*

The rateable value of the portion of railway occupied in any particular parish must be deduced from the net earnings in that parish, ascertained by a comparison of the profits and outgoings arising in that parish; and not by treating the rateable value, however constituted, of the whole line of railway as entire, and dividing it among the several parishes simply according to the distance which the line passes through each. *Ibid.*

In ascertaining the rateable value of a portion of a railway in any parish, the amount at which the company is rated in another parish cannot be taken into consideration. But any expenses, wherever arising, which are shewn to be necessary for keeping the hereditament in the parish at the value which is made the measure of the assessment may properly be taken into consideration in arriving at that value. *Ibid.*

There is no insuperable difficulty in applying the principle of parochial earnings to the rating of railways, as companies are bound to afford to parish officers the means of laying the rate fairly. *Ibid.*

A railway company is entitled to an annual deduction from the ascertained value of their occupation, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent, according to the principle upon which such a deduction is allowed in all cases of property of a perishable nature. *Ibid.*

Such a deduction is not included in the working expenses of the railway. *Ibid.*

The company will not be disentitled to this deduction, because no annual charge for the purpose of meeting the depreciation has, in fact, been made on their receipts, either by way of outlay or setting apart any sum; although such a course ought to be adopted by the company. *Ibid.*

Semble, also, that whenever the time arrives for actually making the restoration, the company will be estopped from claiming more than the annual amount of deduction previously allowed to them. *Ibid.*

Quære—Whether the deduction could be allowed if the company had defrayed such expenses as had been incurred out of their capital instead of their revenues. *Ibid.*

By an agreement between the B. Railway Company and the S. Railway Company, the traffic of the latter passed toll-free over a certain portion of the line of the former, in consideration of the traffic of the former passing toll-free over a certain equal portion of the line of the latter. A portion of the line of the B. Railway, affected by this arrangement, was within the respondent parish; but no part of the line of the S. Railway was within that parish:—Held, that in estimating the rateable value of the B. Railway within the respondent parish, the value of the tolls which would have been received in respect of the passage of the traffic of the S. Railway Company was to be considered as rent in kind earned by the land, but that such earnings must be subject to exactly the same deductions as if they had been received in money, and therefore the B. Company were entitled to deduct the value of the tolls payable by them in respect of the passage of their traffic over an equal portion of the line of the S. Railway. *Ibid.*

Where a rate made in November was based on the last published half-yearly accounts of the company made up to the 30th of June preceding, but in the interval between June and November the value of the working plant of the company had greatly increased, the company were held to be entitled to have their deductions calculated upon this increased value, and to have the rate amended accordingly, the Sessions upon the appeal having been put into possession of the state of facts really existing when the rate was made. *Ibid.*

Parish officers are to make a rate upon the supposed prospective value of the occupation ascertained from the latest evidence in their power as to antecedent value; and although they are justified in rating a railway company upon their latest published accounts, if that is the latest information reasonably procurable, yet if a new state of accounts is communicated to them by the company before they make the rate, they ought to take such new state of circumstances into account if they believe it to be true. *Ibid.*

The Great Western Railway Company was assessed to the relief of the poor of the parish of T in respect of two miles and a half, being a portion of a branch line which was originally constructed as an independent railway, but was afterwards incorporated with the Great Western Railway by act of parliament, and was worked by the company as part of their entire railway. A certain number of engines and carriages and a separate staff of officers and servants were appropriated to the branch. No separate account of receipts and expenditure was kept in respect of the branch as distinguished from the rest of the railway. The branch could be worked as a separate railway under independent management, but at a greater cost and with a larger moveable stock than was bestowed upon it. It was found that the actual expenses of the company were not in the proportion of the actual gross receipts either on the branch or throughout the entire railway, nor were either such gross receipts or such expenses at one uniform rate per mile throughout the entire railway. The parties were agreed upon the gross annual receipts from the whole railway, and the gross annual receipts from the two miles and half in T. In order to ascertain the net rateable value of

the entire railway, the company claimed, in addition to annual allowances for the repairs of the permanent way and of the moveable stock, to deduct specific sums for their ultimate renewal and reproduction:—Held, that such a deduction ought to be allowed. *Regina v. the Great Western Rail. Co.*, 21 Law J. Rep. (n.s.) M.C. 84; 15 Q.B. Rep. 379.

In order to ascertain the net rateable value of the two miles and a half in T, the deductions from the total gross revenue ought to be distributed on the parochial principle, by ascertaining what expenses are incurred in earning the gross receipts on the two miles and a half. This principle does not preclude a consideration of expenses wherever arising locally, which are necessary for keeping the subject of rate at the value which is the measure of the assessment. *Ibid.*

Wherever such expenses in fact apply equally to every mile of a railway, it is a convenient and allowable mode to arrive by a mileage division at the proportional part to be assigned to the miles in any particular parish. *Ibid.*

The company in ascertaining the net rateable value of the two miles and a half in T, claimed to separate the branch from the rest of the railway as to all the expenses, except a small portion of the general expenses of the entire railway, and to divide the expenses of the branch thus separated on the mileage principle:—Held, that under the circumstances of the case, they could not thus separate the branch from the rest of the railway, and consider it as a distinct whole. *Ibid.*

The respondents claimed to assess the two miles and a half in T, in the ratio which the gross annual receipts in T bore to the gross annual receipts of the entire railway:—Held, that the facts found in the case reserved precluded such an apportionment of the expenses, and that the mode contended for by the respondents could not be adopted. *Ibid.*

The Hull Dock Company are the owners and occupiers of several docks and basins, communicating with each other, formed under various statutes at different times, and which are situate in several parishes. They are entitled to tonnage duties for every ship coming into or going out of the harbour, docks or basins, or unloading or lading any of their cargo within the port, such duties being payable as soon as the vessels enter any of the docks or the harbour. By one of their acts no vessel passing up or down the rivers Hull or Humber, without entering any of the docks or basins, is to be subject to toll, unless it shall load or discharge part of its cargo in the Old Harbour, or within that part of the Humber which is in the port of Hull, in which event tonnage-rates are to be paid only in respect of goods so landed or discharged. It was further provided, that if any vessel using the docks should remain there for a longer time than ten months, there should be paid in respect of such vessel a further rate of $\frac{3}{4}$ d. per ton per week, and that the several duties authorized to be taken should be charged equally, and after the same rate in respect of the same description of vessel and same description of goods upon the same voyage, provided always that a vessel proceeding from the port of Hull to any other port or place, and returning thence to Hull or *vice versa*, should be considered as performing the same voyage. A dock and haven master was to be

appointed, who should have power to regulate the position, mooring, placing, or removing within the docks, or any of them, of any vessels entering into, lying in or going out of the same respectively; and whenever the despatch of business should be obstructed by reason of any vessel lying in the docks, whether her cargo should or should not have been discharged, the dock master might remove any such vessel from one of the said docks into any other of the said docks; and vessels after being discharged were to be removed into such part of the docks as should be set apart for light vessels. No separate accounts are kept for the several docks, and there is only one set of officers for the whole establishment. No distinct or separate rates or duties are payable for the use of any particular dock or docks, nor any accumulative rates for the use of all or any number of them, but the same rates are payable into whatever dock vessels go, and whether they use only one or more of the docks, such rates being payable as soon as they enter any of the docks. Vessels on the same voyage frequently use two or more of the docks, paying only one single toll, and no additional charge can be made for a vessel lading her cargo outwards in one dock and discharging her cargo inwards in another of the docks. The further tonnage dues payable for vessels remaining above ten months have always been paid generally, and without regard to their remaining in one particular dock. The net rateable value of the whole of the docks having been ascertained by making the proper deductions from the gross receipts from the tonnage dues received by the company in respect of all the docks,—Held, that this entire rateable value ought to be apportioned among the several parishes within which the docks, &c. were situate, in proportion to the areas of the docks, &c., respectively within such parishes. *Regina v. the Dock Co. at Kingston-upon-Hull*, 21 Law J. Rep. (n.s.) M.C. 153; 18 Q.B. Rep. 325.

The Commissioners of the Huddersfield Waterworks, under two private acts of parliament, were the proprietors of reservoirs, &c. in the township of Longwood for the supply of water to the town of Huddersfield, and to secure a supply of water to certain mill-owners and occupiers in Longwood. The Commissioners were bound by their acts to furnish water gratis in case of fire, to supply it at 1d. per 100 gallons for watering the streets, and to the consumers at certain specified rates so calculated that the water rents were not in any one year, after payment of the expenses, to exceed 7l. 10s. per cent. on the amount which should be owing by the Commissioners in respect of the loan which they were empowered to raise on mortgage of the works and water rents, and after the discharge of the whole of the said loan, the water rents were to be reduced so as merely to cover current expenses. The Commissioners were rated to the relief of the poor on the sum of 490l., the Sessions finding that sum to be the estimated net rateable value of all the reservoirs, pipes and other apparatus in Longwood, taken in connexion with, and as part of the entire works in Longwood and Huddersfield, being made up of 300l. the estimated net annual value of all the reservoirs, and 190l. the net annual value of the pipes and other apparatus in Longwood. The Sessions also found that a tenant of the entire

waterworks, if released from the restrictions in the acts of parliament, and able to exercise his discretion as to the amount of water rents and rates, might calculate, with reasonable certainty, on a gross revenue of 3,000*l.*, and that after deducting 800*l.*, the fair average of the current annual expenses, and the sum of 1,100*l.*, proved and admitted to be a proper annual deduction for repairs, renovations and tenant profits, the residue of 1,100*l.* represented the net rateable value of the entire works; but that if such tenant was to be considered as subject to the restrictions in the acts, he could make no profit at all:—Held, by *Coleridge, J.*, that substantially the consumers, and not the Commissioners as a separate body, were the occupiers and the parties rated, and that the use and enjoyment of the water, and not merely the water rents, constituted the value of the occupation. That the restriction imposed by the acts amounted to no more than an arrangement between the Commissioners and consumers as one body, of the terms upon which the benefits of the occupation were to be enjoyed, and could have no bearing on the question of the amount of rateable value as between the consumers and the inhabitants of Longwood. That therefore, assuming the sum of 490*l.* to be the proper proportion of the 1,100*l.* which according to the above finding of the Sessions had been arrived at on a right principle as the net rateable value of the entire works, the Commissioners were properly rated on that account for the township of Longwood. Held, by *Wightman, J.* and *Crompton, J.*, that the principle put in the finding of the Sessions of a tenant released from restrictions, and at liberty to charge any rates he pleased, did not furnish the proper criterion for ascertaining the rateable value in this particular case; but as no other ground was shewn for altering the rateable value from 490*l.*, that sum must be taken to be, as found by the Sessions, the proper proportion of rateable value. *Regina v. the Township of Longwood*, 21 Law J. Rep. (N.S.) M.C. 215; 18 Q.B. Rep. 871.

The occupier of a ship-building yard on the shore of a tidal and navigable river constructed a floating dock in the river opposite the yard, which was used in the following manner:—When a vessel required repair the dock was hauled into deep water, where, by taking out plugs it was made to sink and ground; the gates were then opened and the vessel hauled into the dock, and allowed to settle down in it as the tide fell. At low tide the dock-gates were again closed and the plugs replaced, and any water that remained was pumped out. With the next tide, the dock with the vessel in it floated, and was hauled towards the shore, and moved by chains about thirteen feet from the building yard. To enable the workmen to get to their work, a plank was laid from the building yard to the floating dock. Two of the mooring chains were attached to anchors in the bed of the river, and two others were fastened to posts standing in the building yard. When the repairs were finished, the dock was again sunk in deep water, and the gates being then opened, the vessel was hauled out:—Held, that as the floating dock had no necessary connexion with the ship-building yard, it could not enhance its rateable value. *Regina v. Morrison*, 22 Law J. Rep. (N.S.) M.C. 14; 1 E. & B. 150.

The Newmarket Railway Company being empowered by their act to make a branch line of railway joining that of the Eastern Counties Railway Company, an agreement was entered into between the two companies (which was afterwards confirmed by act of parliament), whereby in consideration of the benefit likely to accrue to the Eastern Counties Company from the making of such branch, and the working of it in connexion with their railway, the Eastern Counties Company agreed that whenever the net earnings of the Newmarket Railway Company, after payment of working expenses and other charges, &c. should not be sufficient to pay a dividend of 3*l.* per cent. on their share capital, the Eastern Counties Company would pay to the Newmarket Company such sum as would be sufficient to make up the said dividend to the rate of 3*l.* per cent.; provided that the sum payable in any one year should not exceed 5,000*l.* The net earnings of the Newmarket Railway Company not being sufficient to pay the said dividend of 3*l.* per cent. in the year preceding that in which they were rated, the Eastern Counties Company, in pursuance of their agreement, paid to them 3,705*l.* to make up the dividend to the said rate:—Held (*per Coleridge, J.* and *Erle, J.*, *dissentiente Lord Campbell, C.J.*) that in rating the Newmarket Railway Company to the relief of the poor, the sum of 3,705*l.* ought not to be taken into consideration as increasing the rateable value, as it was not an earning of the branch nor money paid by way of rent for the use of the branch, or springing from the profits of the occupation, but a payment arising from a collateral contract of guarantee in case the profits of the occupation should fall short of a certain amount. *The Newmarket Rail. Co. v. St. Andrew the Less, Cambridge*, 23 Law J. Rep. (N.S.) M.C. 76; 3 E. & B. 94.

The Reading, Guildford and Reigate Railway Company constructed a railway joining the main line of the South-Eastern Railway at Reigate. Under powers in their act of incorporation, the R. G. and R. Company leased their line for 1,000 years, at a yearly rent of 41,000*l.*, to the South-Eastern Company, who thenceforth became the sole occupiers of and carriers on the line. The R. G. and R. Company was afterwards amalgamated with the South-Eastern Company, who were bound by the act of amalgamation to pay to the shareholders of the R. G. and R. Company annuities equal to the rent of 41,000*l.* The R. G. and R. line brought a great deal of additional traffic to the main line of the South-Eastern Railway, and that company thus derived benefit from the R. G. and R. line as a feeder to their main line in respect of traffic conveyed on that line. The R. G. and R. line, if in the market, might be an object of competition in consequence of the rivalry existing between the South-Eastern and other companies, the traffic on whose lines would be increased by the possession and controul of it. The annual gross earnings on the R. G. and R. line, less the proper deductions, fell short of 41,000*l.* The South-Eastern Company being rated as occupiers of so much of the R. G. and R. line as passed through the parish of Dorking, upon a valuation founded upon the said rent of 41,000*l.*, appealed against the rate; and upon a case stated for the opinion of this Court, it was held, first (*per totam Curiam*) that the rent of 41,000*l.*, although it was evidence of the

rent at which the R. G. and R. line might reasonably be expected to let to a tenant from year to year, could not be taken as the conclusive or sole criterion of the rateable value, and that the assessment could not therefore be supported. Secondly (*per Lord Campbell, C.J., Coleridge, J. and Crompton J., dissentiente Erle, J.*), that the South-Eastern Company were properly assessable in respect, not only of the net profits derived from the traffic passing through D, but also in respect of the rent paid and the value of the R, G and R line to them, as an integral part of their railway and as increasing the traffic on their main line. *The South-Eastern Rail. Co. v. Dorking*, 23 Law J. Rep. (n.s.) M.C. 84; 3 E. & B. 491.

A brewery and premises, together with the goodwill and trade of certain public-houses, subject to the rents theretofore received for the said public-houses, were leased for seventeen years to A, yielding and paying for and in respect of the brewery and premises the clear yearly rent of 300*l.*, and for and in respect of the fixtures, implements, and utensils specified in a schedule the further clear yearly rent of 50*l.*, and for and in respect of the goodwill and trade of all and every the public-houses, tenements, and premises mentioned in another schedule the further clear yearly rent of 150*l.* A occupied the brewery and premises; and the public-houses, thirty-three in number, which were situate in different streets and places, and quite apart from the brewery, were let by A to separate tenants, at rents about equal to the amount paid by A to his landlord. The tenants of the public-houses, as they were bound to do under an agreement, purchased from A at the brewery all the malt liquors, &c. consumed in their houses, and each tenant was separately rated to the poor-rate. Without the restriction as regards the purchase of malt liquors, &c. a higher rental would have been given for the public-houses:—Held, (*Erle, J.* differing in opinion), first, that the 150*l.* paid for the goodwill of the public-houses, was to be taken into account in estimating the rateable value of A's occupation of the brewery and premises. Secondly, that A was not entitled to claim a deduction equal in amount, as an outgoing necessary to the obtaining by the brewery of the profit derived from the trade of the public-houses. *Allison v. the Township of Monkwearmouth Shore*, 23 Law J. Rep. (n.s.) M.C. 177.

(d) Appeal against.

The 17 Geo. 2. c. 38. s. 4, empowering the Quarter Sessions, upon an appeal against a poor-rate, to order costs to be paid to the party in whose favour the appeal is decided, is not affected by the 12 & 13 Vict. c. 45. s. 5, and the 11 & 12 Vict. c. 43. s. 27. An order, therefore, for the payment of the costs of such an appeal is valid, though it directs the costs to be paid directly to the appellants, and may be removed into this court, and enforced by a writ of execution, under the 18th section of the 12 & 13 Vict. c. 45. *Regina v. Huntley*, 23 Law J. Rep. (n.s.) M.C. 106.

The 11 & 12 Vict. c. 43. s. 27, relates only to appeals against summary convictions and orders of Justices mentioned in the act. *Ibid.*

(B) CHURCH RATE.

The township of B formed part of the parish of

W, but it maintained its own poor, and from time immemorial it had chapelwardens and a chapel, in which divine service and the sacraments of the church had been performed. In 1727, for the first time, a separate burial ground for the township was consecrated, in which the rite of burial had since regularly taken place. The repairs of the chapel had always been defrayed by rates raised within the township; and the vestry books of B shewed that several payments had been made to the churchwardens of W, but it did not appear that they were contributions towards the repair of the parish church. On the 30th of June 1825, it was resolved, by a majority of the vestry of B, duly convened for that purpose, that an offer of 550*l.* from the Society for Promoting the Enlargement of Churches and Chapels should be accepted, and that the chapel should be enlarged, any deficiency in the expense to be made up by the sale of certain pews, and by rates under the act of parliament. It was also resolved to petition the Commissioners for Building New Churches, to erect a new church in the township, free of expense to the inhabitants. On the 29th of November 1827, the then chapelwardens duly executed a deed charging the chapel rates of the township with 600*l.* and interest, borrowed for the purpose of enlarging and rebuilding the chapel, a part of which had been paid off:—Held, first, that B was not in itself a parish, within the meaning of the 58 Geo. 3. c. 45. s. 59. Secondly, that the resolution of the 30th of June did not contain a sufficient consent of the vestry to the borrowing of the 600*l.*, upon the security of the rates, within the same section, and therefore that a mandamus under the 58 Geo. 3. c. 45. to compel the defendants to pay off the arrears of that amount out of the rates, could not be supported. *Regina v. the Chapelwardens of Bilston*, 20 Law J. Rep. (n.s.) M.C. 60; 15 Q.B. Rep. 1083.

(C) COUNTY RATE.

The treasurer of a county partly included within the Metropolitan Police district is, under the 11 & 12 Vict. c. 42. s. 26, liable to pay, out of the county rate, expenses (which the prisoner has no means of defraying) incurred by a Metropolitan Police constable in conveying prisoners to the county gaol, under warrants of commitment made by Justices of the county within the district, directed to the parish constable, and delivered for execution to the police constable under the 2 & 3 Vict. c. 47. s. 12; the orders upon the treasurer for payment of the expenses being made by county Justices within the district; whether such committals are for trial upon charges of felony or misdemeanour, or upon remand followed by a committal or discharge, or upon summary convictions in a penalty, with an adjudication of imprisonment in case of non-payment. The county treasurer is also liable to pay, out of the county rate, like expenses incurred by a Metropolitan Police constable under warrants of committal made by Metropolitan Police Magistrates, sitting at Police Courts, and directed and delivered to such Metropolitan Police constable, the orders for payment on the defendant being also made by Metropolitan Police Magistrates, sitting at the Police Courts, whether such committals are for trial or charges of felony or misdemeanour, or upon remand, or on summary convictions, or for refusing to enter into recognizances to

keep the peace. But the county treasurer is not liable to pay to a police constable the expenses of conveying to a Police Court from the county gaol a prisoner who had been previously committed there for re-examination, when the warrant to bring the prisoner up again was made, not on the police constable, but upon the gaoler who had employed the police constable to reconvey the prisoner. *Leverick v. Mercer*, 22 Law J. Rep. (N.S.) M.C. 81; 1 E. & B. 674.

Semble—that such expenses would be payable if the Magistrate made his order to the constable to bring up the prisoner at the same time as he ordered the gaoler to deliver him to the constable. *Ibid*.

The expenses of the gaol of P were, under the regulations made by the Justices of the county, to be certified by two visiting Justices, and, upon their order, paid by the treasurer of the county. The account of these expenses included the expenses attending the holding of the Quarter and General Sessions of the Peace for the county, under the head "Sessions expenses." It had been long customary at the Sessions and at meetings of Justices on magisterial business in the court house, which formed part of the gaol, to provide refreshments for the jurors and Justices, the cost of which was charged in the county treasurer's accounts under the head "Sessions expenses." In 1851 a public inquiry into the conduct of the Judge of the county court took place at the court house, the visiting Justices having made an order granting the use of the court house for the purpose, and directing the governor of the gaol to make all necessary arrangements. During the inquiry refreshments were supplied to the Justices and others present, to the amount of 53*l.* 7*s.* 6*d.*, and this sum was paid by the treasurer under an order of two visiting Justices, and formed part of an item of 287*l.* 2*s.* 3*d.*, charged in the treasurer's accounts for the year, under the head "Sessions expenses." At the next General Sessions, in September 1852, the said payment of 53*l.* 7*s.* 6*d.* was disallowed, and with this exception the treasurer's accounts were allowed and afterwards transmitted to the Secretary of State for the Home Department. At an annual Sessions, holden on the 30th of June 1853, an order was made, pursuant to a resolution of a majority of the Justices present, allowing the said sum of 53*l.* 7*s.* 6*d.* No notice of any motion for altering or rescinding the former order of Sessions had been given, although required by a standing order of Sessions. The orders of Sessions having been brought up by *certiorari*.—Held, that the order of the visiting Justices was not a judicial order, which the treasurer was bound to obey; that the Sessions held in September 1852 had acted properly in disallowing the sum of 53*l.* 7*s.* 6*d.*; and that the subsequent Sessions had no power afterwards to allow that sum, and that their order of the 30th of June was, therefore, void. *Regina v. Saunders*, 24 Law J. Rep. (N.S.) M.C. 45; 3 E. & B. 763.

(D) BOROUGH RATE.

The council of the borough of Lichfield, before making a borough rate, made an estimate pursuant to 5 & 6 Will. 4. c. 76. s. 92, in which was included an item of 105*l.* 14*s.* 10*d.* in respect of three years' arrears of salary awarded to a former town clerk as compensation for his discharge. The same party having also recovered against the town council 467*l.*

for damages and costs, and threatening execution against the corporation, received payment for that amount from the attorney for the council, who intended to charge it to the council as a disbursement, but had not delivered his bill of costs. In respect of the sum of 467*l.* and the attorney's bill of costs, the sum of 800*l.* was introduced into the estimate. The council afterwards made a borough rate, including the above sums. At a meeting which was *not public*, the borough council made an order which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor-rates *made and collected*; and they also issued a warrant to their treasurer, commanding him within 100 days *from the date thereof* to demand from the overseers the said proportions. The treasurer made his precept to the overseers requiring them within 100 days *after the receipt* thereof to pay the proportions out of the poor-rates made and collected *or to be made and collected*. The plaintiff, an overseer, not having paid the proportions assessed on his parish, a warrant was issued by the defendants, being the Mayor and Justices of Lichfield, commencing thus, "*Borough and city of Lichfield.*" The warrant then directed certain parties to levy the sum of 77*l.* 16*s.* 1*d.* by distress of the plaintiff's goods, and provided that "if within the space of five days next after such distress by you taken the sum of 77*l.* 16*s.* 1*d.* shall not be paid, that *then* you do sell the said goods." "Given under our hand and seal, and under the corporate seal of the said borough and city. T T (L.S.), M B M (L.S.), Justices of the said borough and city. (Corporation seal.) *Thomas Johnson, Mayor.*" The defendant Johnson was not stated in the body of the warrant to be mayor of the borough:—Held, first, that a borough rate need not be made in public. Secondly, that as the rate was good upon the face of it, even although it might be retrospective in fact (which, *semble*, it was not), no advantage could be taken of that circumstance as against the defendants. Thirdly, that the warrant was not bad by reason of its directing the sum to be paid out of the rates *to be made and collected*; nor, fourthly, in directing the overseers to pay the sum within 100 days after the *receipt* of the warrant. Fifthly, that it sufficiently appeared from the warrant that one of the defendants was mayor of the borough at the time of making the warrant. Sixthly, that the warrant of distress appeared to have been made within the jurisdiction of the mayor and Justices. And, lastly, that the warrant was not bad, under the 27 Geo. 2. c. 20, in not fixing the time at which the sale of the plaintiff's goods was to *terminate*. *Jones v. Johnson*, 20 Law J. Rep. (N.S.) M.C. 11; 5 Exch. Rep. 862: affirmed (in error), 21 Law J. Rep. (N.S.) M.C. 102.

(E) HIGHWAY RATE.

By the Ashton-under-Lyne Improvement Act, 12 & 13 Vict. c. xxxv. s. 25. power is given to the mayor, aldermen, and burgesses to make and levy a highway rate upon the occupiers of all messuages, houses, &c., lands, tenements and hereditaments within the borough, for maintaining and repairing "the present highways, within the borough, when sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, &c., and such of the present and future streets as shall

from time to time be declared public highways as aforesaid, and the main sewers under the same." The borough of Ashton-under-Lyne consists of a part of one of the four divisions of the parish of Ashton-under-Lyne, and the whole of another of such divisions, the latter being sub-divided into two districts; and before the passing of the above act each of such districts separately maintained its own highways, and had its own surveyor. The greater part of one district was a country district. After the passing of the said act, the mayor, &c. acting as surveyors, laid a rate on the rateable property within each of the said districts, exclusively for the repair of such highways within them as had not been sewered, drained, levelled, paved, flagged, and otherwise completed to the satisfaction of the mayor, &c.;—Held, that under the above section of the special act, taken in connexion with sections 48. and 49. of the Towns Improvement Clauses Act, 10 & 11 Vict. c. 84, the mayor, aldermen, and burgesses of the borough were empowered to make two general rates within the borough, one for the repair of the urban streets within the 25th section of the special act, and the other for the repair of the rural ways not within that section, and, therefore, that the rate in question was bad. *Regina v. Slater*, 21 Law J. Rep. (N.S.) M.C. 185.

In allowing a highway rate, the two Justices by inadvertence wrote their allowance at the end of a page in the middle of the rate instead of at the end of the rate. The words of allowance were, "We do hereby consent to and allow the foregoing rate and assessment":—Held, that there was no allowance of the latter part of the rate, and that payment of an assessment in the latter part could not be enforced by distress. *In re the Justices of North Staffordshire*, 23 Law J. Rep. (N.S.) M.C. 17.

The proviso in the 27th section of the 5 & 6 Will. 4. c. 50, which extends the liability to highway rates to "such woods, mines, &c. as have heretofore been usually rated to the highways," is not limited to the identical mines before actually rated, but applies to mines of the same class and description as those usually rated in the parish before the act passed, though opened and worked for the first time since the passing of the act. *Regina v. Saunders*, 24 Law J. Rep. (N.S.) M.C. 57.

(F) LIGHTING, WATCHING AND PAVING RATES.

A local act for lighting a hamlet enacted that rates should be laid upon all persons who should inhabit, use, occupy, or be in possession of or enjoy any messuages, tenements, houses, warehouses, or other buildings, tenements or hereditaments, situate or being in such of the streets, &c. or other public passages and places within the hamlet as should from time to time be lighted by virtue of the act:—Held, that the general words "tenements and hereditaments" included only things *ejusdem generis* with those before mentioned; and which were capable of being inhabited and benefited by the act, and that a water company was not rateable in respect of its pipes laid in the ground under the streets of the hamlet. *Regina v. the East London Waterworks Co.*, 21 Law J. Rep. (N.S.) M.C. 49.

Under a local act which enabled trustees to lay rates upon persons holding or enjoying any tenements, land, building, ground, hereditaments or premises in the district, a steamboat company

were rated in respect of their floating pier or landing-place, by the description of "tenement, landing-place and premises, and the brow or brows, barge or barges, &c. lying upon, fixed to or connected with the same tenement, land, landing-place or premises, and the easement or easements, anchorage or anchorages, held, used or enjoyed therewith," &c. The pier consisted of three floating barges, boarded over and kept in their places by chain cables fastened to anchors sunk in the bed of the river; the barges were connected by wooden bridges, the first bridge resting on the first barge at one end, and at the other end being fastened to a platform resting upon an abutment attached and made fast to the wall of a building on the shore. Both bridges and barges rise and fall with the tide. Passengers embarking by the steamboats pass through the ground floor of the building, where a fare is paid, and then proceed over the platform, bridges and barges to the steamboats. The ground floor as well as the said pier and landing-places were in the exclusive occupation of the steamboat company:—Held, that the rate was laid not on the barges, &c. as distinguished from the land, but on the landing-place and premises, together with the floating barges, &c. by which the occupation of the land was rendered more profitable, and that the rate was, therefore, valid. *Regina v. Leith*, 21 Law J. Rep. (N.S.) M.C. 119.

The ground floor of the building was rented of one J S by the company, and formed part of a mill, the residue of which was occupied by J S. In the rate in question J S was assessed for "the mill and premises, exclusive of the steamboat pier":—Held, that this meant to exclude not the floating barges, &c., but the ground floor and landing-place occupied by the company, and therefore the latter were not twice rated. *Ibid.*

By the 40th section of the local act, 11 Geo. 3. c. xii. the Commissioners appointed by the act were empowered to make rates upon all persons who "shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, cellar, vault, or other tenements or hereditaments," within the streets, squares, &c. of a certain district, such rates not to exceed in any one year "the sum of 1s. 2d. in the pound of the yearly rents or yearly value of such of the said lands, houses, shops, warehouses, cellars, vaults, or other tenements or hereditaments respectively, as shall be situate in any of the said streets, squares, &c., the greater part or parts of which said streets, &c. respectively shall be actually begun to be paved with new or other stones of a flat surface; and not exceeding 9d. in the pound of the yearly rents or yearly value of such of the said lands, &c. respectively as shall be situate in any of the streets, squares, &c. which shall be actually begun to be new paved, the footways whereof shall be constructed with new or flat stones, and the carriage-ways whereof with the old stones which shall be taken up in the same or any other of the said streets, squares, &c., and not exceeding 6d. in the pound of the yearly rents or yearly value of such of the said lands, &c. as shall be situate in any of the said streets, squares, &c. which shall only be repaired by virtue or in pursuance of this act." The occupiers of houses situate at the corner of paved streets were made liable by a special provision to half of the rate only, and the act also

contained special provisions as to the rating of public buildings and other specified property, but which had no express reference to the pipes and other property of a company for the supply of water. The Commissioners were empowered by section 22. to alter the situation of the water pipes, &c. throughout the district:—Held, that, under the 40th section, an incorporated waterworks company was rateable in respect of the mains, pipes and other apparatus laid down within the district of the Commissioners. *Regina v. the East London Waterworks Co.*, 21 Law J. Rep. (n.s.) M.C. 174.

At a meeting of the ratepayers of a parish it was resolved to adopt the provisions of the statute 3 & 4 Will. 4. c. 90, so far as they related to lighting the parish. At a subsequent meeting, a requisite number of the ratepayers passed a resolution for the making a lighting rate. On both occasions the ratepayers present elected as chairman a gentleman not a ratepayer:—Held, that although the statute probably intended that the chairman should be a ratepayer, yet, though he was not a ratepayer, the rate was not thereby rendered invalid. *Regina v. the Justices of Middlesex*, 22 Law J. Rep. (n.s.) M.C. 106.

By section 14. ratepayers who have not paid all their parochial rates, taxes, and assessments due six months are disqualified from voting at meetings under the act:—Held, that ratepayers who had not paid the lighting rate of the preceding year were disqualified from voting by this section. *Ibid.*

(G) SEWERS RATE.

The City of London Sewers Act, 1848, (11 & 12 Vict. c. clxiii.), places the whole of the city under Commissioners, who have the sole power of cleansing, paving and lighting the whole, and, by section 168, are empowered to direct the alderman or his deputy and the major part of the common councilmen of every ward within the city to make a rate, called "the consolidated rate," for these purposes, upon the owners and occupiers of all property within the city, or partly within and partly without the city, whether such person be liable to be assessed to the poor-rate or not liable thereto by reason of such premises being situate in any precinct or extra-parochial place or otherwise. By section 262. the word "city" includes the city of London and the liberties thereof, and all precincts or places within the city of London or the liberties thereof:—Held, that Serjeants' Inn, which is extra-parochial and locally within the boundaries of the city, but not part of any ward, was liable to be rated to the consolidated rate under the above act; and that the proper mode of assessing the inn was by the Commissioners, by their warrant, directing the officers of the adjoining ward to rate the inhabitants of the inn. *Moss v. the Commissioners of Sewers of London, respondents*, 24 Law J. Rep. (n.s.) M.C. 84.

(H) DISTRESS FOR RATES.

In an action of trespass the defendants pleaded in justification that while A and four others were overseers of the township of B, and C and D churchwardens, the plaintiff was duly assessed as an inhabitant of the township in the sum of 10s. 4d. for the poor-rate; that the same not being paid on demand, the plaintiff was duly summoned before two Justices; that he did not appear, but that the said church-

wardens and overseers appeared by the said A, and the Justices, after proof of the making of the rate, &c. did, pursuant to the statute, issue their warrant, directed to the overseers of the township of B to levy by distress upon the goods of the plaintiff the sum of 10s. 4d. and the further sum of 6s. for costs incurred by the said churchwardens and overseers; that the said warrant was delivered to the said T B C as such overseer to be executed, by virtue of which warrant the defendants as servants of the said T B C, as such overseer and at his command, and for the purpose of executing such warrant, as such servants, committed the trespasses complained of. Verification. The plaintiff replied, that before execution or notice of the warrant he tendered to T B C the amount of the rate:—Held, upon demurrer, that the replication was bad for not averring a tender of the costs. Held, also, that the plea was good, as the Justices had power under the 12 & 13 Vict. c. 14. to award the costs to the parties applying for the warrant, and the overseers had a right to appoint deputies for the execution of the warrant. *Walsh v. Southwell*, 20 Law J. Rep. (n.s.) M.C. 165; 6 Exch. Rep. 150.

A local drainage act (9 & 10 Vict. c. cxxviii.) provided (s. 81.) that the Commissioners should charge and assess certain lands and the respective occupiers thereof with an acre tax; (s. 84.) that if the rates should not be paid within twenty-eight days after the time appointed for payment, every person failing to pay the same should also pay interest, which was to be recovered in the same manner as the rates; (s. 85.) that the occupiers of the lands rated should pay the sums assessed, and retain the same out of their rents, provided that no occupier should be compelled to pay more than the rent which should "from time to time become due" from him to his landlord; (s. 89.) that if any person, being the occupier of rated lands, should refuse or neglect to pay the money so rated within thirty days the Commissioners should have power to enter and levy the sum of money so rated, and all arrears thereof, by distress and sale of the goods of the person so neglecting or refusing to pay the same; and (s. 90.) that if no sufficient distress should be found, the lands were to remain as security for the payment. *Mattison v. Hart*, 23 Law J. Rep. (n.s.) C.P. 108.

The Court held, on looking at the scope of the statute, but not without doubt,—first, that an occupier, who came into occupation after the expiration of the thirty days from the time appointed for the payment of the rate, was liable to be distrained upon for the rate which his predecessor had failed to pay, there being a continuing default; secondly, that he was liable for the amount not only of rent already due by him to his landlord, but of the rent accruing due; thirdly, that he was not liable for interest from the date of his predecessor's default, but only from the time when he himself came into possession. *Ibid.*

RECEIVING STOLEN GOODS.

A, B, and C were jointly indicted for stealing and receiving some fowls. It was proved that A, carrying a sack containing stolen fowls went with B at half-past four in the morning into the house of C's

father; that in about ten minutes time A (still carrying the sack) came out at the back-door with B, preceded by C with a lighted candle; that C was the only member of the family up in the house; that the three went together into a stable on the same premises; that the police went into the stable after them, and found the sack lying on the floor, and the three men standing round it as if bargaining. The Bench told the jury that the taking of A and B with the stolen goods by C into the stable over which he had the controul for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving them within the meaning of the statute. The jury convicted A and B of stealing the fowls and C of receiving the fowls, knowing them to have been stolen. Upon a case, stating the above facts, the question asked being whether the conviction of C was proper,—Held, by a majority of the Judges (eight to four) that the conviction was wrong. The majority were of opinion that C did not receive the fowls, as they all along remained in the manual possession of A and B, and were never under C's controul, and it was not the intention of A and B that C should have them except on the contingency, which never happened, of his completing a bargain for them. The minority held, that as C co-operated with A and B in the common purpose of carrying the fowls into the stable, he had a joint possession with them; and that as he knew that the fowls were stolen, and assisted in the removing them for the purpose of negotiating about the purchase, he had a possession with a wicked purpose, and therefore might properly be convicted as a receiver. *Regina v. Wiley*, 20 Law J. Rep. (n.s.) M.C. 4.

An indictment in the first two counts charged the prisoner with larceny: in the third count it alleged that the prisoner, "the goods and chattels aforesaid so as aforesaid feloniously stolen," &c. feloniously did receive, knowing them to have been stolen. The jury acquitted the prisoner on the first two counts, but found him guilty on the third. A motion was made to arrest the judgment, on the ground that the words in the third count, "so as aforesaid feloniously stolen," imported a charge that the goods were stolen by the prisoner as alleged in the previous counts, and that as the jury had negatived the charge of stealing, the finding on the third count could not be supported:—Held, that, whether the words "so as aforesaid feloniously stolen" imported that the prisoner stole the goods or not, the conviction was perfectly good, as the finding of the jury on one count could not on a motion in arrest of judgment be used to impeach the finding on another count, however contradictory. *Regina v. Craddock*, 20 Law J. Rep. (n.s.) M.C. 31; 2 Den. C.C. 31.

D and G were indicted in a single count for feloniously receiving stolen goods. It was proved that D first received some of the goods: evidence was then given that G afterwards at a separate time and place received another portion of them. The jury found both guilty:—Held, that D and G could not properly be both convicted under the count for jointly receiving on proof of separate acts of receiving; that as the evidence given against D fully satisfied the allegation of a receiving in the indictment, the evidence of receipt by G ought not to have been admitted; and that consequently the con-

viction was good as against D, but ought to be reversed as against G. *Regina v. Dovey*, 20 Law J. Rep. (n.s.) M.C. 105; 2 Den. C.C. 86.

On an indictment for feloniously receiving goods knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give in evidence that the prisoner at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that those goods had been stolen from such owner. *Regina v. Oddy*, 20 Law J. Rep. (n.s.) M.C. 198; 2 Den. C.C. 264.

A principal in the second degree in larceny cannot be convicted as a receiver. *Regina v. Perkins*, 21 Law J. Rep. (n.s.) M.C. 152; 2 Den. C.C. 459.

If a wife receive goods from her husband knowing that he has stolen them, she does not commit any criminal offence, and cannot be convicted as a receiver of stolen goods. *Regina v. Brooks*, 22 Law J. Rep. (n.s.) M.C. 121; 1 Dears. C.C. 184.

A, who had stolen some goods and had them in his pocket, was caught by the owner, who sent for a policeman. The policeman took the goods out of A's pocket, but afterwards, in concert with the owner, gave them back to A, who was told by the owner to go and sell them where he had sold others. A took and sold them to B, and B bought them believing them to have been stolen:—Held, that B could not be convicted, under the statute, as a felonious receiver of stolen goods. *Regina v. Lyons* overruled. *Regina v. Dolan*, 24 Law J. Rep. (n.s.) M.C. 59; 1 Dears. C.C. 436.

If property, known by A to be stolen property, is in the actual possession of a person over whom A has absolute controul, so that the property will be dealt with by him according to A's direction, and A professes to the owner that he can get the property back for him, A may be indicted as a receiver of stolen property though he never has touched the property or had manual possession of it. *Regina v. Smith*, 24 Law J. Rep. (n.s.) M.C. 135; 1 Dears. C.C. 494.

RELEASE.

General words in a release are limited by the recitals. Therefore, where an arbitrator, having power to settle deeds of indemnity with respect to the purchase of a rectory and tithes, settled a deed reciting that A was to indemnify B in respect of that purchase, and the release in the deed contained general words of indemnity with respect to all acts to be done in respect of the premises,—Held, that the award was not bad for excess, on account of the largeness of the indemnity; but that the indemnity must be taken to be in respect of lawful acts done in carrying out the recited provisions. *In re Bluck*, 22 Law J. Rep. (n.s.) C.P. 173; s. c. nom. *Bluck v. Boyes*, 13 Com. B. Rep. 652.

Where an arbitrator directed A to sign, seal, and deliver a deed "forthwith" to B, though it appeared on the face of the award that the execution of that deed was to depend upon the prior execution of another,—Held, that the award was not bad; the word "forthwith" meaning as soon as B should be in a condition to call upon A to execute. *Ibid*.

To an action upon a bond, the defendant pleaded that after the making of the writing obligatory, an agreement was made by and between the plaintiff and the defendant, and divers other persons, and sealed with the seal of the plaintiff, and that it was agreed, by the said agreement, that the said agreement might be pleaded by the defendant in bar to all demands and proceedings with respect to the alleged claim:—Held, that the plea ought to have set out so much of the deed as operated as a release, and to have expressly averred that the deed did so operate, and that the above plea was, therefore, bad. *Wilson v. Braddyll*, 23 Law J. Rep. (N.S.) Exch. 227; 9 Exch. Rep. 718.

A plea of a release pleaded *puis darrein continuance*, after a demurrer and joinder in demurrer, operates as a retraxit of the demurrer. *Solomon v. Graham*, 24 Law J. Rep. (N.S.) Q.B. 332.

In error to reverse outlawry upon final process, the party suggesting error appeared and assigned error by attorney in the issuing of the writs of exigent. The plaintiff in the action, not denying the error, pleaded that the original judgment was entered up under a warrant of attorney which authorized a release of "all and all manner of error and errors, writ and writs of error, and all benefit and advantage thereof, and all misprisions of error and errors and imperfections whatsoever had, made, committed, done or suffered, or to be had, made, &c. in, about, touching or concerning the aforesaid judgment, or in, about, touching or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever of or any way concerning the same," and that the attorney had in pursuance thereof released the errors assigned in the name of the defendant:—Held, first, that the power in the warrant of attorney did not extend to a release of errors in any proceeding or process by way of execution or outlawry after the judgment entered up under the warrant of attorney; the object of the clause being to give the original plaintiff a valid judgment, and to authorize the release of any error affecting such judgment, but not to enable him to take any erroneous proceeding upon that judgment. Secondly, that after pleading over to the errors assigned, and issue in law having been joined, the plaintiff could not treat the appearance and assignment of error by attorney as erroneous, so as to entitle him to judgment on that ground. *Ibid*.

The omission to state in an assignment of error to reverse an outlawry that the debt has been satisfied or brought into court, is a mere matter of practice, and not a ground of demurrer; and, *semble*, that appearance by attorney of the party assigning error is so also. *Ibid*.

RENTS.

In April A died intestate, leaving his widow *en-cointe* and B his presumptive heir-at-law. In October a child was born. Between April and October some rents of real estate of which A died seised accrued due, but were not received by B:—Held, that these rents belonged to the child of A, and not to B. *Goodale v. Gawthorn*, 23 Law J. Rep. (N.S.) Chanc. 875; 2 Sm. & G. 375.

REPLEVIN.

The Court Baron of the Honour of Pontefract was an immemorial court, and the lord had power to grant replevins and hold pleas in replevin, and also to hold pleas in all personal actions arising within the jurisdiction up to 40s. By the 17 Geo. 3. c. xv. the jurisdiction was extended to 5*l*., but there was a proviso that all pleas in replevin should be had and be proceeded in and be removable in the same manner as if the act had not passed. By the 2 & 3 Vict. c. lxxxv. s. 1, after reciting the 17 Geo. 3. c. xv, it was enacted that "the present jurisdiction and practice of the Court Baron of the Honour of Pontefract shall (with certain exceptions) cease and determine, and thenceforth the said court shall be constituted and be a court of record, under the name of the Court of the Honour of Pontefract." The 4th section extended the jurisdiction of the Court to 15*l*. The 56th section enacted, that six months after the passing of any general act for the recovery of small debts, the operation of which should interfere with the powers given to the said Court by this act, "every clause, matter, or thing in the act contained which shall extend or be construed to extend to give to the court hereby appointed any local or separate jurisdiction shall cease and determine." The act did not specifically mention replevins. By the 9 & 10 Vict. c. 95. s. 5. (the County Courts Act) power was given to the Queen in Council to order that any court holden for the recovery of debts under the provisions of certain acts, specified in Schedules A and B should be held as a county court, with power to alter or vary the districts, and it provided, "that from and after the time mentioned in any such orders the act or acts under which such court is now constituted, so far as the same relate to the establishment or jurisdiction or practice of a court for the recovery of small debts or demands, shall be repealed, but not so as to revive any act thereby repealed;" and the 6th section enacted, that as soon as a court should be established under the aforesaid powers, "every act of parliament, heretofore passed, so far as the same respectively relate to or affect the jurisdiction and practice of the court so established or ordered to be holden as a county court, shall be repealed." By the 119th and 120th sections, actions of replevin are directed to be brought without writ in the courts held under the act, and the pleas are to be entered in the court holden for the district. The 2 & 3 Vict. c. lxxxv. was specified in Schedule A, and an order was duly made establishing a county court for the district included within the jurisdiction of the Court of the Honour of Pontefract, as modified by that act. The defendant being the landlord of certain premises occupied by the plaintiff seized as a distress for rent certain cotton-spinning machines, which were fixed by screws, some into the wooden floor and some into lead which had been poured in a melted state into holes in the stone for the purpose of receiving the screws. The machines having been replevied by a replevin issued out of the Honour Court of Pontefract, the defendant entered and seized them a second time. Held, first, in the absence of evidence that any replevins had ever been issued from the Court Baron of the Honour of Pontefract, except in cases in which there was jurisdiction to try the pleas, that after

the constitution of the new county court no replevin could be issued from the court baron. *Semle*—there may be a franchise for granting replevins independently of the franchise of trying the plaintiffs. *Hellawell v. Eastwood*, 20 Law J. Rep. (n.s.) Exch. 154; 6 Exch. Rep. 295.

Held, secondly, that the machines never became part of the freehold, and were distrainable. *Ibid*.

An action of replevin may be maintained against magistrates *alone* who issue a warrant of distress against the goods of a party. *Jones v. Johnson*, 20 Law J. Rep. (n.s.) M.C. 11; 5 Exch. Rep. 862.

The 5 & 6 Will. 4. c. 76, which enacts, that in all actions against any person for anything done in pursuance of the act if judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, does not apply to actions of replevin brought against magistrates to try the validity of a distress for borough rates. *Jones v. Johnson*, 20 Law J. Rep. (n.s.) M.C. 169; 6 Exch. Rep. 133.

The plaintiff, being Judge of a county court, upon the removal of a plaintiff in replevin from his court into a superior court, under the 9 & 10 Vict. c. 95. ss. 121, 127, took a bond in the usual form, except that he himself was the obligee, instead of the other parties in the suit, as directed by the 127th section. The bond having been forfeited by reason of the suit in the superior court not being prosecuted with effect, the Judge of the county court brought an action upon the bond:—Held, first, that the bond, though irregular, was not void, and that the plaintiff might sue upon it as a voluntary bond; secondly, that although the suit was improperly removed into the superior court, the proceedings after the removal were valid; thirdly, that it appeared at the trial that the plaintiff had taken the bond as trustee for the other parties in the replevin suit, and was suing upon it for them, the full amount of the costs incurred in the replevin suit might be recovered in this action. *Stansfield v. Hellawell*, 21 Law J. Rep. (n.s.) Exch. 148; 7 Exch. Rep. 373.

Replevin. *Avowry*, that the plaintiff was tenant to the defendant at a rent of 400*l.* a year. The plaintiff being the owner of a farm and lessee of the tithe commutation rent-charge, under the Dean and Chapter of W., at a rent of 60*l.* a year, let the land verbally to the defendant at a rent of 400*l.* a year, tithe free:—Held, that as by the 80th section of the Tithe Commutation Act, 6 & 7 Will. 4. c. 71, in the event of the defendant distraining for the tithe rent, she would be compelled to allow the same to the plaintiff in account, the plaintiff was tenant to the defendant at a rent of 400*l.*, and therefore that the *avowry* was proved. *Meggison v. Bowes; Sells v. the Same*, 21 Law J. Rep. (n.s.) Exch. 284; 7 Exch. Rep. 685.

Replevin. *Avowry* “that the plaintiff for a long time, to wit, for all the time during which the rent hereinafter mentioned to be distrained for, was accruing due, and from thence until and at the said time when, &c., held and enjoyed the said close in which, &c., as tenant thereof to the defendant, by virtue of a certain demise thereof theretofore made at and under a certain rent, to wit, the yearly rent of 80*l.*, and because a large sum, to wit, the sum of 80*l.*, of the rent aforesaid, for a certain time, to wit, one year, ending on the 29th of September A.D. 1851,

on the day and year last aforesaid, and from thence until and at the said time when, &c., was due and in arrear” the distress was taken. Plea in bar, *riens in arriere*. At the trial it was proved that there was no rent due for the year ending the 29th of September 1851, but that a portion of the previous year's rent was due:—Held, that the plaintiff was entitled to the verdict. *Roskrug v. Caddy*, 22 Law J. Rep. (n.s.) Exch. 16; 7 Exch. Rep. 840.

REVENUE.

- (A) INCOME TAX.
- (B) CUSTOMS.

(A) INCOME TAX.

The Bengal Civil Service Annuity Fund is composed of monies subscribed by the civil servants of the East India Company and of monies contributed by the company, in an equal proportion, and is invested in India and managed there by a committee. The annuitants, by arrangement with the company, have the option of receiving their annuities either in India from the managers of the fund, or in London from the company; the latter in such case being provided out of the fund in India with monies for the purpose of making the payments. A civil servant entitled to an annuity from the fund and residing in France elected to receive it in London:—Held, that he was not liable to pay income tax, under the 5 & 6 Vict. c. 35, in respect of the annuity. *Udny v. the East India Company*, 22 Law J. Rep. (n.s.) C.P. 260; 13 Com. B. Rep. 733.

A tenant has a right to deduct from his rent the amount of property-tax assessed upon and paid by him in respect of his landlord, although the landlord is not, in fact, liable to be assessed, and has before the payment claimed exemption, and that exemption has been subsequently allowed. *Swatman v. Ambler*, 24 Law J. Rep. (n.s.) Exch. 185; 8 Exch. Rep. 72.

(B) CUSTOMS.

The owner of a vessel, who knowingly lets his vessel that it may be employed in a smuggling adventure, and the cargo of which is unshipped without the duties being paid, is liable to the penalties, under the 8 & 9 Vict. c. 87. s. 46, as a person “concerned” in the illegal unshipping of the goods. *Attorney General v. Robson*, 20 Law J. Rep. (n.s.) Exch. 188; 10 Exch. Rep. 790.

The 8 & 9 Vict. c. 87. s. 117. (Customs Consolidation Act) enacts, that no writ shall be sued out against any officer of the Customs or against any person acting under the direction of the Commissioners of her Majesty's Customs for anything done in the execution of or by reason of his office until a month's notice of action shall have been given, stating the cause of action, &c. The 118th section enacts, that no plaintiff, in any case where an action shall be grounded on any such act done by the defendant, shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid, or shall recover any verdict against such officer or person unless he

shall prove on the trial of such action that such notice was given; and in default of such proof the defendant in such action shall recover a verdict with costs, as hereinafter mentioned:—Held, that, upon the trial of an action against an officer of the Customs, it is the duty of the Judge, unless the facts are admitted, to hear the evidence and decide whether the defendant did the act complained of honestly believing that his duty called upon him to do it, in which case the provisions as to notice of action would be applicable. *Arnold v. Hamel*, 23 Law J. Rep. (N.S.) Exch. 137; 9 Exch. Rep. 404.

ROBBERY.

By the statute 14 & 15 Vict. c. 100. s. 11. if an indictment charges a simple robbery, the jury may acquit the prisoner of the robbery, and find him guilty of a simple felonious assault with intent to rob, and he may be punished for the simple felonious assault; but if the indictment alleges an aggravated robbery, the jury, acquitting him of the robbery, may convict him of the aggravated felonious assault with the like intent, and the punishment for such an aggravated assault may be imposed. *Regina v. Mitchell*, 21 Law J. Rep. (N.S.) M.C. 135; 2 Den. C.C. 468.

SALE.

[See VENDOR AND PURCHASER.]

The defendant, a coal-factor, sold coals for the plaintiff upon the following authority:—"Please sell for me 250 tons of coal at such a price as will realize me not less than 15s. per ton, net cash, less your commission:—Held, not to support a declaration for breach of contract in not selling for ready money. The meaning of such a contract is, "sell for me, so as to have ready money forthcoming to me on the day of sale to the amount of 15s. per ton." *Boden v. French*, 20 Law J. Rep. (N.S.) C.P. 143; 10 Com. B. Rep. 886.

A sale of goods effected by the fraud of the buyer is not an absolutely void transaction, but the seller may elect to treat it as a contract. If he does not treat the sale as void before the buyer has resold the goods to an innocent vendee, the property will pass to that vendee. *White v. Garden*, 20 Law J. Rep. (N.S.) C.P. 166; 10 Com. B. Rep. 919.

M owed S a sum of money for which S had M's promissory note as a security. S applied for payment. M proposed that an inventory should be made of the goods on his premises, and that S should take them at a valuation in discharge of the debt. S consulted his attorney, who prepared a document. After the preparation of the document, M delivered the inventory to S, and S and M insured the goods against fire in their joint names, and S gave up to M the promissory note, which was destroyed. S at the same time credited M in his book to the amount of the debt. Stook possession of a few articles included in the inventory, for which M had no use, but M remained in possession of the rest of the goods as before. The goods in question being seized by the sheriff in execution at the suit of a third party against M, S claimed them as his own, and sued the sheriff in the county court for taking them, and in order to maintain his

claim, offered the document in evidence. This was objected to, and rejected for want of a stamp:—Held, that as M was in possession of the goods, it lay on S to prove clearly that they were his; and that as the document which contained the terms of the arrangement between M and S was inadmissible for want of a stamp, no other evidence of a sale was admissible, and that, consequently, the facts above stated were no evidence for the jury of S's title to the goods. *Yorke v. Smith*, 21 Law J. Rep. (N.S.) Q.B. 53.

A delivery order for goods stated, that the parties signing it held certain goods which they engaged to deliver to A's order on the "presentation" of the document duly indorsed:—Held, that "presentation" meant delivering up the document, and that A's indorsee was not entitled to the delivery of the goods on merely shewing the order. *Bartlett v. Holmes*, 22 Law J. Rep. (N.S.) C.P. 182; 13 Com. B. Rep. 630.

To a declaration for non-delivery of iron sold by the defendant to the plaintiff, and agreed to be delivered to the plaintiff at his works as required, and to be paid for in bills at four months, the defendant pleaded that the plaintiff did not, within a reasonable time after the making of the contract, request the defendant to deliver the iron:—Held, that the plea was no answer to the action. *Jones v. Gibbons*, 22 Law J. Rep. (N.S.) Exch. 347; 8 Exch. Rep. 920.

The 11th section of the 56 Geo. 3. c. 50. is not confined to sales of farming stock and crops on land let to farm, by the sheriff under an execution, but applies to an ordinary sale by the tenant himself, and a purchaser from the tenant is bound by the terms of the lease under which the tenant holds. *Wilmot v. Rose*, 23 Law J. Rep. (N.S.) Q.B. 281; 3 E. & B. 563.

The plaintiff, a merchant at Leeds, contracted with the London partner of a firm carrying on business as merchants at London and Odessa, for the purchase of a quantity of linseed, to be paid for half by drafts on the buyer, at three months from the time of advice of the sale reaching Odessa, and the remainder at three months from the date of shipment. The London partner forwarded the contract to the Odessa partner, and the latter drew upon the plaintiff two bills of exchange on account of the linseed, which were duly accepted and paid when due. In order to fetch the linseed the plaintiff chartered a vessel, which was to proceed with an outward cargo to Odessa, and there take on board "from the agents of the freighter" the linseed, and being so loaded, proceed to Hull, "and deliver the same to the order of the freighter on being paid freight." The vessel having arrived at Odessa the master applied for the linseed, and produced a copy of the charter-party, when he was informed that the cargo should be shipped in due time. A letter was also sent by the Odessa partner to the London partner, informing him of the arrival of the vessel, and stating that a portion of the linseed was ready for her. The Odessa house commenced loading the vessel, but not being able to procure the entire quantity of linseed, the master consented to receive wheat in substitution thereof, which was accordingly shipped. When the loading of the linseed was completed, the Odessa partner wrote to the London partner, stating that he should have

the bill of lading by the next post. The Odessa partner afterwards procured the master to sign bills of lading, making the goods deliverable "unto order or to assigns," and indorsed the bills of lading for value to a third person, who transferred them to the defendants:—Held, that under the above circumstances there was no such delivery of the goods as to vest the right of property or possession in the plaintiff. *Ellershaw v. Magniac*, 6 Exch. Rep. 570 in notes.

An auctioneer may bring an action in his own name for the price of goods sold by him as auctioneer and delivered to the purchaser; and a plea alleging that the goods were sold by the plaintiff as an auctioneer, agent and trustee for K, and that after sale and before the action the defendant paid the said K the price of the goods, is no answer to the action. *Robinson v. Rutter*, 24 Law J. Rep. (N.S.) Q.B. 250; 4 E. & B. 954.

The plaintiff agreed to sell to the defendant a quantity of hoop-iron to be manufactured in Staffordshire, and delivered in January and February at Liverpool. The iron was to be forwarded by canal boats, vessels, and carts. Iron so forwarded at the period of the year in question necessarily suffers some deterioration by being rusted. The iron in question, which was clean and bright when put on board, arrived at Liverpool in a rusty state, and acceptance of it was refused by the defendant:—Held, that the defendant was bound to accept the iron, if it was only so far deteriorated as it would necessarily be in its transit from Staffordshire to Liverpool; and that the Judge misdirected the jury in saying that the defendant was entitled to have it delivered to him at Liverpool in a merchantable condition. *Bull v. Robison*, 24 Law J. Rep. (N.S.) Exch. 165; 10 Exch. Rep. 342.

SCIRE FACIAS.

[See COMPANY.]

Declaration in *scire facias* on a recognizance to keep the peace, recited that the recognizance had been acknowledged before "Lee B. Townshend, Esq. and J. H. Harper, Esq. two of our keepers," &c.:—Held no good objection, on demurrer, that the Justices were described by initial letters. *Per Lord Campbell, C.J.* a consonant may be assumed to be a name of baptism as well as a vowel. The distinction taken in *Lomax v. Lundells* not acquiesced in. *Regina v. Dale*, 20 Law J. Rep. (N.S.) M.C. 240; 17 Q.B. Rep. 64.

Writs of execution having been sued out without effect on a judgment against the publisher of a newspaper for libel, the Court allowed a *scire facias* to issue on the recognizance of the sureties taken under the 60 Geo. 3. c. 9. and 1 Will. 4. c. 78, the Attorney General's fiat having been first obtained. *Ex parte Brunswick, in re Lowe*, 6 Exch. Rep. 22.

SEDUCTION.

The plaintiff's daughter, who had formerly been in the defendant's service and was living with her parents, at the defendant's request, and with the consent of the plaintiff, went and resided at the defendant's house for a month to attend to his busi-

ness during the absence of his wife, and the defendant promised, before she went, to pay her something for so doing, and when she left the defendant's wife gave her 8s. During the time she so resided with the defendant he seduced her:—Held, that the above facts were not inconsistent with the relation the daughter held of servant to the plaintiff, and that an action for her seduction was maintainable by him. *Griffiths v. Teetgen*, 24 Law J. Rep. (N.S.) C.P. 35; 15 Com. B. Rep. 344.

SEQUESTRATION.

Judgment having been obtained against the defendant, a benefited clergyman in the county of Brecon, a writ of sequestration was issued against him on the 17th of August, at which time no writ of *fi. fa.* had been issued. On the 9th of October a *fi. fa.* against him was returned by the sheriff of Bristol *nulla bona*, but not that the defendant was a benefited clerk. The rule to set aside the writ of sequestration was moved for on the 22nd of November:—Held, that the writ of sequestration was irregular, and that the application to set it aside was made in sufficient time. *Bromage v. Vaughan*, 21 Law J. Rep. (N.S.) Exch. 111; 7 Exch. Rep. 223.

The rectory of M, prior to 1836, was in the archdeaconry of Dorset and in the diocese of Bristol, and the archdeaconry was, by Order in Council made pursuant to an act of parliament in that year, annexed to the diocese of Salisbury. Prior to 1836 S was the registrar of such portion of the diocese of Bristol as lay within the archdeaconry, and had an office at Blandford, where writs of sequestration of livings within the archdeaconry were delivered, and the business relating to them transacted. After the annexation of the archdeaconry to the diocese of Salisbury, S continued to act as registrar and keep the office at Blandford, and the business of the sequestration of livings within the archdeaconry continued to be transacted there as before, by the permission of the then Bishop of Salisbury. In 1840 the plaintiff's writ of sequestration issued, directed to the Bishop of Salisbury since deceased, and was delivered to and accepted by him. Two sequestrators were appointed under the seal of the Bishop, and the writ still remained in the office at Blandford, which had been continued as an office up to the present time:—Held, that on the death of a bishop to whom a writ of sequestration has been directed no fresh writ of sequestration need issue, and that the present Bishop of Salisbury was bound to return the writ of the late bishop. *Phelps v. St. John*, 24 Law J. Rep. (N.S.) Exch. 171; 10 Exch. Rep. 895.

Semble—that a writ of sequestration directed to the Bishop of Bristol would have been good, but that, under the circumstances of this case, it was too late for the Bishop of Salisbury to object to the form of the writ, and that he was bound to make a return to it. *Ibid.*

Semble—that the 10 & 11 Vict. c. 98, which provides for the saving of the powers of the ecclesiastical court, does not apply to the act of issuing a sequestration on a *levari facias de bonis ecclesiasticis* by a bishop, in which he acts as ecclesiastical sheriff, who is a mere ministerial officer. *Ibid.*

A writ of sequestration is a continuing execution, and continues in force until the debt and costs are realized, without reference to the time at which the writ is nominally returned, or until the bishop is ruled to return it, which puts an end to the writ. *Ibid.*

SESSIONS.

- (A) APPEAL.
 - (a) *Right of.*
 - (b) *Notice of.*
 - (c) *Practice on.*
- (B) ORDERS.
 - (a) *Erroneous Procedure.*
 - (b) *Enforcing.*

(A) APPEAL.

(a) *Right of.*

No right of appeal to the Quarter Sessions exists against an order of Justices, made under 4 Geo. 4. c. 34. s. 5, for the payment of an amount of weekly wages adjudged to be due from a master to his servant, upon a complaint under 20 Geo. 2. c. 19, although the Justices in making such order may have acted without jurisdiction. *Regina v. Bedwell*, 24 Law J. Rep. (n.s.) M.C. 17; 4 E. & B. 213.

The recorder of a borough has no jurisdiction to hear an appeal under the 9 Geo. 4. c. 61. s. 27, against a refusal by the borough Justices to grant a licence to keep an inn, alehouse or victualling-house, such jurisdiction being expressly taken away by the proviso to section 105. of the 5 & 6 Will. 4. c. 76. *Regina v. the Recorder of Bristol*, 24 Law J. Rep. (n.s.) M.C. 43; 4 E. & B. 265, s.c. reported as *Regina v. Cockburn*.

(b) *Notice of.*

The 6 Geo. 4. c. 129. (Combination of Workmen Act) by section 12, gives a right of appeal against a conviction under it, and provides "that the execution of every judgment so appealed from shall be suspended" in case the party convicted shall immediately enter into recognizances before the convicting Justices conditioned to prosecute his appeal with effect, and to be forthcoming to abide the decision of the Sessions; and if, on hearing the appeal, the conviction be affirmed, the appellant is to be immediately committed to gaol according to the conviction. A was convicted under this act on Saturday, March 24th. On the 28th of March the convicting Justices were told that A intended to appeal, and recognizances were duly entered into before them, which recited that A had given notice of appeal. A was thereupon discharged from custody. The next sessions were held on Monday the 2nd of April, when the appeal was entered, but the Sessions confirmed the conviction, upon the ground that notice of appeal had not been given in accordance with a rule of the Sessions, requiring, in all cases not otherwise provided for, a notice of appeal to be given to the respondents on the Saturday se'nnight previous to the Sessions, and re-committed A to gaol:—Held, that the Sessions, having improperly declined to hear the appeal, had no right to commit A, and

therefore that the custody was illegal and the recognizances still in force. And the Court ordered A to be discharged upon the same recognizances, and issued a mandamus to the Sessions to hear and decide the appeal. *Ex parte Blues*, 24 Law J. Rep. (n.s.) M.C. 138.

Where a statute gives a right of appeal without any condition, it is necessary that the party appealing should give notice of appeal to the other side. *Rex v. the Justices of Essex* commented on. *Ibid.*

(c) *Practice on.*

G, who was convicted as a rogue and vagabond, gave due notice of appeal, and entered into the proper recognizances to appeal to the Quarter Sessions. The recognizances were to attend at the sessions on Wednesday, the 20th of October, which was the second day of the sessions, though the first day on which legal business was taken. On the morning of that day G attended at the sessions, and applied to enter his appeal. The clerk of the peace declined to receive it, on the ground that according to the practice it ought to have been entered the day before. G then, by means of his counsel, made a special application to the Court to allow the entry, but the Justices nevertheless refused to allow it, and would not hear the appeal. On an application by G for a mandamus to the Justices to hear the appeal, the clerk of the peace swore that the practice was that appeals should be entered before eleven o'clock in the morning of the first day of the sessions; and he stated that that practice was founded on a rule of the sessions, to the effect that all appeals should be entered by twelve o'clock of that day. He also swore that no appeal could be entered after the first day of the sessions without a special application to the Court:—Held, that although this Court has no authority to interfere where there is a reasonable and valid rule of practice at the sessions, and the Justices act on that rule, yet that the writ should go, as it was not clear on the affidavits what the practice was, or that the Justices acted on any plain rule of practice, or exercised their discretion in dealing with the special application. *Regina v. the Justices of Derbyshire*, 22 Law J. Rep. (n.s.) M.C. 31.

(B) ORDERS.

(a) *Erroneous Procedure.*

The 11 & 12 Vict. c. 43. s. 27. provides that where Quarter Sessions, upon an appeal against an order, direct either party to pay costs, "such order shall direct such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled:—"Held, that a mistake in ordering costs to be paid directly to the party to the appeal instead of to the clerk of the peace, was not a defect of jurisdiction, but merely erroneous procedure; and, therefore, where such an order had been made under an act taking away the *certiorari*, the Court refused to set it aside when brought before them by *certiorari*. *Regina v. Binney*, 22 Law J. Rep. (n.s.) M.C. 127; 1 E. & B. 810.

(b) *Enforcing.*

When a Judge's order or rule of this court is made under the statute 12 & 13 Vict. c. 45. s. 18. for the removal of an order of Quarter Sessions into this court for the purpose of enforcing it, it is not neces-

sary that any *certiorari* should issue to remove the order of Sessions. *Hawker v. Field*, 20 Law J. Rep. (N.S.) M.C. 41.

A conviction under 9 Geo. 4. c. 61, 'An Act to regulate the granting of licences to keepers of inns, alehouses, and victualling-houses in England,' was confirmed, on appeal, at the October Quarter Sessions, 1850, and thereupon an order was made under section 29. of the same act, directing the appellant to pay forthwith to the Justices their costs, amounting to 20*l*. On the 19th of November, the appellant paid 10*l*. on account. On the 8th of February 1851, the order was removed into the Court of Queen's Bench under the 12 & 13 Vict. c. 45. s. 18. for the purpose of enforcing the payment of the residue of the costs. On the 21st of the same month, an unsuccessful application was made to a Judge at chambers to stay proceedings on the order. On the 1st of May, a writ of *fiat facias* was issued to enforce payment of the balance under the order, together with the costs of bringing up the order, 14*l*., and that amount was levied on the 3rd of March. On the 9th of May, a rule *nisi* was obtained for setting aside the order and the *fiat facias*, and for a return of the money levied. By section 34. of 9 Geo. 4. c. 61, the writ of *certiorari* was expressly taken away:—Held, first, that the defendant had not precluded himself from objecting to the order, either by laches or acquiescence in it. Secondly, that although the defendant could not have removed the order by *certiorari*, yet being removed under 12 & 13 Vict. c. 45. s. 18, for the purpose of being enforced, it was open to the defendant by an original application to object to the illegality of the order. Thirdly, that section 29. of the 9 Geo. 4. c. 61. was repealed by the 11 & 12 Vict. c. 43. ss. 27. and 36, and the order of Sessions invalid; and therefore that the proceedings for enforcing it must be set aside, and the money levied returned. *Regina v. Hellier*, 21 Law J. Rep. (N.S.) M.C. 3; 17 Q.B. Rep. 229.

SET-OFF.

A set-off cannot be pleaded to an action on a bond conditioned to indemnify generally. The plaintiff and defendant being part owners of a ship, the plaintiff assigned his share to the defendant, who executed a bond conditioned at all times to save harmless and indemnify the plaintiff from all debts due in respect of the said ship, and against all actions, costs and damages commenced against, or sustained by, the plaintiff by reason of such debts. A declaration on this bond averred that, at the date of the bond, a debt of 7*l*. 3*s*. 9*d*., on account of the said ship, was due to R. H. for the recovery of which he sued the plaintiff, and recovered judgment for 9*l*. 8*s*. 11*d*. debt and costs, which was paid by the plaintiff; alleging as a breach that the defendant had not indemnified the plaintiff against the said debt, or the said action and costs. Plea of set-off in the common form upon a bill of exchange for 20*l*., drawn by the plaintiff and accepted by the defendant:—Held, that the plea was bad in substance, as this was not a debt to which a set-off could be pleaded under the 8 Geo. 2. c. 24, and also that it was defective in form for not shewing how much was justly due on either side. *Attwool v. Attwool*, 22 Law J. Rep. (N.S.) Q.B. 287; 2 E. & B. 23.

The statute of set-off, 8 Geo. 2. c. 24, applies only where the debts between the parties are mutual legal debts, the object of the statute being to prevent cross actions between the same parties. *Isberg v. Bowden*, 22 Law J. Rep. (N.S.) Exch. 322; 8 Exch. Rep. 852.

Declaration for freight due under a charter-party. Plea, that the plaintiff entered into the charter-party as master of the ship, and for and on behalf of and as agent for W, the owner; that the plaintiff never had any beneficial interest in the charter, or any lien on the freight, and that he brought the action solely as agent and trustee for W, and that W was indebted to the defendant in a certain amount, which the defendant offered to set off:—Held, that the statute of set-off did not apply. *Ibid*.

To a declaration in debt for 100*l*., the only plea was a set-off of 120*l*. The plaintiff, in his particulars of demand, claimed 4*l*. 10*s*. as a balance. On the trial of the issue joined on the plea, the defendant proved a set-off a little exceeding 4*l*. 10*s*. in amount:—Held, that the question raised on the issue was, whether the true amount of the set-off exceeded the true amount of the plaintiff's claim, and that consequently the defendant was entitled to a verdict. *Nichols v. Tuck*, 22 Law J. Rep. (N.S.) Q.B. 351.

Cross demands existing in different rights cannot in equity be set off the one against the other, except under special circumstances, or where the right to such set-off is conferred by an agreement expressed or implied between the parties. Thus, where an executor and residuary legatee claimed to retain the unpaid portion of a specific legacy on account of monies paid by him as surety for the legatee (since become bankrupt), the Court being of opinion that there was not any express or implied agreement to that effect between the executor and the legatee,—Held, on bill filed by the bankrupt's assignees, that the right to such set-off did not exist, and decreed payment of the legacy accordingly. *Freeman v. Lomas*, 20 Law J. Rep. (N.S.) Chanc. 564; 9 Hare, 109.

A trading firm assigned their estate, stock, debts due to the firm, &c. to trustees upon trust for sale and distribution, with power to carry on the business, but the trustees did not undertake to discharge the liabilities of the firm. The deed of assignment contained a proviso making it void if the firm became bankrupt before a certain day. The plaintiffs, who were at the date of the assignment creditors of the firm, afterwards became indebted to the trustees, who continued to carry on the business. The firm becoming bankrupt before the day named,—Held, that the plaintiffs had no right to a set-off; but that the result would have been different if the plaintiffs, instead of creditors, had been debtors at the date of the assignment, and had afterwards become creditors of the trustees. *Hunt v. Jessel*, 18 Beav. 100.

SETTLEMENT.

[See MARRIAGE.]

- (A) GENERALLY.
- (B) CONSTRUCTION OF.
- (C) COVENANT TO SETTLE.

- (D) SETTLEMENT BY THE COURT OF CHANCERY.
- (E) PORTIONS.
- (F) JOINTURE.
- (G) RECTIFYING.

(A) GENERALLY.

The heiress-at-law of a supposed intestate and her husband, and her illegitimate son, an expectant devisee of the supposed intestate, for the purposes of avoiding questions and differences between them touching the estate of the intestate, and of making an amicable settlement of their respective claims, settled their interests upon certain trusts for the benefit of themselves and certain legitimate and illegitimate children of the heiress and her husband:—Held, to be a valid family settlement, and not voluntary or void under the statute of Eliz. c. 4. as against subsequent mortgagees (without notice) and others claiming under the heiress and her husband. *Heap v. Tonge*, 20 Law J. Rep. (N.S.) Chanc. 661; 9 Hare, 90.

Whether the Court will in such a case take the title deeds out of the hands of the mortgagees,—*quære*. *Ibid*.

A woman while sole, in contemplation of a marriage with J T, assigned the whole of her property to trustees for the benefit of herself until her marriage, if any; or in case no such marriage should be solemnized, and after the solemnization, if any, of the same marriage, upon trust for her; and after her decease, in case she should marry and have issue, upon trust for the children as therein mentioned. The fund was transferred to the trustees; but the contemplated marriage did not take effect, and the woman married another person:—Held, that the settlement was voluntary; that the trusts arose upon the fund being completely vested in the trustees; that they could not, at the request of the settlor, allow any part of the fund to be withdrawn; and that the settlement was good upon her while sole, and upon her and her issue in the event of any marriage, and could not be revoked. *M'Donnell v. Heslridge*, 22 Law J. Rep. (N.S.) Chanc. 342; 16 Beav. 346.

Husband and wife joined in settling freehold and copyhold estates to which she was entitled in reversion expectant upon the decease of her mother, for the benefit of herself, her husband and children; she afterwards joined her husband in mortgaging the estates to the plaintiff; both the deeds were acknowledged by her:—Held, that the husband's giving up his interest in his wife's estates was a good consideration for the settlement, and that it was valid against the mortgagee. *Hewison v. Negus*, 22 Law J. Rep. (N.S.) Chanc. 655; 16 Beav. 594.

A grandfather having made a will of his real and personal estate in 1808 cancelled it in 1810, but wrote on the back of the will a letter addressed to his only daughter, stating that she was his heiress-at-law, and charging her to fulfil his wishes at her death by a disposition of a specified freehold estate to her eldest son, and by an equal disposition of his "property" equally among his grandchildren, her eldest and youngest son and daughter, her three only children. The letter was unattested, and thought to be inoperative as to the grandfather's personal as well as real property. The daughter became his administratrix, and entered into possession of his real estate, and she and her husband received his personal

estate in right of the daughter as sole next-of-kin. By a settlement in 1811 between the husband of the daughter and the daughter and two trustees, and the three children of the daughter, reciting the will, its cancellation and the letter, and that the testator had died wholly intestate, but that the daughter was desirous of fulfilling the intention of the grandfather, his real estates were settled in accordance with the directions contained in the letter. The daughter died in 1827, and her husband became her administrator, and also the administrator *de bonis non* of the grandfather. The husband of the daughter died in 1840, having previously by will, after reciting his wish to carry into effect the desires of the grandfather, disposed of the grandfather's and his own real and personal property between the two grandsons and the granddaughter (his children) accordingly. The granddaughter, who had married in 1843, obtained letters of administration to the grandfather, with his letter to his daughter, which were then admitted as a will annexed, and instituted a suit against the personal representatives of her father, claiming that the personal estate of the grandfather should be accounted for to her; but the benefits she received under the settlement of 1811 and will of 1837 were greater than those she claimed under the testamentary paper, the letter of the grandfather, and it was contended that she must elect between these benefits:—Held, that the deed of 1811 and will of 1837 were expressed to be founded on the intention of the grandfather in reference to his real estate only, and that even after an acquiescence since 1811 in the family arrangement no case of election arose. *Lee v. Egremont*, 5 De Gex & Sm. 348.

Under the same circumstances the granddaughter had received an allowance of 300*l.* a year from the time of her marriage in 1829 till the death of her father, and her husband was also greatly indebted for advances made to him on several occasions, and became bankrupt, and obtained his certificate and a disclaimer by the assignees of all interest under the grandfather's will in his favour:—Held, that the allowance must go towards satisfaction of interest on the granddaughter's one third of the grandfather's personal estate, and that the debt due from the husband of the granddaughter must be set off against the third of his wife, the granddaughter, to be recovered by him in right of his wife against the estate of her father. *Ibid*.

(B) CONSTRUCTION OF.

Under a deed of settlement lands were limited to the use of trustees for 1,000 years, without impeachment of waste, upon trust, by cutting and selling the timber thereon, or by demising, mortgaging, or selling the premises, to raise three sums of 10,000*l.* each; and, subject to the said term, to the use of the settlor for life, without impeachment of waste, with remainder to A B for life, without impeachment of waste, with divers remainders over. After the death of the settlor, A B entered and claimed the right to cut the timber for his own use exclusively. Upon bill by the trustees, held, upon appeal, that, upon the true construction of the settlement, a discretionary power was given to the trustees to cut timber and apply the proceeds *pro tanto* in discharge of the sums to be raised; and that the rights of A B, as tenant for life without impeachment of waste, were subordinate to

the discretionary power given to the trustees; and an injunction was granted to restrain A B from cutting timber, on the ground that his so doing would interfere with the prior right given to the trustees. *Kekewich v. Marker*, 21 Law J. Rep. (N.S.) Chanc. 182; 3 Mac. & G. 311.

By a post-nuptial settlement, R M settled certain policies of insurance on his own life, in trust for his wife for life, and after her death, upon trust for the appointees of R M, and in default of appointment for the children of the marriage. In 1821 R M, by deed, appointed the monies to become payable on the policies to his executors and administrators. Under an order in a suit instituted for the purpose of carrying the settlement into effect, the policies were sold, and the proceeds invested, to accumulate during the joint lives of the husband and wife. In 1847 the wife died. In 1828 R M took the benefit of the Insolvent Debtors Act, and in 1845 became bankrupt:—Held, that by the appointment, the money representing the policies became part of the general personal estate of R M. *Mackenzie v. Mackenzie*, 21 Law J. Rep. (N.S.) Chanc. 465; 3 Mac. & G. 559.

By a post-nuptial settlement, 4,000*l.* was vested in trustees, upon trust to invest, and to pay the income to the husband and wife for their joint lives, and then to the survivor for life; and, after the death of either, to stand possessed of one moiety of the trust fund for the survivor absolutely, and of the other moiety for the children of the marriage, as the parents should jointly appoint; and, in default of such appointment, for the children in equal shares, with powers of advancement; and it was thereby declared that the income of the trust monies was made payable to the parents and the survivor of them, upon the condition only, that they and the survivor of them should, during the minority of the children, provide them with suitable diet, clothing, maintenance and support, in proportion to the circumstances and condition in life of the parents, and the expectancies of such child or children; but that, in case of an advance to any of the children, the parents or the survivor should be released from the condition. In 1844 the husband petitioned the Court of Bankruptcy, and, under the 5 & 6 Vict. c. 116, a conditional order was made for his protection upon payment of a yearly sum. In 1845 the husband and wife assigned by way of mortgage all their interest in the income and capital of the trust fund. The fund was then transferred into court, under the Trustees' Relief Act. On petition by the six infant children, stating that their parents were in embarrassed circumstances, and had for some time past omitted to provide them with suitable diet, &c., (following the words of the deed) and that no advance had been made to them or any of them; and it appearing that the parents were in a respectable station in life, and in no business, the Court ordered the whole income to be applied for the maintenance of the petitioners. *In re Dalton's Settlement*, 21 Law J. Rep. (N.S.) Chanc. 681; 1 De Gex, M. & G. 265.

Quære—the effect of a conditional order for protection under the 5 & 6 Vict. c. 116, as to vesting the assets of the insolvent in the official assignee. *Ibid.*

Family estates, which were subject to mortgages,

DIGEST, 1850—1855.

were conveyed to trustees, to raise money for the payment of incumbrances, and subject thereto, for A B for life, and then for C D, his eldest son, for life, without impeachment of waste, but subject to a power to the trustees after contained, with an ultimate remainder to A B in fee simple. The power to the trustees was during the life of A B, and after his death, with the consent of C D, if he should be the survivor, to fell timber, and apply the proceeds towards paying off incumbrances so long as they should exist:—Held, that the power was paramount any authority in the tenant for life without impeachment of waste, and that it was not an infringement on the law of perpetuity. *Briggs v. the Earl of Oxford*, 21 Law J. Rep. (N.S.) Chanc. 829; 1 De Gex, M. & G. 363; 5 De Gex & Sm. 156.

By a marriage settlement, estates A and B were limited to the husband for life, with remainder, as to estate A, to the first son of the marriage in tail male, with remainder to the second and other younger sons in tail male; and as to estate B to the second son in tail male, with remainder to the third and other younger sons, &c. Proviso, that if such second or other younger son should become an eldest son, and, as such, entitled, under the limitations of the settlement, to the possession of the estate A, then estate B should go over to the person next entitled under the limitations. There were several sons of the marriage, the eldest of whom died in the lifetime of his father, without issue. The father and the second son (the plaintiff) joined in suffering a recovery of estate A to such uses as they should jointly appoint, and, subject thereto, to the old uses of the settlement. The father and the plaintiff then executed a mortgage of estate A for a sum expressed to be paid to them jointly, and the deed provided for a re-conveyance, on payment of the mortgage money, to the uses of the recovery deed:—Held, that on the death of the father, the plaintiff, notwithstanding the recovery and mortgage, came into the possession of estate A, under the limitations of the settlement, and that, under the shifting clause, estate B passed over to the third son. *Harrison v. Round*, 22 Law J. Rep. (N.S.) Chanc. 322; 2 De Gex, M. & G. 190.

Held, also, that the father and the plaintiff had power to have so dealt with the estates as to prevent the operation of the shifting clause. *Ibid.*

Fazakerly v. Ford and Taylor v. the Earl of Harewood approved of. *Ibid.*

The proceeds of a sale of part of the estate A were, in the lifetime of the father, applied in redemption of the land-tax on both estates:—Held, that the circumstance that estate B, after the father's death had gone over to the third son, did not give to the second son, as owner of estate A, any equity to follow the money so applied for the benefit of estate B. *Ibid.*

By a marriage settlement one moiety of a fund was limited to trustees to pay the interest to the husband and wife for their lives, and afterwards in trust for the benefit of their children. The second moiety was given to trustees to pay the interest to the wife for life, and in case her husband should die first, then in trust for the wife, her executors, administrators and assigns absolutely; but in case the wife should die first, then in trust, after her death, as she should by deed or will appoint, and in default of appointment, for the benefit of such persons as, at her decease, would have been entitled to her personal estate under

the Statute of Distributions, in case she had died intestate and "without being married." The wife died before her husband, without having executed her power of appointment:—Held, that the children of the marriage were entitled to the second moiety of the fund. *In re Norman's Trust*, 22 Law J. Rep. (n.s.) Chanc. 582, 720; 3 De Gex, M. & G. 965.

A, tenant for life, and B, tenant in tail, of estates subject to prior charges, suffered a recovery, and by a deed of 1793, re-settled the estates in strict settlement, and power was given to A to charge the estates with 3,000*l.*, and to B to charge the estates with 6,000*l.* respectively, for their own benefit. The deed contained a joint power to A and B of revocation and new appointment. A and B by deed revoked "all the uses, trusts, limitations, intents and purposes," by the deed of 1793 limited; and declared that the estates, "subject to the several charges and incumbrances created," should enure to the new uses:—Held, that the power to charge the 3,000*l.* and 6,000*l.* was not thereby revoked. *Evans v. Evans*, 22 Law J. Rep. (n.s.) Chanc. 785.

An absolute power to charge an estate with a definite sum of money is "an incumbrance" upon the estate. *Ibid.*

A and B, under the power of leasing, demised part of the settled estates to S, the wife of B, by way of jointure:—Held, that S, in respect of her life interest, was not liable to contribute to the charges on the estates. *Ibid.*

By a settlement personal estate was vested in trustees upon trust for the husband and wife successively for their lives, and after the death of the survivor for the children, their shares to be paid as they should attain twenty-one, or if daughters at that age or marriage, with maintenance in the mean time. It was afterwards declared, that if there should be only one child living at the decease of the survivor of the husband and wife, or if there should be more than one such child and all but one should die before twenty-one, then the fund should be paid to such only child on attaining such age if a son, or if a daughter at that age or marriage, with maintenance in the mean time; and if there should be no such child then living, upon trust for J. A. There was issue only one daughter of the marriage, and she attained twenty-one:—Held, after the death of her mother, that she took a contingent interest in the settled property during the life of her father. *Lloyd v. Cocker*, 24 Law J. Rep. (n.s.) Chanc. 84; 19 Beav. 140.

Held, also, that the Court would not rectify the settlement, as the trusts were complete. *Ibid.*

This Court will put a construction upon foreign marriage articles without requiring a settlement to be executed, even though such construction involves the removal of the entire fund from the settlement. *Byam v. Byam*, 24 Law J. Rep. (n.s.) Chanc. 209; 19 Beav. 58.

A discretion, to be exercised by "the aforesaid and undersigned trustees," one of whom alone executed the articles, is not personal to the individuals, but is attached to the office; and it may be exercised by new trustees. *Ibid.*

By the settlement made on the marriage of J R with M his wife, freehold property was conveyed to trustees in trust, after certain limitations (which failed), "for all and every the child or children then already born and thereafter to be born of F R and E

his wife." At the date of the settlement F R and E his wife had been married about five years. They had previously cohabited together, and had several illegitimate children, but they never had any children born after marriage. F R and E his wife being now both dead:—Held, that the illegitimate children were entitled under the settlement. *Gabb v. Premdergast*, 24 Law J. Rep. (n.s.) Chanc. 431; 1 K. & J. 439.

By a settlement personal estate was limited after the death of the husband and wife in trust for all the children as tenants in common, and the several issue of the body of such children; and failing issue of any such children their shares to the use of the surviving children as tenants in common, and the issue of their bodies. There was a gift over in case there should be no issue of the marriage or any issue of such issue, or being such all should die before their shares should become payable:—Held, that the children of the marriage took absolute interests, and that the representatives of a child who died an infant, without issue, in the life of his parents were entitled to a share. *Mount v. Mount*, 13 Beav. 333.

By a settlement the wife's father covenanted to pay 3,000*l.* to trustees for the husband for life, then to the wife for life, and afterwards for the younger children; but it was provided that upon the husband's settling a certain real estate, he should become absolutely entitled to the 3,000*l.* In 1814 the husband assigned that sum to trustees for his wife during their joint lives. In 1820 the estate was settled, and in 1823 the 3,000*l.* was paid to the trustees, who paid it over to the husband, taking his bond for the amount. The husband by his will directed his debts, including, as he declared, this bond, to be paid out of his real estate:—Held, that upon satisfaction of the wife's claim, the debt upon the bond ceased. *Senhouse v. Hall*, 14 Beav. 241.

To put an end to litigation between a husband and wife, the husband conveyed property to trustees upon trust to pay his wife 3,700*l.* a year, or so much as she should "order or require." The wife was, out of that sum, to keep up an establishment for herself and children upon such a scale as she should think fit; and the husband was to have the benefit of it under certain restrictions. But if she should not require the whole for the purposes aforesaid, the surplus was to be paid to the husband:—Held, that so long as she kept up the establishment, she was not liable to account for the surplus in her hands. *Jodrell v. Jodrell*, 14 Beav. 397.

Held, also, that this was like the case of guardians of infants and committees of lunatics having allowances made to them for maintenance, and who are not accountable for their expenditure, so long as they properly maintain those committed to their care. *Ibid.*

Principles on which the Court proceeds in putting a construction upon inconsistent clauses in a settlement. By the terms of a marriage settlement, 1,000*l.* secured by a policy of insurance on the life of the intended wife's father, was to be paid to the intended husband, provided he had previously effected an insurance on his own life for a similar amount; if not, it was to be paid to the wife. It then directed that if the insurance should not have been effected, or if the husband and wife should be both dead when the 1,000*l.* should be received by the trustees, it should

be paid to the issue of the marriage. The husband covenanted to effect an insurance within six months from the decease of the wife's father, to secure the payment of the said sum of 1,000*l.* at his decease. By a clause at the end of the settlement it was directed, that in default of the husband's effecting the insurance, the 1,000*l.* should be invested, and the interest paid to the husband until he effected it, and then he was to receive the principal. The insurance was not effected within the time mentioned:—Held, that the husband might effect the insurance at any time during his life; that the trusts in favour of his wife did not arise till the close of the life of the survivor of her father and husband; and that the trusts in favour of the children did not arise till after the death of all three, viz. the father, the husband, and the wife. *Bush v. Watkins*, 14 Beav. 425.

The dividends of the 1,000*l.* were, therefore, directed to be paid, during the life of the husband, to his mortgagees, or until he should effect the insurance; and if he effected an insurance, the principal was to be applied in payment of the mortgage debt, and the residue to be paid to the husband or the parties claiming under him. *Ibid.*

Where a deed contains inconsistent clauses, the Court very reluctantly rejects one altogether; and never, unless it is absolutely impossible to reconcile the inconsistencies. *Ibid.*

Under a marriage settlement trustees were, after the bankruptcy of the husband and the death of the wife, to pay the income "in such manner for the maintenance and support, or otherwise for the benefit of the husband and the issue," as they might think proper:—Held, that the discretionary power of the trustees, as to the application of the income, was not taken away by the bankruptcy, so as to entitle the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were declared entitled to the surplus. *Wallace v. Anderson*, 16 Beav. 533.

Under a power to lend 2,500*l.* of the trust funds to the tenant for life,—Held, that it was not exhausted by one loan, but that, after repayment, the power might be exercised a second time. *Versturme v. Gardiner*, 17 Beav. 338.

Trust funds were settled upon a husband for life, and if the wife should die in the lifetime of the husband, then, after his decease and failure of issue, "for such persons (other than the husband) as should then be the next-of-kin of the wife, and would have been entitled thereto under the Statute of Distribution in case she had died sole, unmarried and intestate":—Held, that her next-of-kin at her own death, and not those at the death of her husband, were entitled. *Wheeler v. Addams*, 17 Beav. 417.

In a limitation by deed on a particular event to the "then" next-of-kin of A, the word "then" was held to refer to the event, and not to the time of its happening. *Ibid.*

Construction of a clause of forfeiture of the interest of a husband on his doing or attempting to do any act whereby the wife should be prevented executing a power, or the property be prevented devolving on her heirs. *Wade v. Hopkinson*, 19 Beav. 613.

By a settlement the husband and wife had a joint power of appointment over part of the property in favour of the children; the wife held in one event a general power to appoint by deed or will, and in another event by will only over the other part, the ultimate remainder in default of issue, &c. was to the wife's heir and next-of-kin. The deed contained a proviso of forfeiture of the husband's interest in case he should do or "attempt" to do any act which would prevent or hinder the wife executing her powers, or prevent the property devolving on her heirs, &c. The husband and wife appointed a part of the fund nominally to a child, but really for her husband's benefit, which was set aside:—Held, that the husband's interest had not been thereby forfeited, and that the proviso pointed to the separate power of the wife, and not to the joint power of husband and wife. *Ibid.*

A settlement contained a power of advancement, a power of appointment, and a hotchpot clause applicable to the former and not to the latter; part of the trust fund having been taken out of the settlement, and paid over to a child without stating under which power,—Held, that it was *prima facie* attributable to the advancement clause, and that it was confirmed by the subsequent memoranda in the handwriting of the donee of the power. *In re Gossett's Settlement*, 19 Beav. 529.

Funds were, in 1823, settled on a wife for life, with remainder to the husband, "until" he should "make any composition with his creditors for the payment of his debts, although a commission of bankruptcy should not issue against him." In 1842 his principal creditors agreed to take a composition on their debts secured by bills. The wife died in 1852:—Held, that the composition, though not made with the whole of his creditors, and though it was made during the wife's life, and did not affect the trust property, nevertheless operated as a forfeiture of the husband's interest. *Sharp v. Cosserat*, 20 Beav. 470.

By an antenuptial settlement a fund was declared to be held by the trustees upon trust for the intended wife for life for her separate use, without power of anticipation, and after her death in trust for the intended husband for life, and after the decease of the survivor in trust for the children of the marriage as the intended husband and wife should jointly appoint, and (subject thereto and to a separate power of appointment in the survivor) in trust for the children equally, to be vested in sons at twenty-one and in daughters at twenty-one or marriage. There was also a power for the trustees, at the request of the husband and wife during their joint lives, to advance, for the benefit of any child whose portion should not be vested, any part of his or her presumptive portion, and to apply for or towards the maintenance or education of any such child or children all or any part of the income of such his, her or their presumptive portions. The only children of the marriage were two sons and a daughter. The husband and wife appointed the trust fund to the three children equally, to be vested in sons at twenty-one and in the daughter at twenty-one or marriage, with trust for accruer in the event of any child dying before attaining a vested interest. By the same deed the husband and wife requested the trustees to pay for five years after the date of the

deed certain sums for the maintenance of the three children, and after the expiration of that period to pay 150*l.* towards the maintenance and education of the children during the residue of the life of the wife:—Held, that the maintenance clause did not enable the wife to affect her life interest by such a prospective provision, at all events as regarded any period beyond the minority of the sons or the minority or marriage of the daughter. *Horlock v. Horlock*, 2 De Gex, M. & G. 644.

By an incorrectly framed settlement a sum of money was settled on trusts for A for life, with trusts in remainder for her children, and if she should die without issue, in trust to pay a portion of the fund to B, or her legal representatives:—Held, that the words “legal representatives” were either words of limitation, so as to give B an absolute interest, or were intended to provide for her being dead at the date of the settlement, or were void for uncertainty. *Topping v. Howard*, 4 De Gex & S. 268.

By a settlement trustees were directed to be possessed of 1,760*l.*, in trust for her daughter and her sons at twenty-one and daughters at twenty-one or marriage. Like trusts of two other sums of 1,760*l.* were declared for two other daughters and their children. Benefit of survivorship and accrue between the three daughters and their children, in default of children was declared, with a declaration that the provisions applicable to the original shares should apply to such surviving or accrued shares; and it was provided, that if either of the three daughters should die without having or leaving any child who should attain a vested interest, she might dispose of any part of “her share” not exceeding one-third, by deed or will. On the death of one of the three daughters her share accrued among the survivors. One of the survivors then died without a child, and appointed by will “one-third of her share or shares, as well accrued as original, in the said sum of 5,280*l.*” The trustees paid as much of the share of the testatrix as had accrued into court under the Trustees’ Relief Act:—Held, that the previous provisions of the settlement consolidated the accrued with the original shares, and that the power to appoint overrode the whole share thus consolidated. *In re Hutchinson’s Settlement*, 5 De Gex & S. 681.

In determining the rights of children under a marriage settlement, the Court, unless prevented by clear and distinct words, will hold that children who attained twenty-one and died, living their parents, took vested interests under the settlement. *Baillie v. Jackson*, 1 Sm. & G. 175.

The Court will lay hold of minute circumstances in favour of such construction. *Ibid.*

A, who, under a deed made by his father, was entitled upon his father’s death to a moiety of his personal estate, assigned to trustees in these words:—“all the property which he now is, or may stand possessed, both real and personal, and now consisting of one note of hand for 120*l.*, one other note of hand for 40*l.* on cottage in his own possession sold to S at his decease for 155*l.*, two other cottages in the occupation of F and W,” upon certain trusts for his wife and relations. A afterwards died in the lifetime of his father. Upon the death of the father,—Held, that the trustees under A’s instrument were entitled to take under that instrument the moiety of

the father’s personal estate. *Choyce v. Olley*, 10 Hare, 443.

Limitation over after a life interest to husband for life or until bankruptcy, remainder to the wife for life, remainder in case of the wife dying in the husband’s lifetime, then after the husband’s death, or sooner in case of his becoming bankrupt, to the children “then living”:—Held, these words referred to the period of the wife’s death, and not of the bankruptcy. *In re Edgington’s Trusts*, 3 Drew. 202.

By a voluntary settlement expressed to be made in consideration of natural love and affection for settlor’s son G, and daughters M and E, property was settled in trust for settlor for life, with remainder as to part in trust for G for life, and after his decease in trust for all G’s six children which might be living at the time of his decease, as tenants in common; and if G should have but one such child, then for such only child; the share of every such child to be vested at twenty-one, or if a daughter at twenty-one or marriage; with proviso for survivorship if more than one child of G, and any of them being a son should die under twenty-one, or being a daughter under twenty-one without having been married; and in case all such of G’s children as were sons should die under twenty-one, and all such of them as were daughters under that age, without having been married, then over; and as to other parts of the property in trust for M for life, and after her decease for all her children who being sons should attain twenty-one, or being daughters should attain that age or be married, in such manner and form, and in such shares and proportions, and subject to such clauses of survivorship, &c. as before declared with respect to G’s children; and as to a third part of the property upon trust for E and her children, similar to the trusts for M and her children:—Held, that the instrument, though voluntary, and not expressed to be made in consideration of natural love and affection for the settlor’s grandchildren, was within the rule in *Emperor v. Rolfe* (1 Ves. sen. 208), and that having regard to the terms of the limitation over after the trusts for G’s children, and notwithstanding the different form in which the trusts for the children of M and E were expressed, two children of G who attained twenty-one, and subsequently died in his lifetime, took vested and transmissible interests equally with those of G’s children who survived him; the rule being that whereas in ordinary instruments an express estate thereby limited cannot be enlarged, except by necessary inference, yet upon instruments of this description there is an implication of law arising upon the instrument itself, subject to any expression to the contrary, that it is the intention of any person who places himself *in loco parentis* to provide portions for children or grandchildren, as the case may be, at the period when such portions will be wanted, namely, upon their attaining the age of twenty-one, or in case of daughters upon their attaining that age or marriage, and that such portions shall then vest whether the children do or do not survive their parents. *Swallow v. Binns*, 1 Kay & J. 417.

(C) COVENANT TO SETTLE.

By a marriage settlement, it was agreed and declared, and the husband covenanted with the trustees, to make, do and execute, or cause or procure to be made, done and executed, or join or

concur with his wife, her heirs, executors or administrators, in making, doing and executing all such acts, deeds, conveyances, assignments and assurances as should be necessary for the purpose of conveying and assuring to the trustees all property which should descend or devolve to or vest in the wife or in any person or persons in trust for her or to or in the husband in her right, upon the trusts of the settlement. After the marriage, a sum of money was left to the wife, for her separate use:—Held, that this money was not included in the covenant to settle future-acquired property. *Ramsden v. Smith*, 22 Law J. Rep. (N.S.) Chanc. 757; 2 Drew. 298.

A covenant to pay a sum of money to the trustees of a marriage settlement will not be satisfied by the covenantor expending money in erecting buildings and improving lands purchased with other money originally comprised in the settlement. *Horlock v. Smith*, 23 Law J. Rep. (N.S.) Chanc. 662; 17 Beav. 572.

A tenant for life paying the costs of investing settled money in lands will not be allowed to set off such payment against money secured by covenant and due from him to the trustees of the settlement. *Ibid*.

By a marriage settlement made between A (the intended husband) of the first part, B (the intended wife) of the second part, and C and D (the trustees) of the third part, certain property therein mentioned was settled on the usual trusts. The settlement then contained the following clause:—And it is hereby declared and agreed by and between the parties hereto, and A doth hereby for himself, &c. covenant with C and D, that, if B, or A in her right, shall at the said intended marriage, or any time thereafter become entitled to any personal estate, the same shall be and remain, and A will permit the same to remain, on the same trusts, &c. And for the better effecting this purpose, A, his heirs, &c., will pay, &c., and join with B in paying, &c., such sums, &c., to C and D:—Held, that this clause applied to the property only to which the marital right attached, and that property to which B became entitled after the death of A was not bound by it. *Reid v. Kenrick*, 24 Law J. Rep. (N.S.) Chanc. 503.

By a marriage settlement it was expressed to be agreed between the parties thereto, and the husband covenanted that if any personal property should, during coverture, come to or vest in the wife, or in him in her right, the same should be transferred by all proper parties upon the trusts of the settlement. The wife became entitled to a reversionary interest in a chose in action which did not fall into possession until after the death of the husband:—Held, that the wife was bound to settle it. *Butcher v. Butcher*, 14 Beav. 222.

A covenant in a marriage settlement that in case at any time thereafter, during the coverture, any real or personal estate should "descend, come to, or vest in" the wife (who was then an infant) it should be settled, —Held to include the proceeds of the real estate taken by a public company to which the wife at the execution of the settlement was entitled in remainder. *Ex parte Blake, in re the London Dock Co.*, 16 Beav. 463.

Effect of an agreement on the marriage of a female infant to settle her real estate. It would be a fraud upon the husband's contract if he were to

consent to a disposition of the estate by his wife calculated to defeat the settlement. *Ibid*.

A sum of 865*l.* stock partly belonging to the husband and partly belonging to the wife, was settled (subject to the interests given to the husband, wife and children), as to the husband's part, on the husband's executors, and as to the wife's, on the wife's next-of-kin. The settlement contained a covenant that the after-acquired property of the wife should be settled on like trusts:—Held, that the husband's and wife's representatives were, under the ultimate limitation, entitled to the wife's after-acquired property in proportion to their interests in the 865*l.* *Stevens v. Van Voorst*, 17 Beav. 305.

Covenant to settle after-acquired property of the wife held to extend to property acquired after the death of the husband. *Ibid*.

Husband and wife covenanted to vest in the trustees of their settlement upon the trusts thereof, "all property which should come to her absolutely, and not bound by any trust or provision otherwise than for her absolute use":—Held, that property bequeathed to her "for her separate use" was bound by the covenant. Held, secondly, that leaseholds and chattels bound by the covenant were to be enjoyed in specie and unconverted. *Milford v. Perle*, 17 Beav. 602.

Upon the marriage of one of several residuary legatees under her father's will, the intended husband and wife assigned to trustees all and every the sum and sums of money, legacy and legacies, and other personal property then due and payable or belonging to or to become due and payable to the intended wife under or by virtue of her father's will "or otherwise however," upon trusts for her separate use for her life, without power of anticipation, with trusts in remainder in favour of the children of the marriage. By the next witnessing part of the same settlement it was agreed that in case any real or personal property should, during the coverture, be given or bequeathed to the wife, the husband should settle it upon trust so that the wife should have the sole power of disposing of the same:—Held, that a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for the children, the latter witnessing part of the settlement shewing that the former must be read in a restricted sense. *In re Stephenson, ex parte Stephenson*, 3 De Gex, M. & G. 969.

By marriage articles the intended husband agreed to settle when required one moiety of the wife's reversionary interests, and after the death of the tenant for life reduced one moiety into possession and gave a release for the same, but he never executed a settlement or assignment of the other, and died in the lifetime of the wife:—Held, that as the covenant was only the covenant of the husband and not of the wife, and merely executory, he never having executed any assignment, the wife was not bound. *Cramer v. Moore*, 3 Sm. & G. 141.

In a marriage settlement the intended wife assigned all the property to which she then was, or to which she or her intended husband in her right should, during the coverture, become entitled, to trustees upon the trusts thereby declared, for herself, the husband and the children of the marriage. After the marriage her father died, having, by his will, given her a general power of appointment over

his residuary estate. The wife, during the coverture, in exercise of the power contained in the will, appointed to herself, for her separate use, a gross sum of 1,000*l.* and an annuity of 100*l.* for her life, and amongst her family the residue, upon trusts differing from those of the marriage settlement, reserving a power of revocation:—Held, that the terms of the assignment by the wife in the marriage settlement did not amount to a covenant to exercise a general power of appointment in favour of the objects, and in conformity with the trusts of such settlement, and that property over which the wife afterwards acquired a general power of appointment was not, by that circumstance, brought within the operation of the settlement; that the appointment by the wife was a valid exercise of the power contained in her father's will; that upon the appointment by the wife of the 1,000*l.* for her own absolute use, that sum became bound by the trusts of the settlement, and the power of revocation was ineffectual; that the interests in the annuity of 100*l.* for her own life for her separate use, which the wife took under her appointment (an interest which was in conformity with that which she would have taken under the trusts of the settlement if the annuity had been otherwise acquired) was not disturbed by the effect of the settlement, inasmuch as it was not the intention of the contract expressed therein that any after-acquired property should be converted or taken otherwise than in the state in which it should be so acquired. *Ewart v. Ewart*, 11 Hare, 276.

(D) SETTLEMENT BY THE COURT OF CHANCERY.

Where a testator had directed that in the event of the marriage of his daughter, a certain portion of his property should be secured to her and the issue of her marriage, by a settlement or some other good assurance, in such manner as his trustees or trustee for the time being might think fit, the Court, on an application to which the surviving trustee was a party, approved of a power in the settlement made on the marriage of her daughter, enabling her to appoint by will a life interest in the property to her husband. *Charlton v. Kendall*, 11 Hare, 296.

(E) PORTIONS.

A, by a deed, dated in 1826, settled property on himself for life, with remainder for such of his children as he should by deed or will appoint, with remainder in default of appointment to all of his children equally. The deed contained a power enabling A to give a jointure to any wife whom he might afterwards marry, and a direction that, unless the contrary should be directed by any appointment, it should be lawful for the trustees to apply the income of the share of any child for his maintenance. A married soon after the date of this deed, and his wife died in 1836, and there were two children of this marriage. In 1836 A married B, and, by a deed dated in that year, he gave a jointure to B, and directed that, if there should be two children of the marriage, the trustees should raise 4,000*l.* for the portions of such children, to be paid to them at their ages of twenty-one years, after the death of the survivor of A and B, with power for the trustees to give interest on the portions between the death of the survivor of A and B and the time of payment. A afterwards appointed portions for the children of

the first marriage, with interest from his death. There were two children of the second marriage. A died in 1849:—Held, that the children of the second marriage were not entitled to interest on their portions between the death of A and the death of his widow. *Gardner v. Perry*, 20 Law J. Rep. (n.s.) Chanc. 429.

A tenant for life of real estates, with a power to charge 20,000*l.* for the portions of younger children, mortgaged his life estate; he covenanted with some of the mortgagees that he would not execute the power without their consent. He subsequently exercised the power for the benefit of his children, and created a term of 1,000 years to secure payment of the 20,000*l.*, and upon the marriage of one of his daughters he appointed 5,000*l.* to her for a portion. The trustees and also the appointees had notice of the mortgages and of the covenant entered into by the tenant for life:—Held, that the appointees were not entitled to any priority, and that they must be postponed to the previous mortgage. *Hurst v. Hurst*, 22 Law J. Rep. (n.s.) Chanc. 538; 16 Beav. 372.

Held, also, that the Court has a discretion, under the 15 & 16 Vict. c. 86. s. 48, and that it will not direct a sale of an incumbered estate, unless it is manifestly for the benefit of all parties, and, under the circumstances, a common decree of foreclosure was made. *Ibid.*

In a settlement of real estate a term of years, created after an estate in fee for the payment of children's portions, will be supported where the intention of the parties is clearly apparent on the face of the deed; and a purchaser of such term will be entitled to cut timber, although in his purchase deed the words "without impeachment of waste" were omitted. *Beaumont v. the Marquis of Salisbury*, 24 Law J. Rep. (n.s.) Chanc. 94; 19 Beav. 198.

Real estate was settled to W B for life, remainder to trustees and "their heirs," to preserve contingent remainders, remainder to R, the wife of W B, for life, remainder, after the decease of W B and R his wife, to the same trustees, their executors, administrators and assigns, for 500 years thence ensuing, without impeachment of waste, remainder to J B, the son, for life, remainder to the same trustees and "their heirs during the life of J B," with remainder to the children of J B in tail, &c. The term of 500 years was declared to be that the trustees might raise 2,200*l.* as portions for the younger children of W B and R his wife. The surviving trustee sold a portion of the settled estates, and demised them to the purchaser for 500 years at a peppercorn rent, but in the lease the words "without impeachment of waste" were omitted. On a subsequent sale of this interest, upon an objection by the purchaser,—Held, that the settlors intended to create a term of 500 years; that the union of the fee and the term did not prevent its being assigned, and that it was an existing term; that a demise was an assignment for the full term of 500 years; and notwithstanding the words "without impeachment of waste" were omitted in the deed, the right of cutting timber passed to the owner of the term during such interest. *Ibid.*

On a marriage two separate sums were provided by two separate deeds for the portions of younger children, and each deed contained a hotchpot clause:

Held, that these clauses were separate and distinct, and operated only on the fund contained in each settlement respectively. *Montague v. Montague*, 15 Beav. 565.

An estate was limited to trustees for a term, with remainder to A, and afterwards to his son in tail, with similar limitations successively to B and C and their sons in tail. The trusts of the term were on the death of A, B and C respectively to raise portions for their respective younger children:—Held, on the death of C in the life of B, that the portions of the younger children of C could not be raised during the life of B. *Lawton v. Swetenham*, 18 Beav. 98.

(F) JOINTURE.

By a marriage settlement, the intended husband demised real estate to trustees for a term, upon trusts thereafter declared. He then covenanted for payment of an annuity by way of jointure to his intended wife surviving him. Afterwards there was a declaration of the trusts of the term for the settlor until some default in payment of the jointure, and then to secure the same. The settlor's personal estate was not augmented by the settlement:—Held, that as between the real and personal representatives of the settlor, the real estate was primarily liable to the payment of the jointure. *Loosemore v. Knapman*, 23 Law J. Rep. (N.S.) Chanc. 174; Kay, 123.

A wife had a jointure secured on her husband's estate. In 1844 the husband contracted to purchase an estate Y; and to enable him to sell the estate X, the wife in 1845 released her jointure, and he then covenanted to secure it out of "estates he should thereafter acquire." Before the estate Y had been conveyed the husband contracted to sell it:—Held, that in equity the estate Y was charged with the jointure. *Warde v. Warde*, 16 Beav. 103.

A covenant is to be construed most strongly against the covenantor. *Ibid.*

(G) RECTIFYING.

A marriage settlement omitted, in an event which happened, to declare a life interest in the settled fund for the intended wife. The Court being of opinion that the settlor did not intend to reserve any portion of the fund for himself, declared the wife to be entitled by implication to a life interest in the settled property. *Allin v. Crawshay*, 21 Law J. Rep. (N.S.) Chanc. 873; 9 Hare, 382.

A marriage with a ward of court, a tenant in tail of real estates, took place without consent; proposals were made under various orders of the Court, that the personal and real estate of its ward should be settled, and that the income should be secured for the separate use of the wife. A deed of covenant was afterwards executed by the husband, and the income of the personal and real estates was to be paid to the wife for life for her separate use, with a provision against anticipation as to the personal estate, which was omitted as to the rents of the real estate. The deeds executed to bar the entail and re-settle the estate, according to the proposals, were informal, and the wife alleged that she executed them under duress, and for fear of an attachment. The wife separated from the husband and charged the rents of the estate with the payment of several annuities, after which the husband died. Upon a

bill by the wife to rectify the settlement and obtain payment of the rents,—Held, that the wife having dealt with the property upon the footing of the settlement was so far bound; and that, assuming there was a mistake, the Court would not assist her to defeat transactions *bond fide* entered into with third parties on the faith of the settlement being correct; and the cross-bill was dismissed, but without costs. *Blaikie v. Clark*, 22 Law J. Rep. (N.S.) Chanc. 377; 15 Beav. 595.

On clear evidence of a mistake, a marriage settlement of a lady's fortune reformed by striking out a proviso against anticipation of her separate estate, she having executed it on a representation that the most unlimited controul over both principal and interest was secured to her, it having been agreed before the marriage that she would continue to possess the same power of disposition which she then had. *Torre v. Torre*, 1 Sm. & G. 518.

SEWERS.

[See RATE.]

The 69th section of the Metropolitan Commissioners of Sewers Act, the 11 & 12 Vict. c. 112, which provides that full compensation shall be made to all persons sustaining damage by the exercise of the powers of the act, and "in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this act," does not give jurisdiction to proceed by arbitration in a case in which the Commissioners dispute their liability to make any compensation. Therefore, upon an application for a mandamus to compel the payment of an amount of compensation, for which, in such a case, an award had been made *ex parte*,—it was held, that the award was altogether invalid. *Regina v. the Metropolitan Commissioners of Sewers*, 22 Law J. Rep. (N.S.) Q.B. 234; 1 E. & B. 694.

A presentment was duly made at a court of sewers for the county of Lincoln, held on the 15th of May 1819, that a drain called the Boy Grift was ruinous and insufficient for the drainage, and that certain works were absolutely necessary, and that certain lands in the occupation of various persons and specified in a schedule—amongst which were the lands of the plaintiff—received benefit or avoided danger by the drainage through the Boy Grift. The presentment was not appealed against, and on the 27th of June 1823, a special law of sewers was made and registered in the rolls of the court containing the said presentment touching the said works, and rates were made from time to time up to 1837. In that year a new commission of sewers for the county of Lincoln was issued, and at the first court under it it was ordered, that all laws, acts, deeds, constitutions, and orders of sewers heretofore made, executed, ordered and decreed by courts of sewers held for the county of Lincoln, and which had not been repealed or altered, or superseded, should be confirmed and stand in full force. Rates including the said lands of the plaintiff were made by the dyke-reeve, under the authority of the Commissioners, in the years 1846, 1847, and 1848, without any new presentment:—Held, that such rates were valid, the effect of the order under the new commission being to make the presentment of 1819 a continuing and valid present-

ment. *Taylor v. Loft*, 22 Law J. Rep. (N.S.) Exch. 131; 8 Exch. Rep. 269.

Under a precept to summon a jury *de corpore comitatús*, the sheriff may summon the whole jury from a particular hundred. *Ibid*.

SHERIFF.

[See EXECUTION — PLEADING — PRACTICE, AT LAW.]

(A) RIGHT TO FEES.

(B) DUTIES AND LIABILITIES.

- (a) *Escape*.
- (b) *Return*.
- (c) *Extortion*.
- (d) *Acts of Bailiff*.
- (e) *Receipts of Fines at Sessions*.
- (f) *Landlord's Rent*.
- (g) *Possession for Unreasonable Time*.

(A) RIGHT TO FEES.

The fees allowed to sheriffs and their officers under the 7 Will. 4. & 1 Vict. c. 55. s. 2. "for search for detainers," and "for supersedeas—discharge to any writ or process, or for the release of any defendant in custody, or of goods taken in execution," are not applicable where the debt and costs are paid after the seizure under a *fi. fa.* *Masters v. Lowther*, 21 Law J. Rep. (N.S.) C.P. 130; 11 Com. B. Rep. 948.

Where a sheriff has levied 40s. on the defendant on a *distringas* to compel an appearance, and judgment having gone by default, the defendant afterwards pays the debt and costs, and applies to the sheriff for a return of the 40s., the sheriff is not entitled to deduct 4s. 6d. or any other sum as a fee for returning the issues. *Taylor v. Warrington*, 22 Law J. Rep. (N.S.) Q.B. 99.

(B) DUTIES AND LIABILITIES.

(a) *Escape*.

In an action against the sheriff in which the damages for the escape of an execution debtor were to be assessed upon the same principle as in an action under the 5 & 6 Vict. c. 98. s. 31,—Held, that the true measure of damages is the value of the custody of the debtor at the moment of the escape; and that no deduction ought to be made on account of anything which might have been obtained by the plaintiff by diligence, after the escape. *Arden v. Goodacre*, 20 Law J. Rep. (N.S.) C.P. 184; 11 Com. B. Rep. 371.

(b) *Return*.

To a writ of *fi. facias*, at the suit of the plaintiff, against the goods and chattels of J W, the sheriff returned that, before the same was delivered to him, another writ of *fi. facias* against the goods and chattels of the said J W, at the suit of another plaintiff, was delivered to him, and that by virtue of the writ first delivered he had caused to be seized and taken in execution the goods and chattels of the said J W, which goods and chattels remained in his hands; and that the said J W had no more goods and chattels in his bailiwick, whereof he could cause to be levied the damages in the writ at the suit of

the plaintiff:—Held, in an action against the sheriff for a false return and for not seizing, as he might have done, the goods of J W under the plaintiff's writ, that the sheriff was not estopped by his return from proving, as he did at the trial, that the goods seized under the first writ were the goods, not of J W, but of a third person, it appearing that the judgment upon which such first writ issued was fraudulent and void. *Remmett v. Lawrence*, 20 Law J. Rep. (N.S.) Q.B. 25; 15 Q.B. Rep. 1004.

Quære—whether, because of the prior judgment being fraudulent and void, a seizure of J W's goods under the plaintiff's writ must, in point of law, have been considered as made by the sheriff. The decision in *Imray v. Magnay* questioned. *Ibid*.

The meaning of a return of *nulla bona* to a *fi. fa.* is, that there are no goods applicable to the plaintiff's writ. Where, therefore, a declaration for a false return of *nulla bona* stated that the sheriff took in execution the goods of the judgment debtor to the amount indorsed on the writ, and levied the same thereout, and the defendant pleaded that the sheriff did not levy,—Held, that under that plea the defendant might prove that the plaintiff's judgment was obtained by fraud, and that the defendant had paid the proceeds of the execution to another execution creditor, notwithstanding the writ of that creditor was dated subsequently to the plaintiff's writ. *Shatlock v. Carden*, 21 Law J. Rep. (N.S.) Exch. 200; 6 Exch. Rep. 725.

(c) *Extortion*.

In a declaration against the sheriff for treble damages for extortion, the statute was recited, under a *videlicet*, as of the twenty-ninth year of Elizabeth, instead of the twenty-eighth. The declaration stated that a *fi. fa.* was delivered to the sheriff, indorsed to levy debts and costs, and that the sheriff wrongfully took 8l. more for the execution than he was entitled to, although he did not levy any sum of money by virtue of the execution:—Held, that the declaration was good; that the misrecital of the statute was immaterial, and that it was not necessary to negative the acts by which a levy might have been made. *Holmes v. Sparks*, 20 Law J. Rep. (N.S.) C.P. 194; 12 Com. B. Rep. 242.

(d) *Acts of Bailiff*.

Although the sheriff is responsible for all acts of his bailiff done in the execution or under colour of a writ of execution because he has committed the duty which properly belongs to himself to another, yet, as it is no part of the sheriff's duty to receive payment of the amount for which a judgment debtor is in his custody, he will not be liable if his bailiff receives the amount of such debt from the debtor and misappropriates it, or neglects to pay it within a reasonable time to the creditor. A judgment debtor being taken under a *ca. sa.* paid the sheriff's officer the amount of the debt and costs, and also one guinea, officer's fee for executing the writ, 3s. 6d. for searching the office for other writs against him, and 4s. 6d. discharge fee, which were demanded from him by the sheriff's officer. The sheriff's officer retained this money in his own hands, and another writ of *ca. sa.* having been issued into London upon the same judgment, the debtor was a second time arrested at the suit of the creditor and kept in prison until the

officer who had first arrested him and received the debt, &c. did pay over the amount to satisfy the judgment:—Held, that although the sheriff was liable in an action on the case for the sums improperly taken as fees by the bailiff he was not liable for the consequences of his negligence in not paying over to the execution creditor the amount he had received from the debtor. *Wood, or Woods, v. Finnis*, 21 Law J. Rep. (N.S.) Exch. 138; 7 Exch. Rep. 363.

(e) *Receipt of Fines at Sessions.*

The duty of the sheriff, with respect to the roll of fines sent to him by the clerk of the peace, pursuant to statute 3 Geo. 4. c. 46, is not purely ministerial, and the sheriff is not justified in levying a fine stated in the roll to be unpaid, when the amount has been paid to the sheriff himself before receiving the roll. The deputy clerk of the peace is authorized to receive the amount of fines imposed at the Quarter Sessions; and if he receives the money and omits to notify the receipt in the roll, and damage accrues in consequence to the party fined, the latter may maintain an action against the deputy clerk of the peace for negligence. *Wildes v. Morris*, 22 Law J. Rep. (N.S.) M.C. 4.

Quære—whether the deputy clerk of the peace is liable for acts of negligence of the assistant whom he appoints, pursuant to statute 59 Geo. 3. c. 28, to record the proceedings of the Justices sitting in a second court at the Quarter Sessions. *Ibid.*

(f) *Landlord's Rent.*

Where the sheriff seized the goods of A, under an execution against the goods of B, and, after the making of an interpleader order, and before the trial of the issue, paid the landlord a quarter's rent, out of the proceeds of the goods,—Held, that the sheriff was bound to pay over the amount of the quarter's rent, as well as the rest of the proceeds of the sale, to A, after the decision of the issue in his favour. *White v. Binstead*, 22 Law J. Rep. (N.S.) C.P. 115; 13 Com. B. Rep. 304.

The statute of 8 Anne, c. 14. s. 1, under which a landlord is entitled to get his rent paid out of goods taken in execution, does not apply unless the goods be removed from the premises. *Ibid.*

(g) *Possession for unreasonable Time.*

A sheriff, who remains in possession under a writ of *fi. fa.* more than a reasonable time is liable to an action of trespass. *Ash v. Dawney*, 22 Law J. Rep. (N.S.) Exch. 59; 8 Exch. Rep. 237.

SHIP AND SHIPPING.

[See STOPPAGE IN TRANSITU—WARRANTY.]

- (A) CHARTER-PARTY.
- (B) INSURANCE.
- (C) BILL OF LADING.
- (D) CARGO, SALE OF.
- (E) OWNERS.
- (F) MASTER.
- (G) PILOT AND PILOT ACT.
- (H) SEAMEN.
- (I) PASSENGERS ACT.
- (J) REGISTRY.
- (K) SALE AND TRANSFER.

- (L) FREIGHT.
- (M) DEMURRAGE.
- (N) HARBOUR AND OTHER DUES.
- (O) LIEN AND MORTGAGE.
- (P) COLLISION AND DAMAGE.

(A) CHARTER-PARTY.

The defendants received goods at Panama, to be carried to and delivered in London, the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads, and rivers of whatever nature or kind soever excepted. The goods were stolen, without violence, when in the course of transmission from Southampton to London:—Held, that this was not a loss within the exception either of "robbers" or "dangers of the roads," as the word "robbers" meant loss by violence, and "dangers of the roads" meant either dangers of roads where ships lie at anchor, or such dangers on land as more immediately occur on roads, e.g. the overturning of the carriages. *De Rothschild v. the Royal Mail Steam-Packet Co.*, 21 Law J. Rep. (N.S.) Exch. 273; 7 Exch. Rep. 734.

The defendant chartered the plaintiff's vessel to proceed to Newcastle-on-Tyne, and there be ready forthwith "in regular turns of loading" to take on board by spout or keel, as directed, a complete cargo of four keels of coal, and the remainder coke. In an action for not loading the vessel with coke within a reasonable time,—Held, that evidence was admissible to explain the meaning of the expression in the charter-party, "in regular turns of loading," by shewing that there was a usage of the port of Newcastle that vessels should take in their cargoes of coke in a certain regular order or turn; and that the question, whether the vessel was loaded within a reasonable time, ought not to be decided without reference to such usage, if proved. *Leideman v. Schultz*, 23 Law J. Rep. (N.S.) C.P. 17; 14 Com. B. Rep. 38.

The term "final sailing of the vessel from the port of loading" stated in a charter-party as the period for payment of the freight or part of it, means the final departure from the port and being at sea ready to proceed on her voyage, and not merely having the clearances on board, and being ready to sail. *Roe-landts v. Harrison*, 23 Law J. Rep. (N.S.) Exch. 169.

In determining the point at which a vessel has "finally sailed," the circumstances of the particular port of loading must be considered; and where the vessel was wrecked after having her clearances on board, and had left the dock gates, and had reached a ship canal between high and low water, where she was subject to certain regulations under a local act, and where she was liable to be stopped by the harbour master, it was held that she had not finally sailed within the meaning of the charter-party. *Ibid.*

A charter-party provided that a ship should "sail and proceed from Amsterdam with all convenient speed to Liverpool, to leave Amsterdam not later than all March." On the 30th of March the vessel, with a part of her ballast on board, quitted the docks at Amsterdam, and on the same evening reached the entrance of the North Holland Canal. On the 31st she arrived at Alkmaar, and stayed there during the 1st and 2nd of April, being engaged in taking in the

remainder of her ballast. On the 3rd of April she set sail and left Nieuve Diep, having completed her crew there on the 9th, and on the 17th arrived at Liverpool:—Held, that the words "leave Amsterdam" did not mean "sail on her voyage from Amsterdam," and therefore that the agreement in the charter-party had been fulfilled. *Van Baggen v. Baines*, 23 Law J. Rep. (N.S.) Exch. 213.

By a charter-party the master of a vessel engaged to proceed with his vessel to a particular colliery and there take on board for the freighters a cargo of coal. Before the charter-party was signed both parties knew that the colliery was not at work, an accident having happened to the steam-engine, and both were told it would be repaired in a short time, and that the vessel would be loaded in her turn within a few days after the colliery got to work again, according to the practice of the port, which was, that ships were loaded in their regular turns as they were entered on the colliery books. The freighter had no controul over the colliery. The ship was loaded in her turn, but not until several days later than the colliery agents had led the parties to expect:—Held, that if the steam-engine was repaired and the colliery got to work in a reasonable time after the execution of the charter-party, and if the vessel was loaded within a reasonable time after the colliery got to work, the freighters were not liable to compensate the master of the vessel for the delay in the loading. *Harris v. Dreesman*, 23 Law J. Rep. (N.S.) Exch. 220; 9 Exch. Rep. 485.

The defendants agreed by a charter-party that the ship should proceed to Galatz, or as near thereto as she could safely get, and there load a cargo, the act of God, &c. and every other dangers and accidents of the seas, rivers, and navigation during the voyage excepted. The ship arrived on the 5th of November off the mouth of the Danube. At that time, and until the 7th of January following, the water was unusually low on the bar and the ship was unable to cross. On the 11th of December she was obliged by stress of weather to go to Odessa as the nearest safe port, where she afterwards took in a cargo and sailed for England. On and after the 7th of January there was sufficient water in the port for the ship to have crossed and to have gone up to Galatz and there shipped a cargo:—Held, that, under these circumstances, there was a breach of the charter-party, and that the defendants were not justified in putting an end to the contract by any of the excepted causes. *Schilizzi v. Derry*, 24 Law J. Rep. (N.S.) Q.B. 193; 4 E. & B. 873.

Declaration on a charter-party of a ship from the Tyne to Naples, and thence to Odessa, there to load, from the factors of the freighter, a full and complete cargo of wheat or other grain, and to return to Falmouth or Queenstown; thirty-five running and laying days are allowed. Breach, that the defendant made default in loading the agreed cargo, and kept and detained the ship on demurrage at Odessa, and did not pay the demurrage. Pleas, first, that the defendant was a British subject, and that after the making of the charter-party, and before the arrival of the ship at Odessa, and before the defendant provided or purchased any cargo for the loading of the ship, war was declared against the Emperor of Russia, and Odessa had from that time been a hostile port in the possession of the Queen's enemies; that it became impossible for the defendant to perform his agreement, and to fulfil

the terms of the charter-party without dealing and trading with the Queen's enemies, of which the plaintiff had notice before the expiration of the laying days, and the charter-party thereby became and was wholly rescinded. Secondly, to the second breach, that the defendant did not keep and detain the ship on demurrage at Odessa for the days mentioned in the declaration. Replication, first, taking issue; secondly, to the first plea, that, by an Order in Council of the same date as the declaration of war, Her Majesty declared that she would waive the right of seizing enemies' property on board neutral vessels unless contraband of war; and further, that by an Order in Council, dated the day after, Her Majesty ordered that Russian merchant vessels should be allowed a certain time unmolested to load within Her Majesty's dominions and to proceed on their voyages; and that, by certain other Orders in Council, made long before the expiration of the thirty-five running days, and while there was time to load the cargo within the said running days, it was ordered that neutral vessels should be permitted to import and export into and from Her Majesty's dominions goods and merchandise, not contraband of war, to whomsoever the same might belong; and further, that British subjects and the subjects of a neutral or friendly state might freely trade with all places not in a state of blockade, save and except that no British vessel should enter or communicate with any port belonging to or in the possession of the Queen's enemies. Averment, that the said ship was a neutral vessel and under a neutral flag, and the plaintiff the subject of a neutral and friendly state; that Odessa was not in a state of blockade whilst the cargo, which was not contraband, might have been loaded, and that the cargo might and ought to have been loaded, pursuant to the charter-party, in the said ship, notwithstanding the hostilities:—Held, upon demurrer, that, assuming the first plea to be a sufficient answer, the replication was no answer to it, as the first and second of the Orders in Council relied upon were inapplicable, and the third, not being contemporaneous with the declaration of war, could not prevent the dissolution of the contract, or, once dissolved, re-integrate it:—But, held, also, first, that the plea was no answer to the action, on the grounds, first, that it was possible, and even probable, that a cargo might have been furnished and loaded at Odessa by the defendant's factors, in pursuance of the charter-party, without illegally trading with the subjects of Russia. Secondly, supposing the plea to mean that a cargo had not been obtained before the arrival of the ship and could not afterwards be procured without purchasing from Russian subjects, still that it did not shew a dissolution of the contract, as the purchase of a cargo before the arrival of the ship was one mode of dealing under the contract, equally open and probable; and the defendant, therefore, having by his own choice, disabled himself from performing his contract, could not set up his omission to procure a cargo before the ship's arrival as an excuse for the alleged breach of the charter-party. *Espósito v. Bowden*, 24 Law J. Rep. (N.S.) Q.B. 210; 4 E. & B. 963.

To a declaration for breach of a charter-party in not loading a cargo at Odessa, the defendant pleaded that after the vessel had proceeded to Odessa, and before the breach of contract, war was declared by Her Majesty Queen Victoria against the Emperor

of Russia, and they then went to war, and that ever since that period this kingdom and the empire of Russia had been at open war, of which the plaintiffs and defendant, before the alleged breach of contract, had notice; that Odessa was part of the empire of Russia, and that the plaintiffs and defendant were natural-born subjects of this kingdom and not of the empire of Russia; that the said ship was a British registered ship, and that no licence for loading a cargo on board the said vessel at Odessa was or could be obtained, and that the defendant could not, without trading and corresponding with the enemy, have procured or received a cargo, or loaded the said ship, as agreed:—Held, upon demurrer, that the plea was an answer to the action, as it shewed a dissolution of the contract by the declaration of war before any breach, and that the defendant, without any default on his part, was unable to provide or load a cargo without trading with the enemy, which, being a British subject, he could not lawfully do. *Reid v. Hoskins*, 24 Law J. Rep. (N.S.) Q.B. 315; 4 E. & B. 979.

The declaration alleged a charter-party, under which the plaintiffs' ship, being tight, staunch, &c., and every way fitted for the voyage, should load a cargo at Sunderland, and proceed to Constantinople, "one-fourth of the freight to be advanced on the ship having sailed, less 5% per cent. for insurance." It then averred that the ship was loaded, and sailed for Constantinople, pursuant to the charter-party, and alleged as a breach, that the defendant (the charterer) had not paid the one-fourth of the freight. First plea, that the ship did not sail for Constantinople pursuant to the charter-party, on which issue was joined. The facts were, that the ship left Sunderland Docks, to save a spring tide, with her rigging and equipment incomplete, and part of her crew absent, and anchored in the roads, where she was lost, during the absence on shore of the master, who had not then signed the bills of lading:—Held, that she had not sailed pursuant to the charter-party. *Thompson v. Gillespy*, 24 Law J. Rep. (N.S.) Q.B. 340.

The second plea was, that the ship was not, at the commencement of the voyage, tight, staunch, &c., and every way fitted for the voyage, and by reason of the premises the ship and cargo were lost:—Held, a good answer to the action, as it shewed that the advance of freight had never become payable, but not as avoiding circuity of action. *Ibid*.

The third plea was, that the plaintiffs, after the ship had sailed, negligently and improperly permitted the master to go on shore and the ship to be left without a sufficient crew, whereby the ship and cargo were lost:—Held, to be no answer to the action. *Ibid*.

By a charter-party, made in London, the defendant contracted to load, in the plaintiff's ship, "a full and complete cargo of sugar, molasses ^{and} _{or}

other lawful produce." By the custom of Trinidad, the port of loading, a cargo was a full and complete cargo of sugar and molasses if it was a full and complete cargo of sugar and molasses packed in puncheons and hogsheads, though room for other packages was left. The defendant loaded as many puncheons and hogsheads of sugar and molasses as the ship could hold, and some cocoa also, but still

there was room for other cargo or for more sugar and molasses if packed in barrels or tierces, which are ordinary vessels for the packing of sugar and molasses, but which do not bring them home in so good condition as the larger casks. In an action against the defendant for not loading a full and complete cargo, according to the charter-party,—Held, that the custom was reasonable; that evidence of it was relevant and admissible for the defendant, as it did not vary the contract, but only explained what was the meaning of the expression in the contract, "a full and complete cargo of sugar and molasses." *Cuthbert v. Cumming* (in error), 24 Law J. Rep. (N.S.) Exch. 310.

By charter-party, a vessel, after discharging her outward cargo for the owner's benefit, was to proceed to Galatz or Ibraila, as ordered at Constantinople, or Sulina, by the charterer's agents, and there load a cargo of corn, and therewith proceed homewards and discharge at a port in the United Kingdom, and so end the voyage, restraints of princes and rulers, the dangers of the seas, navigation, &c. during the said voyage, always mutually excepted:—Held, that the voyage commenced from the period of the discharge of the outward cargo, and that the exception as to the restraints of princes applied to the loading at Ibraila, where the vessel proceeded; and, consequently, that it was a good plea to an action by the owner against the charterer, for not loading a cargo at Ibraila, that the defendant was prevented from loading by the restraint and prohibition of the ruler of the country wherein Ibraila is situate. *Bruce v. Nicolopulo*, 24 Law J. Rep. (N.S.) Exch. 321.

On an issue joined on this plea it was proved that no corn was exported from Ibraila during the vessel's stay, and evidence was given that Wallachia, in which Ibraila is situate, was invaded by the Russians, and at the time in question was under the command of Prince Gortschakoff, a Russian general, who, while at Ibraila, being applied to, to allow grain to be exported, refused, and desired the applicant to petition the commissary at Bucharest. Evidence was also tendered of copies of placards, in the name of Gortschakoff, posted on the walls of Ibraila, at the period of the ship's arrival, prohibiting the exportation of grain:—Held, that such evidence was admissible, and, coupled with the other evidence, proved the plea. *Ibid*.

Observations on an opinion expressed by Lord Cottenham, that when a merchant enters into a charter-party in his own name, containing a clause that no goods shall be taken abroad without the consent of the freighter or his agent, and that the vessel shall be consigned to the freighter's agent both in England and abroad, a third party may deal with the correspondent abroad with respect to the cargo, without inquiring as to the rights and relations existing between the charterer and his correspondent. *Zulueta v. Tyrie*, 15 Beav. 577.

A chartered a ship in his own name, and consigned it to B in Cuba under an agreement that B should ship goods and consign them to A, and that A should accept B's bill for their value. After B had accepted bills on the faith of the agreement, B sold the cargo to C, who had notice of the terms of the charter-party, and it was consigned to another person:—Held, that, assuming that the fact of A's

appearing principal on the charter-party made it incumbent on C to ascertain the relations between A and B, yet that as B was actually the principal, and not the agent of A, C could safely deal with him for the cargo, and that the circumstance of B having committed a fraud on A did not prevent C from obtaining a good title to the goods. *Ibid.*

A merchant in Cuba sold part of a cargo shipped by him to B, and C (who was A's correspondent in England) being informed thereof by B, made no claim until four months afterwards, when he insisted on a paramount right over B to the cargo:—Held, that even assuming he had originally such right, his conduct had been such that a Court of equity would not allow him to enforce it against B. *Ibid.*

(B) INSURANCE.

A cargo of wheat was insured from O to L, and the vessel was damaged and repaired, and vessel and cargo were hypothecated for repairs, by a bottomry bond, and afterwards the vessel was wrecked and towed into the port of C by salvors. The cargo was damaged, but part of it could have been dried and conveyed in a merchantable condition to L, the port of discharge. Proceedings were taken in the Admiralty Court, and a sum was awarded on the bottomry bond, and another sum for salvage:—Held, that in determining whether it was "practicable" to send the whole or part of the cargo to its place of destination in a marketable state, the jury ought to have ascertained the costs of unshipping, drying, warehousing and transhipping the cargo into a new bottom, the cost of the difference of transit to the port of discharge if it could be only effected at a higher than the original rate of freight, and the amount of the salvage in proportion to the value of the cargo saved; that the loss would have been total if the aggregate of those items had exceeded the value of the cargo at L, but if the aggregate would not have exceeded the value of the cargo or the part saved, then the loss would have been only partial. Held, also, that the sum paid to the parties entitled under the bottomry bond, and to the costs in the Admiralty Court, could not be taken into account. *Rosetto v. Gurney*, 20 Law J. Rep. (n.s.) C.P. 257; 11 Com. B. Rep. 176.

A marine policy was made subject to certain rules, one of which was that ships were not to sail from any of the ports following, between the times set opposite thereto, that is to say, from any port on the east coast of Great Britain between the 5th of October and the 5th of April to any port in the Belts between the 20th of December and the 15th of February. The plaintiff's vessel sailed, on the 8th of February, for F, a port in the Belts, and was lost:—Held, in an action by the assured against the insurer, that the rule amounted to a warranty, and not to an exception, and that the plaintiff was not entitled to recover in respect of the loss. Held, also, that the word "to" as used in this rule meant "towards." *Colledge v. Harty*, 20 Law J. Rep. (n.s.) Exch. 146; 6 Exch. Rep. 205.

Where corn is insured free from average, and in consequence of injury sustained by the ship is damaged in the voyage and taken out at an intermediate port during the repairs of the ship, there is not a total loss unless the corn is in such a condition that the expense of bringing it to the port of desti-

nation for sale would exceed the value of it when brought; and it is not a proper question to leave to the jury, whether the insured had acted as a prudent uninsured owner would have acted under the circumstances. *Reimer v. Ringrose*, 20 Law J. Rep. (n.s.) Exch. 175; 6 Exch. Rep. 263.

A ship loaded with hides and tobacco whilst on her voyage encountered bad weather and shipped much sea water, whereby the hides were wetted and rendered putrid. Neither the tobacco nor the packages containing it were immediately in contact with nor directly damaged by sea-water, but the tobacco was damaged and deteriorated in flavour by the fetid odour proceeding from the putrid hides:—Held, that this was a loss by perils of the sea. *Montoya v. the London Assurance Co.*, 20 Law J. Rep. (n.s.) Exch. 254; 6 Exch. Rep. 451.

A declaration in assumpsit for a total loss on a policy of insurance for 1,100l. on a ship and cargo, stated that the defendants were shareholders of, and partners in, the General Maritime Assurance Company, that the plaintiff caused a policy (which was set out) to be effected on the ship and cargo, and which stated that "it was declared and agreed by and between the company and the assured that the capital stock and funds of the said company should alone be liable to answer and make good all claims and demands whatsoever, under and by virtue of the said policy, and that no proprietor of the said company, his or her heirs, executors, or administrators, should be in anywise subject or liable to any claims or demands, nor be in anywise charged by reason of the said policy beyond the amount of his or her share or shares in the capital stock of the said company, it being one of the original and fundamental principles of the said company that the responsibility of the individual proprietors should in all cases and under all circumstances be limited to their respective shares in the capital stock." The declaration then averred that, in consideration of the payment of the premium and of the promises of the plaintiff, the defendants then promised the plaintiff that they would become and be insurers to the plaintiff of the said sum of 1,100l. &c. "and would perform and fulfil all things in the said policy of insurance contained on their part as such insurers of the said sum of 1,100l. to be performed and fulfilled, and the defendants then became and were insurers to the plaintiff, and duly subscribed the said policy of insurance as such insurers of the said sum of 1,100l. upon the said ship." After stating the loss of the ship, the declaration proceeded:—"Although the capital stock and funds of the said company, always from the time of the making the policy, hitherto have been, and still are, sufficient to pay the plaintiff the said sum of 1,100l., yet that the defendants have not paid. To this declaration there was a demurrer by one defendant; and by another a plea of non assumpsit, and a traverse of the allegation of the sufficiency of the capital stock and funds of the company to pay the plaintiff. On the trial of the issues in fact, the plaintiff proved that the defendants were all shareholders, and one of them a director, in the General Maritime Assurance Company, and put in the deed of settlement of the company and the policy. The former instrument stated that the company was formed for the purpose of effecting insurances on vessels, and that it was agreed that there should be a capital of 1,000,000l.

in 100l. shares; that the direction of affairs should be vested in directors, who had power to make calls; that every policy should be signed by three directors; that they should be indemnified for all liabilities out of the funds of the company; that the directors should cause it to be stated in every policy that the subscribed capital of 1,000,000l., and the funds and property of the company undisposed of, should alone be liable for claims under a policy; that the directors issuing the policy should not be responsible, and that no proprietor should be liable beyond the amount of his unpaid shares. The policy was signed by three directors of the company, none of whom were defendants. It purported to be made between the company and the assured, and contained the restrictive clauses stated in the declaration. Evidence was also given that only a portion of the shares had been subscribed for, and only a quarter of those shares paid up. It was then proved, on behalf of the defendants, that neither at the time of the loss, nor since, had the company any available funds in their hands out of which they could pay the plaintiff.—Held, in error, (*Platt, B. dubitante*), affirming the judgment of the Court of Queen's Bench on the demurrer, that the declaration disclosed a joint contract by all the defendants with the plaintiff; and was, therefore, good. *Hallett v. Dowdall* (in error), 21 Law J. Rep. (n.s.) Q.B. 98; 18 Q.B. Rep. 2.

Held, further, on a bill of exceptions (*Cresswell, J. and Williams, J. dissentiente*), that the deed of settlement, the policy, and the facts proved, contained no evidence for the jury, on the issue on non assumption, in support of the joint contract alleged in the declaration. *Ibid*.

A vessel being in the ordinary course of her voyage moored in harbour, floated when the tide was in, and took the ground when the tide was low. She became hogged, or strained all over in consequence.—Held, that this did not constitute a loss for which an underwriter was liable as a loss from perils of the seas, there having been no accident. *Magnus v. Buttener*, 21 Law J. Rep. (n.s.) C.P. 119; 11 Com. B. Rep. 876. *Fletcher v. Inglis*, 2 B. & Ald. 315, distinguished. *Ibid*.

A ship on her voyage from Nantes to Dublin was obliged by stress of weather to run into the Bay of Palais, on the coast of France, and there let go the bower anchors and chains. The gale increasing, and the ship dragging the large anchor, the captain, for the preservation of the ship and the lives of all on board, and particularly to prevent the ship going on shore, slipped both chains overboard, got the ship under sail, and succeeded in entering the tidal harbour of Sanzon, where, by reason of its being at the time low water, the ship took the ground, and for a month only floated about eight days, and then only at the top of spring tides. When afterwards the ship proceeded to sea, it was found that she had become strained and was making water, in consequence of which her cargo was damaged.—Held, that the ship was "stranded" in the harbour of Sanzon, within the meaning of the memorandum in a policy of insurance, and that the defendant as underwriter was liable in respect of an average loss, occasioned by the damage to the cargo. *Corcoran v. Gurney*, 22 Law J. Rep. (n.s.) Q.B. 113; 1 E. & B. 456.

Declaration on a valued policy of marine insurance, underwritten by the defendant for 100l., on goods

from D to L, alleging a partial loss above 5l. per cent. and a breach of the policy by reason of the defendant's non-payment of the loss, or any part thereof, or of the 100l., or a proportional or any part thereof. Plea, that before action the proportional sum which the defendant was liable to pay in respect of the loss, was, by agreement between the plaintiff and the defendant, adjusted at a certain rate per cent., and thereby then liquidated and ascertained to be a certain sum, against which the defendant is willing to set off a larger sum due to him from the plaintiff for premiums of insurance:—Held, on demurrer, to be a bad plea; that the action was for unliquidated damages, and that the adjustment did not make them liquidated, but was only evidence for a jury of the amount of damages. *Luckie v. Bushby*, 22 Law J. Rep. (n.s.) C.P. 220; 13 Com. B. Rep. 864.

By a charter-party, effected at Monte Video, on the 10th of February 1847, the vessel was to proceed to the F Islands and thence to S C, and there to take in a cargo, and to discharge it at a port in Europe, freight to be paid at 250l. a month, one month's pay to be paid when the vessel sailed from the F Islands, the balance at the port of discharge. The vessel sailed from Monte Video to the F Islands with a cargo, which she there safely delivered about two months afterwards. While there the plaintiffs paid 250l. for the one month's pay. The vessel then went to S C, took in a great portion of a cargo, and returned to Monte Video, where she completed her cargo. There, also, in October 1847, the plaintiffs and the captain entered into a new charter-party with respect to the vessel, by which instrument the vessel was to proceed to Havre direct with the cargo on board, the freight to be paid at the rate of 250l. per month, the time to commence from the 26th of March then last, and to be paid at the port of discharge, after deducting 250l., which it stated the captain had already received on account of that charter-party. By the direction of the plaintiffs, his agent effected a policy of insurance, lost or not lost, from Monte Video to Havre, on 450l. freight advanced. The vessel was totally lost with her cargo on the voyage from Monte Video to Havre:—Held, that the second charter-party annulled the first, and that the parties were entitled to treat the 250l. as paid under the second charter-party. *Ellis v. Lafone*, 22 Law J. Rep. (n.s.) Exch. 124; 8 Exch. Rep. 546.

Held, also, that the plaintiffs were entitled to recover on the policy the 250l. as freight advanced, since that amount was not a separate sum paid in respect of the voyage to the F Islands, but was part of an entire sum payable for the whole voyage, and therefore remained at risk until the vessel arrived at the port of discharge. *Ibid*.

Held, further, that the voyage was properly described in the policy. *Ibid*.

A declaration upon a policy of insurance, effected to secure advances made for the purpose of conveying Coolies as emigrants from Canton to Callao, stated in the usual form that the perils insured against were of the seas, pirates, rovers, thieves, and all other the perils, &c., and then averred a total loss by reason of the Coolies, whilst on the voyage, piratically and feloniously murdering the captain and part of the crew, and forcibly carrying away the ship and rest of the crew, so that the ship never

arrived at Callao, and the transport of the Coolies was not completed. Pleas, eighthly, that after the Coolies had so murdered the captain and some of the crew, and obtained possession of the vessel, they caused the same to be steered to the nearest land for the purpose of being landed, and refused to, and would not and did not, proceed on the voyage; that the vessel then was fit and able to proceed to Callao, and convey the emigrants there; that the rest of the crew were able and willing to take the vessel and the Coolies there, if the Coolies had been willing, but that they refused, and by reason of such refusal, and from no other cause, the transport was not completed. Ninthly, as to the taking of the vessel, that the Coolies were unwilling to go; that they murdered the captain and some of the crew, and took possession of the vessel only to be landed, and avoid being carried on the voyage, which was the supposed piratical taking:—Held, that neither of the pleas was good, for that the proximate cause of the loss was the seizure of the ship, and that was one of the perils insured against, either as an act of piracy and theft or as a peril *ejusdem generis*, and so falling within the general words of the policy. *Naylor v. Palmer*, 22 Law J. Rep. (n.s.) Exch. 329; 8 Exch. Rep. 739.

A vessel insured by a time policy was during the risk captured by pirates, and being shortly after recaptured by an English ship of war, was taken possession of by a prize crew, and sent to England for the purpose of being adjudicated upon in the Court of Admiralty. While on her return, and after the expiration of the risk, she met with sea damage, and was taken into a port to be repaired, where she was sold by the prize master. From the time of the recapture to the sale the ship was in the possession and under the controul of the prize crew, and not of her own crew. On her arrival in England proceedings were taken in the Admiralty Court without prejudice to the legal right of the parties, and possession was decreed to the owners. After the termination of the risk, but as soon as the assured received intelligence of the capture by the pirates, they gave notice of abandonment:—Held, that under the above circumstances the assured were entitled to recover as for a total loss. *Dean v. Hornby*, 23 Law J. Rep. (n.s.) Q.B. 129; 3 E. & B. 180.

A declaration upon a policy of insurance effected to secure advances made for the purpose of conveying Coolies as emigrants from Canton to Callao, stated, in the usual form, that the perils insured against were of the sea, pirates, rovers, thieves, and all other the perils, &c., and then averred a total loss by reason of the Coolies, whilst on the voyage, piratically and feloniously murdering the captain and part of the crew, and forcibly carrying away the ship and rest of the crew, so that the ship never arrived at Callao, and the transport of the Coolies was not completed. Pleas, eighthly, that after the Coolies had so murdered the captain and some of the crew, and obtained possession of the vessel, they caused the same to be steered to the nearest land for the purpose of being landed, and refused to and would not and did not proceed on the voyage; that the vessel then was fit and able to proceed to Callao and convey the emigrants there; that the rest of the crew were able and willing to take the vessel and the Coolies there if the Coolies had been willing, but

that they refused, and by reason of such refusal, and from no other cause, the transport was not completed. Pleas, ninthly, as to the taking of the vessel, that the Coolies were unwilling to go to Peru, that they murdered the captain and some of the crew, and took possession of the vessel only to be landed and avoid being carried on the voyage, which was the supposed piratical taking:—Held, that neither of the pleas afforded any answer to the declaration, as the seizure of the ship by the Coolies, which was an act of piracy, or an act *ejusdem generis*, covered by the policy, was the proximate cause of the loss, which was complete and total from the moment of the seizure. *Palmer v. Naylor* (in error), 23 Law J. Rep. (n.s.) Exch. 323; 10 Exch. Rep. 382.

Barratry may be committed by the master of a ship who is part-owner. *Jones v. Nicholson*, 23 Law J. Rep. (n.s.) Exch. 330; 10 Exch. Rep. 28.

Where the master, being part-owner, fraudulently sold the ship and cargo, and applied the proceeds to his own use,—Held, that this was a loss insured against by the words “barratry of the master,”—and *per Martin, B.*, also by the words “all other perils, losses and misfortunes.” *Ibid.*

A declaration set out a policy of assurance in the ordinary form on a ship and cargo from Cardiff to Panama, with a memorandum stating that the ship and freight were warranted free from average under 5l. per cent. unless general, or the ship should be stranded, and that the assurance thereby effected was and should be on money advanced on account of freight valued at 815l., and alleged that E S was interested in the money insured against, being money advanced to him as owner of the ship on account of freight of the cargo, and that the insurance was made for his benefit and on his account. It then further alleged that during the voyage and the continuance of the risks insured against, the ship, with the cargo, was by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, greatly damaged and injured, and in consequence the master of the ship, in order to enable the ship to prosecute the adventure and proceed on the voyage, was compelled and did put in at Valparaiso to repair, and did then and there repair the said damage and injury, and that the costs and expenses incurred in and about repairing the said damage and injury, and in and about unloading and reloading the cargo, which was necessarily unloaded for the said repairs and reloaded, and in and about providing stores, &c., amounted to a large sum, to wit, &c., and that divers of the said costs and expenses were the subject of a general average loss and contribution amongst all parties interested in the ship, cargo, and the freight, and the money advanced on account of freight, &c. Breach, that the defendant had not contributed according to the rate and quantity of the sum in the said policy assured by him, nor paid any part of the charges incurred in respect of the safeguard and recovery of the said ship and cargo. Pleas, that the policy was made in London, and according to the usage and custom of merchants, underwriters, and others effecting and underwriting marine insurances in London, and the known and accepted mercantile interpretation and meaning of a policy so worded, an insurer of money advanced on account of freight was not liable to a general average loss or contribution:—Held, upon demurrer, first, that the

declaration sufficiently shewed a loss in respect of which a claim to general average contribution arose, and for which the underwriters to the policy were liable; secondly, that "money advanced on account of freight" might be insured as freight, and that there was nothing in the description of the interest insured by the policy to lead the underwriters to infer that the insurance was effected by the charterer or shipper, and not by the ship-owner; thirdly, that the alleged usage was in derogation and contradiction of the written contract, and could not be set up in bar of the action, and, therefore, that the plea was bad. *Hall v. Janson*, 24 Law J. Rep. (N.S.) Q.B. 97; 4 E. & B. 500.

On an insurance of a vessel at and from New York to Quebec, during her stay there, thence to the United Kingdom, the said ship being warranted to sail from Quebec on or before the 1st of November A.D. 1853.—Held, that the assurer was liable for a loss occurring on the voyage to Quebec after the 1st of November 1853. *Baines v. Holland*, 24 Law J. Rep. (N.S.) Exch. 204; 10 Exch. Rep. 802.

The owner of six ships by a deed to which he and two trustees alone were parties, and which was duly registered, assigned them to two trustees for securing sums of money expressed to be lent to him by them (but which in fact had been lent by the plaintiffs), and covenanted to insure each vessel in the sum of 1,500*l.* at the least, and on request to assign the policies to the trustees. He did insure the ships in his own name through the agency and in the name of a broker who had notice of the mortgage, but who had been informed by the owner that insurances had been effected by the trustees in respect of their interest, and who trusted him in the belief that the insurances were on the owner's own account in respect of his interest as mortgagee. One of the ships insured for 1,000*l.* was lost. The owner subsequently became bankrupt. The broker was a creditor of the owner for premiums on the insurance policies and for 100*l.* cash advanced after the policies had been effected, and he brought an action against the underwriters for the monies secured by the policies. In a suit by the plaintiffs, who had really lent the money on the mortgaged security, against the broker, the underwriters and the trustees for the plaintiffs, asking a declaration that the proceeds of the policies belonged to the plaintiffs, and for an account and injunction:—Held, first, that the provisions of the Ship Registry Act afforded no defence to the suit; secondly, that the broker was not entitled to a general lien for the whole balance due to him from the bankrupt, but only on each policy for the sums paid in respect of that policy; thirdly, that the assignees had no title under the order and disposition clause in the Bankruptcy Act. *Ladbroke v. Lee*, 4 De Gex & S. 106.

(C) BILL OF LADING.

W at Amsterdam bought of the defendants, merchants at Dantzic, a cargo of wheat, which was shipped by the defendants in a ship chartered by them, under a bill of lading making it deliverable "to order or assigns," which they indorsed in blank and forwarded to C and S in London, together with directions to follow the instructions of W, on whose account they advised C & K that they had drawn upon them for the price, "which drafts we recommend to

your protection on account of W." C & S in reply stated that they would follow the orders of W with the bill of lading, and that the drafts would be protected on presentation for account of W. W, in fact, bought the cargo for P, but this was unknown to the defendants. W had previously to the sending of the bill of lading informed C & S that he had on account of P opened a credit with them in favour of the defendants, and had requested C & S to honour their draft against the bill of lading, and to debit it to P. P, who had had frequent similar dealings with them, obtained from A & B in London an advance on the promised deposit of the bill of lading, which he handed to them indorsed by the defendants on the 8th of January, and A & B on the same day handed it over to the plaintiffs as a security for an advance then actually made by them in the ordinary course of their business. The bill of lading was in the hands of C & S on the morning of the 8th of January; but there was no evidence to shew how it came into the possession of P. On the 8th of January the defendants' draft was left with C & S for acceptance, and on the following day was returned dishonoured, when the defendants' agent demanded the bill of lading from C & S, but it was not delivered up by them. C & S and W afterwards stopped payment, and the defendants had never been paid any part of the price of the wheat. On the arrival of the cargo it was taken possession of by the defendants, who obtained the delivery of it from the captain on payment of the freight, and refused to deliver it up to the plaintiffs. In an action for converting the cargo,—Held, that, subject to the right of stopping *in transitu*, the cargo vested in the vendee when the cargo was loaded and the indorsed bill of lading was sent by the defendants to C & S; and that the right to stop *in transitu* could not be defeated by a *bona fide* indorsement for value of the bill of lading, unless it was so indorsed by the authority of the defendants; that the delivery of the bill of lading by C & S to P (which the Court inferred) was not, under the circumstances of the case, an excess of authority, as no condition was imposed that the bill of lading should not be handed over before acceptance of the draft. *Gurney v. Behrend*, 23 Law J. Rep. (N.S.) Q.B. 265; 3 E. & B. 632.

(D) SALE OF CARGO.

The plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and there having loaded a cargo of Indian corn to proceed to a safe port in the United Kingdom. The plaintiffs accordingly shipped at Salonica, 1,180 quarters of Indian corn; and on the 22nd of February 1848, the master signed a bill of lading, making the corn deliverable "to order of the plaintiffs or to their assigns, he or they paying freight as per charter-party." The plaintiffs indorsed the bill of lading, and sent it, together with the charter-party, to B, their London agent, with orders to sell the cargo on their account; and they also, through B, insured the cargo "at and from Salonica to the port of discharge in the United Kingdom," &c., "corn warranted free from average unless general, or the ship be stranded." On the 1st of May 1848, B employed the defendants, corn-factors in London, to sell the cargo, and sent them the bill of lading indorsed, the charter-party,

and policy of insurance; and they advanced 600*l.* on the cargo. The custom of corn-factors is to sell under a *del credere* commission, and when so selling not to mention the purchaser. On the 15th of May 1848 the defendants sold the cargo to C, and sent him a bought note, which stated that he had bought of them "1,180 quarters of Salonica Indian corn of fair average quality when shipped, at 27*s.* per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, payment at two months from this date, upon handing over shipping documents." On the same day the defendants wrote to B, advising him of the sale, but without making any mention of the purchaser or of commission. The vessel sailed from Salonica on the 23rd of February, and having met with tempestuous weather, the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo, having been surveyed, was found to be unfit to be carried further, and on the 24th of April it was sold. On the 23rd of May, C gave the defendants notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March 1849 C became a bankrupt. The plaintiffs brought the present action against the defendants to recover the price of the cargo, and declared specially on a *del credere* guarantee:—Held, first, that evidence was not admissible of usage to explain the meaning of the contract. *Couturier v. Hastie*, 22 Law J. Rep. (N.S.) Exch. 97; 8 Exch. Rep. 40.

Secondly, that the meaning of the contract was, that the purchaser bought the cargo if it existed at the date of the contract; but that, if it had been damaged or lost, he bought the benefit of the insurance; and, therefore, he was bound to pay the stipulated price in a reasonable time after the bill of lading and other shipping documents were handed over to him. *Pollock, C.B. dissentiente*. *Ibid*.

Thirdly, that the defendants were responsible for the default of the purchaser by reason of their *del credere* commission, although there was no guarantee in writing signed by them within the 4th section of the Statute of Frauds. *Ibid*.

Fourthly, that the plaintiffs were entitled to judgment *non obstante veredicto* on a plea, which stated that, at the time the defendants were employed to sell the corn, it was heated and fermented, and had been unloaded and sold; that the defendants and C were ignorant of the premises; and that C repudiated the contract in a reasonable time after the sale, and before the time of payment. *Ibid*.

The plaintiffs having chartered a vessel, and loaded it at Salonica with a cargo of Indian corn, insured it "at and from Salonica to the port of discharge, in the United Kingdom," &c. "corn warranted free of average unless general or the ship be stranded," and employed the defendants, who were corn-factors, to sell the cargo. The latter, on the 15th of May, sold it to C. The bought note stated that he had bought of the defendants "a cargo of about 1,180 quarters of Salonica Indian corn per K.P. from Salonica of a fair average quality when shipped," &c. "at 27*s.* a quarter free on board, and including freight and insurance to a safe port in the United Kingdom," &c. "payment at two months from this date or in cash less discount," &c. "upon handing shipping documents." Prior to this date, the vessel having sailed

from Salonica with the cargo described in the bought note, was obliged to put into Tunis in distress. On examination, it was found that the cargo was so heated and damaged that it was unfit to be carried further, and it was consequently unshipped and sold by the captain at Tunis, on the 21th of April, by public auction. These facts were not known to any of the parties interested in the cargo until after the sale to C.—Held, that the contract was a contract for the sale of a cargo supposed to exist and to be capable of transfer at the time of the purchase, and that as the corn had been sold and delivered to others by the captain before the contract was made, it consequently could not be enforced. *Hastie v. Couturier*, 22 Law J. Rep. (N.S.) Exch. 299; 8 Exch. Rep. 40.

The defendant sold to the plaintiff at Liverpool a cargo of corn; the bought and sold notes described it as "the cargo per *Prima Donna*, now at Queens-town, as it stands, consisting of 1,300 quarters Ibraila Indian corn, at the price of 30*s.* per imperial quarter; the quantity to be taken from the bill of lading, and measure calculated 220 quarters equal to 100 kilos. Payment cash on handing shipping documents and policy of insurance." At the time when the contract was made, the ship was at Queenstown waiting for orders, and neither the bill of lading nor policy of insurance was then in Liverpool. When they arrived the defendant sent an invoice, calculating the price at 30*s.* on 1,667 quarters, which was the quantity specified in the bill of lading, reduced from kilos to quarters, at the rate stated in the note, and the plaintiffs paid that price (less freight and interest) to the defendant, and received in exchange the shipping documents and policy of insurance. When the cargo was delivered it was found to measure only 1,614 quarters. There was no evidence to shew how the deficiency arose, or that either party was aware of it, or had measured the cargo before the sale. The plaintiffs thereupon sued the defendant for the deficiency (53 quarters) at 30*s.* per quarter:—Held, that the parties had agreed by the contract to take the quantity as fairly represented in the bill of lading, and that the price was to be paid on that footing, the purchaser taking the chance of the actual quantity turning out to exceed or fall short of that specified in the bill of lading; and that consequently the action could not be maintained. *Covas v. Bingham*, 23 Law J. Rep. (N.S.) Q.B. 26; 2 E. & B. 836.

The declaration stated that the plaintiff had agreed to buy and the defendants to sell from 300 to 350 bales of wool; to arrive, at 10½*d.* per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August, to be shipped with all despatch, warranted fine average quality, but if otherwise, to be taken with fair allowances as decided by a named referee, "subject to the safe arrival of the wool in good condition at any of the ports stated, and the name of the vessel to be declared as soon as the wools are shipped; payment, cash in fourteen days, less 1*l.* 10*s.* per cent. discount, from the date of finishing loading." It then averred that the wool was shipped during August and arrived at Liverpool in November, and general performance of conditions precedent by the plaintiff, and stated the breach to be the non-acceptance of the wool and non-payment. Plea, that the defendants agreed to

buy the wool for the purpose of re-sale; that wool varies in price, and that it could not be re-sold before the name of the vessel by which it was shipped was declared according to the contract; that the plaintiff had notice of the premises, and that the name of the vessel upon which the wool was shipped was not declared as soon as it was shipped, but was delayed for a long and unreasonable time, during which period the price of wool fell; and because of the delay of the plaintiff in declaring the vessel, the defendants refused to accept or pay for the said wool:—Held, upon demurrer, that, according to the true construction of the agreement, taken with the facts stated in the plea, and in the absence of any act by the defendants amounting to a waiver, the declaring the name of the vessel was a condition precedent, and the plea, therefore, good. *Graves v. Legg*, 23 Law J. Rep. (N.S.) C.P. 228; 11 Exch. Rep. 642.

(E) OWNERS.

A declaration in assumpsit stated that the defendant was the owner of a certain ship at a certain port beyond the seas, and bound from thence to London; that the plaintiffs caused certain goods to be shipped on board the said ship at the said port, to be carried thence to London, and there delivered to the plaintiffs for certain freight; that the ship set sail and proceeded on her voyage; that having been injured by tempestuous weather, the master was obliged to put into the port of Monte V. in order to have her repaired; that to pay for these repairs, it became necessary for the master to raise money, and without his so doing the vessel would have been unable to leave the port; and that the master, not being able to raise the money otherwise, took the goods of the plaintiffs and sold them for a certain sum, with which he paid the expenses of the repairs; that the defendant promised to pay the plaintiffs the value for which the goods would have sold had they been delivered by the defendant to the plaintiffs in London. Plea—so far as the declaration claims or seeks to recover damages beyond the value of the ship and freight thereafter mentioned, in respect of the breaches of promise complained of, that the plaintiffs ought not to maintain their action to recover damages to a greater amount than aforesaid, because, after the goods were shipped and before any part had been conveyed to London, and whilst they were in the custody and under the controul of the master, the master wrongfully and without any authority from the defendant, and without his knowledge, privity, or consent, sold the goods, and the defendant thereby was unable to deliver them to the plaintiffs. That the defendant, at the said time when, &c., was the owner of a British ship duly registered; that the goods were shipped by being received into the custody of the master; and that the defendant never personally accepted or received nor did he interfere with them or the shipping or the sale, except as such owner of the vessel; that the shipping and sale took place after the 1st of September 1813, and that the sale was done without the fault or privity of the defendant; and further, that the value of the ship, together with the value of the freight due or to grow due during the voyage, did not exceed a certain sum therein named:—Held, on special demurrer, first, that the plea was bad, as it was pleaded merely to

the damages; secondly, that when goods forming part of the freight of a ship had been sold at an intermediate port to defray expenses necessarily incurred in repairing the vessel, the merchant is not entitled to claim from the shipowner the price which they might have realized at the port of delivery unless the ship arrives; and that as the declaration did not contain any averment of the arrival of the ship at her port of destination, it was bad. *Atkinson v. Stephens*, 21 Law J. Rep. (N.S.) Exch. 329; 7 Exch. Rep. 567.

Seemle, that the plea did not bring the case within the 53 Geo. 3. c. 159. *Ibid*.

The 26 Geo. 3. c. 86. s. 2. limiting the responsibility of shipowners for a loss occasioned by fire, does not extend to the case of a fire happening on board a lighter, employed in carrying goods from the shore to be loaded on board a ship. *Morewood v. Pollok*, 22 Law J. Rep. (N.S.) Q.B. 250; 1 E. & B. 743.

Declaration alleging the delivery of cotton to the defendants, the owners of the ship B, at the town of M, to be safely carried, conveyed to and shipped on board of the said ship, and carried and conveyed in the said ship to L, and there delivered to the plaintiffs, &c., and although the defendants received the said cotton to be carried, &c., and had delivered a small part of the said cotton at L, yet, &c. they did not safely carry and convey on board the said ship the residue of the said cotton, &c., but, by and through the carelessness and negligence of the defendants and their servants, the said residue while the same was on board of a lighter for the purpose of being shipped on board the said ship, and before the same was shipped, was destroyed by fire. Plea, that the said lighter was a vessel necessarily and properly, and according to the custom of the port of M, used for carrying the cotton from the land to the ship, &c.; that the said carelessness, &c. was solely the negligence, &c. of the defendants' servants, in the absence of the defendants, and of which the defendants were guilty, if at all, merely as the masters of and responsible for such servants, and not otherwise; and that the said residue was consumed by the said fire in the declaration mentioned, and was not lost by or through any other cause whatever, &c.:—Held, upon demurrer, that as the cotton, at the time of the fire, was not on board the ship of which the defendants were the owners, they were liable for the loss; and that the plea, therefore, was no answer to the action. *Ibid*.

The defendant, being the registered owner of a ship, in 1852 agreed to sell it to G, for the purpose of carrying emigrants to Australia, the defendant contracting to repair her so that she should be approved by the Emigration Commissioners, and the purchase-money to be paid out of the freight received. This agreement was void for not reciting the certificate of registry. G, with the privity of the defendant, appointed T master of the ship for the voyage to Australia, and he was registered accordingly. T went on board in September 1852, and acted as master, but the defendant, during the whole of the time that T acted as master, had shipkeepers and an agent on board who superintended the repairs and paid the dock dues. By the defendant's order, and at his expense, the ship while in dock was new coppered and supplied with standing

rigging, but he refused to supply new running rigging. The plaintiff, upon the order of T while he was acting and registered as master, supplied, for the necessary repairs of the ship, then in dock at London, rope, which was worked up into the running rigging, the invoice, debiting "Capt. T and owners," being sent to the defendant with a demand of payment. The plaintiff had no knowledge either of G or the defendant, but had inspected the ship's register, but it did not appear whether this was before or after the rope was supplied. The defendant, not being able to obtain payment of the purchase-money, in October 1852 resumed possession of the ship in the absence of T, and having completed her outfit sent her upon his own account on the voyage, under a different master, with the rope in question on board. The defendant always remained registered as owner of the ship, but had never seen T nor given him any directions to purchase anything for the use of the ship:—Held, by *Lord Campbell, C.J., Wightman, J. and Crompton, J. (dissentiente Erle, J.)* that upon this evidence it was properly left to the jury to say whether, as between the plaintiff and himself, the defendant had given authority to T to order the rope to be supplied for the use of the ship. *Frost v. Oliver*, 22 Law J. Rep. (n.s.) Q.B. 353; 2 E. & B. 301.

Damage done to goods on board a ship by rats, is not within any of the exceptions in the ordinary bill of lading; and the shipowner is liable for such damage, although there are cats on board. *Laveroni v. Drury*, 22 Law J. Rep. (n.s.) Exch. 2; 8 Exch. Rep. 166.

Quære—whether damage caused in consequence of rats making a hole in the ship and letting in the water, would be within the exceptions in the bill of lading. *Ibid.*

The owner of a vessel which has been sunk in a navigable river is bound to use proper care to prevent accidents to other vessels so long as he has the possession, controul, and management of the vessel, that is, so long as by due care and exertion he can either remove the vessel, or so far shift its position as to prevent such injury. This duty attaches to the ownership for the time being, and will be transferred to a purchaser of the sunken vessel; and it makes no difference that the vessel lies in a part of the channel not ordinarily used for navigation; but the duty ceases on the abandonment of the possession of the vessel. *White v. Crisp*, 23 Law J. Rep. (n.s.) Exch. 317; 10 Exch. Rep. 312.

Where part owners of a ship differ on the terms of an agreement to manage and charter the vessel, the construction of such agreement is within the province of a court of equity; and the question of its concurrent jurisdiction with the Court of Admiralty cannot be raised. *Darby v. Baines*, 21 Law J. Rep. (n.s.) Chanc. 801; 9 Hare, 369.

The power given by the 514th section of the Merchant Shipping Act, 1854, to the Court of Chancery is simply to determine the amount of a shipowner's liability, and to distribute that amount among the several claimants, and not to decide the question of liability or non-liability. A shipowner, therefore, seeking to have the amount of his liability determined by the Court, and to have an injunction to restrain proceedings in the other courts, will not be relieved if he denies his liability altogether. *Hill*

v. Audus, 24 Law J. Rep. (n.s.) Chanc. 229; 1 Kay & J. 263.

Form of order made on motion for injunction, in a suit by shipowner to restrain actions for damage occasioned by loss of the ship and cargo, under the provisions of the Merchant Shipping Act, 1854, part 9. *The African Steam-ship Co. v. Swanzy*, 1 Kay & J. 326.

(F) MASTER.

The master of a ship has no general authority from the owner to sign bills of lading for goods not received on board; and all persons taking a bill of lading by indorsement or otherwise have notice that his authority is limited to signing bills of lading for goods received on board. Therefore, where a bill of lading signed by the master in the usual form, but for goods which were never received on board, had been deposited, according to the custom of merchants, with the plaintiffs by the parties to whom the master had delivered it, as a security for advances from the plaintiffs to them, and had been indorsed by them to the plaintiffs, together with a bill of exchange drawn by them, and afterwards dishonoured owing to the non-delivery of the goods mentioned in the bill of lading,—It was held, that the plaintiffs could not recover, in an action on the case against the owners of the ship, the amount for which the bill of lading, if true, would have been a good security. *Grant v. Norway*, 20 Law J. Rep. (n.s.) C.P. 93; 10 Com. B. Rep. 665.

The master of a ship has no authority to hypothecate the ship for money advanced for repairs, unless the payment of the money borrowed is made to depend upon the arrival of the ship; nor can he pledge the ship itself and the personal credit of the owners. *Stainbank v. Fenning*, 20 Law J. Rep. (n.s.) C.P. 226; 11 Com. B. Rep. 51.

Where the master of a ship, having borrowed money for repairs, gave the lender bills on the owner of the ship and on the consignee of the cargo for the amount, and also an instrument by which he purported to hypothecate the vessel, &c., and stipulated that in case the bills were not accepted or paid, the lenders might take possession, and sell under process of the Admiralty Court, and in which it was agreed that the lender should forbear maritime interest, and that the advances were to be recoverable whether the vessel arrived at its port of destination or not,—Held, that the instrument was void, and that the lender had no insurable interest. The case of *Samsun v. Bragginton*, 1 Ves. 443, fully stated and commented upon. *Ibid.*

The authority of the master of a ship to pledge the credit of his owner is incident to his being employed to bring the ship to the end of its voyage, and to obtain things necessary for that purpose he may, in the absence of the owner, or any easy means of communicating with him, pledge his credit or even borrow money in his name where immediate payment for such necessary things is required, but he has no authority to borrow money to pay for work previously done. *Beldon v. Campbell*, 20 Law J. Rep. (n.s.) Exch. 342; 6 Exch. Rep. 886.

Therefore, where a ship bound to Newcastle, was towed into that port, no agreement having been previously made that the towage was to be paid for immediately, and the master, six days afterwards,

borrowed money to pay the towage,—Held, that the owner was not liable. *Ibid.*

So, where repairs were being done to the ship after its arrival at Newcastle, and the owner was residing one day's post distance, and the master borrowed money to enable the shipwright to pay his workmen on Saturday, the owner was held not to be liable. *Ibid.*

Where a captain has signed bills of lading for a cargo that is actually on board his vessel his power is exhausted; and he has no power, by signing other bills of lading for goods that are not on board, to charge his owner. *Hubbersty v. Ward*, 22 Law J. Rep. (n.s.) Exch. 113; 8 Exch. Rep. 330.

The master of a ship obliged to borrow money in a foreign port for repairs of the vessel, has no authority to mortgage the vessel so as to transfer the property in it to the lender; but he may, in case of necessity, hypothecate it, so as to give the lender a right to proceed against the vessel by Admiralty process, provided the lender incurs the sea risk, and the hypothecation is only to take effect in case of the safe arrival of the vessel. *Stainbank v. Shepard* (in error), 22 Law J. Rep. (n.s.) Exch. 341.

The master has no authority to hypothecate the ship, and also to pledge the owner's personal credit, however low may be the amount of interest required by the lender—*Erle, J. dubitante. Ibid.*

In an action for money lent, it appeared that the defendant, residing at Exeter, was owner of a ship, and that P, the master, being wind-bound in a river, at the distance of one day's post from Exeter, borrowed 5*l.* of the plaintiff, to buy provisions. The master was called as a witness, but was not asked whether he could have got the goods on the owner's credit:—Held, that the jury were justified in inferring that there was such necessity for borrowing the 5*l.* as to make the defendant liable. *Edwards v. Havell*, 23 Law J. Rep. (n.s.) C.P. 8; 14 Com. B. Rep. 107.

Where seamen are injured by an accident, and put on shore while the ship proceeds on the voyage, the captain of the ship has no implied authority to make the shipowner liable for expenses incurred for their maintenance and care. *Organ v. Brodie*, 24 Law J. Rep. (n.s.) Exch. 70; 10 Exch. Rep. 449.

(G) PILOT AND PILOT ACT.

By the 35th section of the Liverpool Pilot Act, 5 Geo. 4. c. lxxiii. it is enacted that in case the master of any ship, outward bound, shall proceed to sea, and shall refuse to take on board a pilot, he shall pay the pilot who shall first offer his service at a certain rate as if the pilot had piloted the vessel, and all expenses for recovering the same. On the 2nd of December a vessel left the Liverpool Docks, with a pilot on board; on the 3rd, the boat of the plaintiff, who was then employed by the owners in raising the vessel's anchor, was lost, through the carelessness of those on board the ship. At this time the master was not on board, and the vessel being employed by the Post Office was not to sail till the 4th of December; she was at anchor, and her rigging was being completed:—Held, assuming an outward-bound vessel to be liable when proceeding to sea to take a pilot on board, still that this vessel was not proceeding to sea. *Rodriguez v. Methuist*, 24 Law J. Rep. (n.s.) Exch. 26; 10 Exch. Rep. 110.

Where, by the mismanagement of a vessel which is proceeding to sea, damage is done, the owners will not be exonerated unless they shew that the damage was occasioned exclusively by the fault of the pilot. *Ibid.*

(H) SEAMEN.

There is no implied obligation on the part of the owner of a ship towards a seaman who had agreed to serve on board of her, that the ship shall be in a fit state to perform the voyage; and in the absence of any express warranty to that effect, or any knowledge of the defect, or any personal blame on the part of the ship-owner, the seaman cannot maintain an action by reason of the ship becoming leaky and of his being obliged to undergo extra labour. *Couch v. Steel*, 23 Law J. Rep. (n.s.) Q.B. 121; 3 E. & B. 402.

The plaintiff and other seamen had entered into articles of agreement to serve for a voyage from Liverpool to Melbourne and home. At Melbourne several of the crew deserted, and one of the crew was discharged by the captain. Whilst the desertion was going on, the captain entered into a fresh agreement with the plaintiff and the other remaining seamen, to raise their wages for the remainder of the voyage:—Held, that the plaintiff never was, under the circumstances, released from the obligation of the original articles, and could not, therefore, maintain an action to recover the increased rate of wages for the voyage home. *Harris v. Carter*, 23 Law J. Rep. (n.s.) Q.B. 295; 3 E. & B. 559.

To a declaration by a seaman for wages, the defendant pleaded that the plaintiff had been engaged as a seaman on board the *Candace*, a British registered ship, for a voyage from Liverpool to San Francisco and back, and had during such voyage and while he belonged to the said ship, at San Francisco, deserted from the said ship within the meaning of the 7 & 8 Vict. c. 112; and that the plaintiff afterwards, and whilst he was such deserter, engaged himself as a seaman for the voyage back to England from San Francisco with the defendant as the master of another ship, for wages to recover which this action was brought. Replication, that while the plaintiff was serving on board the *Candace*, the captain and officers flogged and punished him with great and unreasonable cruelty and severity, and that such floggings and punishments were not rendered necessary by the mutinous or improper conduct of the plaintiff, but were unnecessary and unreasonable; that the plaintiff requested the said captain and officers to desist, which they refused to do, whereupon the plaintiff, having reasonable grounds to believe that they would continue to flog and punish him with such great and unreasonable cruelty and severity, in order to escape therefrom, deserted from the said ship for the cause aforesaid, and not otherwise:—Held, a good answer to the plea. *Edward v. Trevellick*, 24 Law J. Rep. (n.s.) Q.B. 9; 4 E. & B. 59.

The plaintiff also replied to the same plea, that he was a negro, and that negroes are bought and sold as slaves in divers States of the United States; that while he was serving on board the *Candace*, and before he deserted, the captain of the said ship threatened to sell the plaintiff as a slave to certain citizens of the said United States; that San Francisco is situate in one of the United States, to wit, in

California, and that the plaintiff had just and reasonable grounds for believing and did believe that on the arrival of the said ship at San Francisco the said captain was about and meant to carry his said threat into execution; and that in order to prevent the said captain from selling him as a slave as aforesaid, the plaintiff deserted.—Held, to be no answer to the plea. *Ibid.*

The plaintiff was hired as a mariner on board a ship for a specific voyage. In the course of the voyage he was obliged to leave the ship, and was sent to England by authority of a British consul, under the 7 & 8 Vict. c. 112, s. 60, as a witness upon a trial of a person for an offence committed on the high seas.—Held, that this operated as a dissolution of the contract, and that the plaintiff could not recover any wages subsequent to the period when he was sent to England. *Melville v. De Wolf*, 24 Law J. Rep. (N.S.) Q.B. 200; 4 E. & B. 844.

(I) PASSENGERS ACT.

An emigration officer appointed under the 15 & 16 Vict. c. 44, is justified, under section 26, in refusing to certify that the requirements of the act have been complied with, if he, acting *bond fide*, deems that the quantity of cargo on board of a passenger ship is such as to endanger the safety of the ship, although none of the articles expressly prohibited by that section are on board, and although his objection is not to any specific articles on board, but solely because the ship is too deep in the water; and if an action is brought against him for refusing his certificate under such circumstances, he is by section 81, entitled to have the verdict entered for him. Section 16, does not apply to such a case. *Steel v. Schomberg*, 24 Law J. Rep. (N.S.) Q.B. 87; 4 E. & B. 620.

If any passengers of a passenger ship shall, without any neglect or default of their own (as by reason of the ship being lost), find themselves within any colonial or foreign port or place other than that at which they may have contracted to land, the master of the ship is bound under "The Passengers Act," 15 & 16 Vict. c. 44, ss. 49, 50, and 51, to forward them to their original destination; and the amount expended by him in forwarding them may be recovered from the underwriters of a policy of assurance on the passage-money against all costs, charges and liabilities to which the owner may be subjected under sections 46, 47, 48, 49, 50, and 51, of the act in question. *Gibson v. Bradford*, 24 Law J. Rep. (N.S.) Q.B. 159; 4 E. & B. 586.

(J) REGISTRY.

A ship having been registered by the proper authorities appointed under the Ship Registry Acts, it is not competent for this Court to entertain the question whether the registration was properly effected or not; but it must be assumed that the registration was regular and valid. *Coombs v. Mansfield*, 24 Law J. Rep. (N.S.) Chanc. 513; 3 Drew. 193.

The operation of the Ship Registry Acts is such as to preclude any application of the equitable doctrine of notice; and, therefore, a person advancing money upon a ship and taking an assignment, which he registers, may have relief, although he knows that another person has a prior assignment of the ships not registered. *Ibid.*

The plaintiffs, a firm in Liverpool, agreed with a colonial firm to accept their agency, and make certain advances to them, in consideration of all consignments being made to the plaintiffs. The plaintiffs, being under large advances to the colonial firm, were advised by the latter of their intention to consign the ship M and her cargo to them, to the credit of the consignors' account with the plaintiffs. A power of attorney to sell the ship on its arrival at Liverpool duly executed, specifications and invoice of the cargo and freight, and bills of lading of the cargo to be delivered to the plaintiffs, and signed by the then master of the ship, were duly forwarded to the plaintiffs, who upon the receipt thereof made further advances to the colonial firm. The latter, becoming embarrassed, before the sailing of the ship, assigned it and the cargo to C & M, who duly registered the ship in their own names. C & M having changed the master, assigned the ship to P, a member of the defendants' firm of R & Co., and it was duly registered in the name of P; and the ship and cargo were then consigned to R & Co. of Liverpool, accompanied with a power of attorney to sell the ship, and with the usual bills of lading, &c. to be delivered by the master to R & Co. On the arrival of the ship and cargo at Liverpool, the plaintiffs claimed possession of the same of R & Co.; and this being refused, they filed their bill against the colonial firm, C & M, P, and R & Co., and the assignees of the English agents of the colonial firm who had become bankrupt, and the master of the ship, praying for a declaration of their lien upon the ship and cargo, a sale and an account. None of the defendants had been served with a subpoena, except a member of the firm of R & Co. The ship was sold, and the proceeds received by R & Co. after bill filed.—Held, that a contract or agreement for the sale of a ship is within the 31st section of the 3 & 4 Will. 4, c. 55; and, therefore, to be valid either in law or equity, it must have all the formalities prescribed by the act in the case of a transfer. *M'Culmont v. Rankin*, 22 Law J. Rep. (N.S.) Chanc. 554; 2 De Gex, M. & G. 403; affirming 19 Law J. Rep. (N.S.) Chanc. 215; 8 Hare, 1.

Quære—whether a case of gross actual fraud would take the case out of the statute, so as to enable a Court of equity to give relief? *Ibid.*

Where a party cannot, by reason of non-compliance with the requirements of the Ship Registry Acts, assert a title to the ship itself, he cannot follow the proceeds after it is sold. *Ibid.*

In a suit to obtain the shares of a testator in a ship which had been registered in the name of his agent, who sold the shares after having agreed to consider himself a trustee of them for the parties entitled under the testator's will,—Held, though the purchaser had notice of the transaction, that the personal representatives of the testator were entitled to receive the purchase and other monies due for freight and earpings, and that the agreement as regarded the proceeds of the ship was not affected by the Ship Registry Acts. *Armstrong v. Armstrong*, 24 Law J. Rep. (N.S.) Chanc. 659; 21 Beav. 78.

Between the date of a bill of sale of shares of a ship and the entry of the transfer on the register, the purchaser had notice that the vendor, though the shares were registered in his name, was a trustee. The case presenting a *prima facie* appearance of

fraud, the Court granted an interim injunction to restrain the purchaser from dealing with the shares or indorsing the transfer on the certificate of registry, so as to ensure the effective determination of the questions at the hearing. *Armstrong v. Armstrong*, 21 Beav. 71.

[*The King of the Two Sicilies v. the Peninsular and Oriental Steam Packet Company*, 6 Law Dig. 658; *nom. King of the Two Sicilies v. Willcox*, 1 Sim. N.S. 334.]

(K) SALE AND TRANSFER.

No action can be maintained for the breach of an executory contract for the sale of a ship, unless the contract be by an instrument in writing containing a recital of the certificate of registry. *Duncan v. Tindal*, 22 Law J. Rep. (N.S.) C.P. 137; 13 Com. B. Rep. 258.

In an action for falsely and fraudulently representing a ship to be sound, the jury were directed to find for the plaintiff if the representation was false to the defendant's knowledge and the plaintiff sustained damage in consequence. The jury returned a verdict, "We find for the plaintiff, but acquit the defendant of any fraudulent intention." The Judge thereupon directed the verdict to be entered for the plaintiff:—Held, no misdirection. *Milne v. Marwood*, 24 Law J. Rep. (N.S.) C.P. 36; 15 Com. B. Rep. 778.

A Court of equity will not enforce specific performance of a contract for a sale of a ship or part of a ship. *Hughes v. Morris*, 21 Law J. Rep. (N.S.) Chanc. 761; 2 De Gex, M. & G. 349; 9 Hare, 636.

By the 34th section of the statute 8 & 9 Vict. c. 89. (the Ship Registry Act), every sale or transfer of a ship, or part of a ship, must be registered, and a Court of equity must construe the section to extend to any contract for sale or contract to transfer. Whether, under this statute an action could be maintained on a contract for sale of a ship or part of a ship—*quære*. *Ibid*.

(L) FREIGHT.

The defendant chartered a ship to bring from Bombay, at 3*l*. 5*s*. per ton, a cargo, not being his own, but for the purpose of making a profit on an increased rate of freight. The defendant's agents filled the carrying part of the vessel and then the cabin with their own goods, which were consigned to the defendant, as their factor, for sale. There was contradictory evidence as to the amount to be paid for the cabin freight. The defendant refused to pay the plaintiff more than 3*l*. 5*s*. per ton for the freight of the cabin goods, but had charged his agents with the payment of 7*l*. per ton, and had allowed them commission at that rate. The goods having been stopped for the non-payment of a bill of exchange, given in respect of them, the defendant after the commencement of the action, the bill having been paid, obtained possession of the goods:—Held, first, that the Judge rightly directed the jury that, although the defendant's agents at Bombay had no authority to put the goods into the cabin, yet if they did so, and the defendant on the ship's arrival took to them and received the freight, he was bound to pay the plaintiff the current freight, and was not confined to the charter freight of 3*l*. 5*s*. per ton; and, secondly, that the action was not brought too soon, for that the taking to the cabin cargo for the purpose of obtaining the freight render-

ed the defendant liable irrespectively of the possession obtained after action brought. *Michelson v. Nicol*, 21 Law J. Rep. (N.S.) Exch. 323; 7 Exch. Rep. 929.

S, being the sole registered owner of the ship *Ellen*, sent her to H, at New Orleans, with general instructions to do the best he could to load her on freight or shipping cotton on joint account of S and H. It is usual, when cotton is shipped on account of the shipowner, to insert the bill of lading "nominal freight," or the terms "no freight, being the owner's property," which enables the shipper to sell bills drawn against the shipment on better terms, or to obtain a larger advance than where full freight is charged. Purchases were made on joint account of H and S, and bills of lading drawn in the above form on several occasions during two voyages of the *Ellen*. In May 1851, cotton was purchased by H on joint account of H and S, and shipped on board the *Ellen*, for which two bills of lading were signed. The first was dated the 7th of May, and was for 381 bales of cotton, "to be delivered unto order or assigns, he or they paying freight for the said cotton 1*s*. per bale, being owners' property, and when draft against the same is paid, say 2,590*l*. 9*s*. 8*d*., with primage and average accustomed." The other was dated the 16th of May, and was for 381 bales, and contained a similar clause as to the amount of freight, but not stating them to be owner's property. These bills were signed by the master, and the draft for 2,590*l*. 9*s*. 8*d*., referred to in the first bill of lading, and drawn for the invoice price of the cotton, was purchased on the day of its date by the plaintiffs' house at New Orleans, who took, at the same time, from the shippers, indorsed in blank, the first bill of lading, as security for the due payment of the draft. A bill of exchange, dated the 15th of May 1851, for 3,169*l*. 19*s*. 3*d*., was in like manner drawn for the price of the cotton, in the second bill of lading, which bill of exchange was also purchased by the plaintiffs; the second bill of lading being in like manner indorsed to them. These bills, when due, were dishonoured by S, and were taken up by the plaintiffs. On the 10th of May 1851, S, being indebted to the defendants, assigned the *Ellen*, by way of mortgage, with all her freight and earnings, with a power of sale, and authority to receive the freight:—Held, that the mortgagees were only entitled to demand from the plaintiffs the freight specified in the respective bills of lading, for there was authority given by S to H to ship the goods on those terms, and the mortgage did not invalidate an arrangement made pursuant to previous authority from the mortgagors, and before the mortgage could be known. *Brown v. North*, 22 Law J. Rep. (N.S.) Exch. 49; 8 Exch. Rep. 1.

The plaintiffs chartered from the defendants a ship to convey a cargo from Liverpool to Calcutta under a charter-party which stipulated that the ship was to be consigned to E & Co., Calcutta, "on the usual terms," one of which was that E & Co. might procure the homeward freight at a commission of 5*l*. per cent. The defendants accordingly consigned the ship to E & Co., but made an agreement with a third party for the homeward freight. The plaintiffs, who had previously agreed with E & Co. for a share in the commission, thereupon sued the defendants for a breach of their agreement, but were unable to prove at the trial in what proportion the commission was to

be divided between themselves and E & Co. :—Held, that the stipulation as to commission having been inserted for the benefit of E & Co., the plaintiffs, notwithstanding their inability to prove their interest in the commission, were entitled to recover as trustees of E & Co. *Robertson v. Wait*, 22 Law J. Rep. (n.s.) Exch. 209; 8 Exch. Rep. 299.

To an action for freight it is a good plea to the further maintenance of the action, that before the freight was earned the master of the ship raised money for the use of the ship upon bottomry bond, pledging the ship and freight, and that upon the non-payment of the sum borrowed, and after the commencement of the action, proceedings were taken in the Admiralty Court, and that in obedience to a monition from that Court the defendant paid into the Court of Admiralty the amount of the freight, although the amount secured by the bottomry bond is less than the freight. *Place v. Potts*, 22 Law J. Rep. (n.s.) Exch. 269; 8 Exch. Rep. 705.

Freight to be earned by a ship on a homeward voyage belongs to the shipowner, so that an agent employed by the ship's husband to obtain a charter-party has no authority to cause it to be paid to himself, for the purpose of setting it off against a debt due to him from the ship's husband. *Walsh v. Provan*, 22 Law J. Rep. (n.s.) Exch. 355; 8 Exch. Rep. 843.

In 1849, and up to the 1st of July 1850, M H and J E H were the registered owners in equal moieties of the ship *Empire*. On the 25th of June 1850, M H transferred his share to M C, which transfer was duly registered, and by the death of M C, in 1851, the share became vested in her executors. Up to the time of the death of M H, he and J E H carried on business as "H & Co.," which name was continued after his death, and "H & Co." were the ship's husbands of the *Empire*, and managed her for her owners. The defendant was a partner in the firm of P & Co., and during the whole period traded with H & Co., and had no knowledge of the transfer to M C. In June 1852 the *Empire* was consigned by "H & Co." to P & Co., at Quebec, with instructions to obtain a homeward charter-party. A charter-party was accordingly obtained, and signed by the captain of the ship and the charterer; but there being a debt due from "H & Co." to "P & Co.," in the bills of lading the freight was merely made payable to the defendant at Quebec, and he received it there pursuant to the charter-party :—Held, in an action by J W, the surviving executor of M C, and J E H, that the defendant was liable either on the count for money had and received or for neglect of duty. *Ibid.*

By a charter-party, the plaintiff, a shipowner, agreed that his ship should proceed direct to P, and there load a cargo for the defendants, and therewith proceed to V, a legal port between V and G, and G, all or any, and there discharge the cargo taken at P and the port between V and G, and at all or any of those ports should take a full cargo, which the defendants had to ship, and proceed to a safe port in the United Kingdom, and deliver the same, freight being paid at the rate of 5*l.* 5*s.* per ton, "such freight being in full for the voyage, the cargo from P being freight free, as well as goods shipped at V, if any, for the port at which the vessel should load her homeward cargo." The ship carried goods from V to X, a legal port between V and G, but did not load any of her

homeward cargo at X :—Held, that the 5*l.* 5*s.* freight was for the whole voyage, and that the plaintiff could not recover freight from V to X, the general words of the charter-party "in full for the voyage" not being controlled by the clause following. *Sweeting v. Darthez*, 23 Law J. Rep. (n.s.) C.P. 131; 14 Com. B. Rep. 538.

By the charter-party, seventy running days were allowed at the several ports for "loading, discharging, and re-loading;"—Held, that these did not include the discharging of the homeward cargo in the United Kingdom; and that the plaintiff could not recover for demurrage for the time occupied in discharging the cargo in the London Docks (which was a reasonable time) although the seventy days were exhausted in the course of the voyage. *Ibid.*

By a charter-party between G Brothers and the plaintiff, the master of a vessel, it was agreed that the ship should load a cargo of flour, the "captain to sign bills of lading at more or less freight without prejudice to this agreement, and being so loaded should proceed to Liverpool or, &c. and deliver the same on being paid freight a lump sum of 100*l.*" G loaded the vessel with 1,350 bags of flour, and P, on account of himself and the defendants jointly, put 500 bags of flour on board of her. The plaintiff, as captain, signed a bill of lading, which he gave to P stating the receipt from him of the 500 bags, and adding "which, &c. I shall deliver for you and in your name to Z & Co. (the defendants), paying me freight according to contract with G Brothers." P, the same day, inclosed the bill of lading to the defendants in a letter, observing that it did not express the freight; and he further said, "I have given a letter of order of this date in favour of G Brothers, that on good delivery you will pay them for freight 3½ reals per Cast. quin." This amount of freight was a larger sum than would have been payable on the 500 bags if it were calculated according to the proportion they bore to the whole cargo, and if the gross freight were the 100*l.* agreed upon in the charter-party. P gave G Brothers an order addressed to the defendants directing them on the right delivery of the 500 bags to pay to the order of G Brothers the freight as specified in his letter. The defendants purchased P's interest in the 500 bags, and on their arrival at Liverpool received them from the vessel under the bill of lading. The agent of G Brothers paid the plaintiff the 100*l.* for freight under the charter-party and demanded freight for the 500 bags from the defendants, who did not pay it :—Held, that on these facts there was no evidence for a jury of any contract by the defendants to pay freight to the plaintiff as master of the vessel for the carriage or for the delivery on request of the 500 bags of flour. *Zwischenbart v. Henderson*, 23 Law J. Rep. (n.s.) Exch. 234.

To an action for freight, the defendants pleaded in bar of the further maintenance of the action, the hypothecation of the ship and freight by the master, a suit in the Admiralty Court by the obligee of the bottomry bond, a monition commanding them to bring the freight into that court, and that the freight had been paid in by them pursuant to the monition :—Held, that the plea was a good answer to the action, as the Court of Admiralty had jurisdiction to decide upon all claims to the freight so paid into court, made by any of the parties to the suit before it.

Place v. Potts (in error), 23 Law J. Rep. (N.S.) Exch. 348; 10 Exch. Rep. 370.

After goods have been taken on board a general ship to be conveyed on freight, and bills of lading signed by the captain, the owner of the goods cannot, before the sailing of the ship, insist upon the goods being re-delivered to him without paying the freight that might be earned, and indemnifying the master against the consequences of the bills of lading signed by him. *Lindall v. Taylor*, 24 Law J. Rep. (N.S.) Q.B. 12; 4 Exch. Rep. 219.

Declaration that certain goods had been received on board a vessel of the plaintiffs for conveyance from London to Port Phillip, upon the terms that two months after the sailing of the vessel, freight and primage should be paid in advance. Averment, that two months had elapsed since the sailing of the vessel and demand of the freight and primage, and that the defendant had not paid the amount. Plea, that after the receipt on board of the said goods, and after a reasonable time for the vessel to have sailed, and a reasonable time before she sailed, the defendant demanded a return of the goods and gave the plaintiffs notice that he did not wish the same to be carried, and required a re-delivery and return to him, but the plaintiffs wholly omitted so to do, and afterwards sailed with the said goods against the will of the defendant. Replication, that before the defendant's demand and the sailing, the captain, at the defendant's request, signed five parts of a bill of lading for delivery of the said goods to D & Co. at Port Phillip, or their assigns, one of which parts was transmitted to the said D & Co. by the defendant; that the defendant had not at any time paid or offered to pay the freight in the declaration mentioned, nor returned or offered to return the said part of the bill of lading, nor offered to indemnify the plaintiffs against any claim or right which D & Co. or any assignee of the bill of lading might have. Rejoinder, that D & Co. were the agents of the defendant, and the said bill of lading was sent to them by the defendant to be held, and was held, by them as such agents of the defendant, and not otherwise, and that the defendant had always been and continued the legal owner of the goods:—Held, upon demurrer, that the plea was no answer to the action; that, consistently with the allegation in the plea, a reasonable time for the vessel to have sailed might have elapsed before the demand for a re-delivery was made, as alleged, without any wilful or unjustifiable delay on the part of the master, and therefore that the plea was not helped by that allegation. But, secondly, supposing any doubt to have existed as to the legal effect of that allegation, it was removed by the replication, which shewed that the action was maintainable. *Ibid*.

And thirdly, that the rejoinder was no answer to the replication. *Ibid*.

A ship proceeded to Odessa, and there loaded a cargo of wheat, under a charter-party, which stipulated that the captain should "deliver his cargo conformably to the signed bills against payment of the freight;" and that "the freight should be paid upon delivery of the cargo." The bill of lading made the wheat deliverable "on paying freight for the said goods as per charter-party," and was indorsed to the defendants, who ordered the ship to London, and upon her arrival sent lighters alongside

to receive the cargo. After a portion of the wheat had been delivered into the lighters and removed by the defendants, the captain refused to deliver the residue, unless he was paid freight for the part already delivered, which the defendants refused to pay, and required the captain to deliver the whole of the cargo, pursuant to the terms of the charter-party, giving notice that they would not pay any demurrage caused by the stoppage of the delivery. The rest of the wheat was ultimately delivered under protest and the freight paid, but ten running days beyond those allowed by the charter-party were consumed solely in consequence of the refusal to deliver the cargo, and if such refusal had not taken place the whole of the cargo would have been discharged within the specified period:—Held, that the defendants, by claiming the cargo under the bill of lading, which referred to the charter-party, impliedly agreed to accept it within a reasonable time, and to pay all that the charterer had contracted to pay in respect of the cargo, and therefore that they were bound to pay freight as the wheat was delivered; and not having done so, had broken their contract, and were liable to pay damages for the detention of the ship at the rate specified in the charter-party. *Moller v. Young*, 24 Law J. Rep. (N.S.) Q.B. 217.

A charter-party provided that the plaintiff should take in a cargo at S, in the Gulf of Bothnia, and without delay proceed to Southampton and deliver it, and on delivery should receive the highest freight which he could prove to have been paid for ships on the same passage by water when the vessel passed Elsinore inwards, but not less than 90s. It was proved that higher freights had been given from S for vessels than on the voyage to London, and that the freights to Southampton were always not less than 5s. higher than the freights to London:—Held, that there was no proof of higher freight for the same passage; that the charter-party could not mean by "same passage" a passage from S or other parts of the same district to Southampton or other parts in the same district; and that the words could not refer to the highest current freight—*dubitante Jervis, C.J.* *Gether v. Capper*, 24 Law J. Rep. (N.S.) C.P. 69; 15 Com. B. Rep. 696.

Held, that the highest freight "paid" must mean "contracted to be paid." *Ibid*.

A cargo of wheat was brought from Odessa to Gloucester in the ship *Prompt*, and there delivered to and accepted by the defendants under a bill of lading in the ordinary form. The material part thereof was as follows: "Shipped, &c. in and upon the *Prompt*, wharf, &c. and now riding at anchor at Odessa, and bound for the United Kingdom, 3,700 chetworts (2,664 quarters) of wheat in bulk, to be delivered, &c. at the port of destination (the act of God, &c. and every other dangers of the seas, &c. excepted) unto A, B & Co., or their assigns, paying freights for the goods as per charter-party." By a memorandum in the bill of lading, the quantity and quality were declared to be unknown to the master. The ship, with the cargo, arrived at Gloucester, and the wheat was there accepted by the defendants as assignees of and under the bill of lading, and was measured under their inspection and that of the Custom House authorities. It then measured 2,785 quarters. There was no distinct evidence that this increased measure was caused by

any negligence in the stowage or carriage:—Held (*Martin, B., dissentiente*), that the freight was payable upon the quantity shipped, and not upon the quantity delivered. *Gibson v. Sturge*, 24 Law J. Rep. (n.s.) Exch. 121; 10 Exch. Rep. 622.

A brought an action for freight due. After action brought, the assignees of the freight, to whom it had been assigned on a bottomry bond for necessary repairs while the ship was in a foreign port, commenced proceedings against the defendant in the Admiralty Court. That Court issued a monition to the defendant to pay the freight, the subject-matter in dispute, into court. The defendant did so, and then pleaded to the action the proceedings in the Admiralty Court, and the payment of the freight into court:—Held, that the plea was a good answer to the action. *Place v. Potts*, 24 Law J. Rep. (n.s.) Exch. 225.

(M) DEMURRAGE.

A consignee who receives goods under a bill of lading which makes them deliverable to him on his "paying for the said goods as per charter-party," does not become impliedly liable to pay demurrage, according to the charter-party, for a detention of the ship at the port of loading which occurred before the bill of lading was signed. *Smith v. Sieveking*, 24 Law J. Rep. (n.s.) Q.B. 257; 4 E. & B. 945.

A ship chartered from Memel to London was detained by the freighter beyond his laying days at the port of loading, and the charter-party stipulated for payment of demurrage at a certain rate. The defendant received the cargo in London under a bill of lading making it deliverable to him "on his paying for the goods as per charter-party," and before they were delivered to him the demurrage for the detention at Memel was demanded of him, but he denied his liability to pay it, and received the cargo on payment of the freight only:—Held, that, under these circumstances, there was no contract by the defendant, either express or implied, to pay the demurrage. *Ibid*.

It is a question of fact for the jury, whether the indorsee of a bill of lading is liable for demurrage. *Wegener v. Smith*, 24 Law J. Rep. (n.s.) C.P. 25; 15 Com. B. Rep. 285.

Where a charter-party contained a provision for demurrage, and the bill of lading stated the cargo to have been received as against freight and "other conditions" as per charter-party, and the assignee of the bill of lading accepted the cargo and paid the freight, but repudiated his liability to pay for demurrage,—Held, in an action by the shipper against the assignee for the demurrage, that the Judge properly left it to the jury to say whether the defendant was liable for the demurrage. *Ibid*.

(N) HARBOUR AND OTHER DUES.

By a charter of James 2. the Master Pilots, &c. of the Trinity House of Newcastle-upon-Tyne were incorporated, and were enabled to receive for pilotage of vessels up and down the Tyne and in and out of any of the creeks or members thereof certain payments, the amount payable by "strangers and aliens" being different. The charter then granted and confirmed that all persons, as well subjects as strangers born, being owners of goods, &c. brought in any ship from beyond the seas into the river of Tyne or the

creeks or members aforesaid, or any creek or member belonging to the port of Newcastle-upon-Tyne, should pay a certain ancient duty called primage, *i. e.*, 2d. for every tun of wine, &c. and all goods rated by the tun (fish killed and brought in by the Englishmen only excepted), and 3d. for every last of flax, &c. in manner and form following, *i. e.* "aliens and strangers born and all other such persons who with their ships or vessels shall arrive within the said port or in any of the said creeks or members and not belonging to the same, before they depart with their ships, &c. from the said port or forth of the said creeks shall pay the duties aforesaid for and in the name of primage as is aforesaid, and every free merchant and other inhabitant of Newcastle aforesaid arriving with their said ships, &c. within the said river of Tyne shall pay the duties aforesaid within ten days after the landing of the said goods." In an action for primage against the defendants, who were merchants and natives of Sunderland, in respect of goods brought by them into Sunderland, which was alleged to be a creek or member of the port of Newcastle-upon-Tyne, evidence was offered on behalf of the plaintiffs of a payment of the duty under the same circumstances sixty years ago. The defendants asserted that Sunderland was a distinct port from Newcastle. The Judge, without calling the attention of the jury to the construction of the charter or to other documentary evidence given by the defendants, left it to them whether this was an immemorial payment belonging to the plaintiffs, and the jury found in the affirmative:—Held, that this was a misdirection, as the terms of the charter and all the evidence given by the defendants ought to have been left to the jury, for the purpose of deciding on the liability of the defendants to these duties. *The Master Pilots and Seamen of Newcastle-upon-Tyne v. Bradley*, 21 Law J. Rep. (n.s.) Q.B. 196; 18 Q.B. Rep. 144.

Semble—that under the terms of the charter a Sunderland merchant importing into Sunderland (assuming it to be a creek of the port of Newcastle) is not liable to primage; but, held, that the language of the charter was sufficiently ambiguous to let in evidence of usage for the purpose of explaining it. *Ibid*.

The 48 Geo. 3. c. civ. s. 33. imposes a duty on all goods "imported into or exported from Berwick harbour." The harbour extends from Berwick Bridge down the Tweed to the sea, but no part of it extends above the bridge. Goods were brought up the river in a sea-going vessel, which, having first used rings and posts erected by the Harbour Commissioners in order to moor the vessel while lowering the masts, passed through Berwick Bridge, and unloaded her cargo about two hundred yards above the bridge, and beyond the limits of the harbour:—Held, that these goods were not "imported into" the harbour so as to make any dues payable in respect of them. *Wilson v. Robertson*, 24 Law J. Rep. (n.s.) Q.B. 185; 4 E. & B. 923.

(O) LIEN AND MORTGAGE.

A ship belonged to A and B in different shares, and they were registered as the owners of it at the port of Liverpool. In April 1849 the ship sailed from Liverpool for Sydney. In October A executed a power of attorney authorizing B to sell his shares. In November A mortgaged his shares in the ship

and freight to C, and the deed of mortgage was registered at Liverpool. In March 1850 B being at Sydney (acting under the power of attorney as to A's shares) sold the ship to D. On this occasion the old certificate of registry was given up, and the ship was registered *de novo* in D's name at Sydney. The ship, with a cargo, was put into the London Docks in February 1851, and both C and D took possession of it, by each of them putting a man on board. Upon the question as to the right of C and D in the ship and freight,—Held, that C was entitled to A's shares in the ship and freight. *Cato v. Irving*, 21 Law J. Rep. (N.S.) Chanc. 675; 5 De Gex & Sm. 210.

A was owner of 7-8ths of a ship, and B was owner of the other 1-8th; A mortgaged his share; A and B sent out the ship for a cargo at their joint risk in the same proportions as they had in the ship; the ship brought home a cargo, and then the mortgagee took possession, and claimed to be entitled to 7-8ths of the proceeds of the cargo, without making any deduction for the expenses of the outfit and voyage. A had assigned all his property to a trustee for the benefit of his creditors:—Held, (affirming a decree of the Master of the Rolls) that the expenses of the voyage were to be paid out of the proceeds of the cargo before any division took place, and that B, the joint owner, was entitled to 1-8th of the residue of the proceeds, the remaining 7-8ths of the residue being payable to the trustees of A, to whom he had assigned his property, there being no contract between A and his mortgagee respecting the cargo. *Alexander v. Simms*, 23 Law J. Rep. (N.S.) Chanc. 721; 5 De Gex, M. & G. 57; 18 Beav. 80.

The owner of a ship mortgaged it with a power of sale, to A B, a partner of C D & Co., for money due to the firm, and the same was duly registered under the statute 3 & 4 Will. 4. c. 55. Afterwards he executed a further charge to A B for money owing from himself or from him and his partners, from time to time, to the firm of C D & Co., however that firm should be constituted, but it was not registered. He then executed a further charge in favour of other persons, who registered their security:—Held, (overruling a decision of the Vice Chancellor of the Duchy of Lancaster) that the unregistered further charge was inoperative. *Parr v. Applebee*, 22 Law J. Rep. (N.S.) Chanc. 767.

The owner of 8-64ths of a vessel, in consideration of 100*l.*, assigned them by bill of sale. Contemporaneously with its execution a memorandum was indorsed thereon, signed by an agent of the assignee, stipulating that on the assignor repaying to the assignee the 100*l.* and interest, the bill of sale should be void. Subsequently, the assignee received interest and gave a receipt for it as for interest on 100*l.* advanced on security of the bill of sale. The registry at the Custom House was of an absolute sale. The assignee sold the 8-64ths, and the bill of sale to the purchaser was duly executed; but before its registry a bill to redeem by the original owner was filed, and the Court restrained the registry of the bill of sale, and made a decree for redemption on payment of the 100*l.* and interest, with costs, so far as they were increased by the dispute of the plaintiff's right to redemption. *Whitfield v. Parfitt*, 4 De Gex & Sm. 240.

The Ship Registry Act, 8 & 9 Vict. c. 89, does

Digest, 1850—1855.

not prevent a lien being created on certificate of original registry deposited by unregistered owner to secure advances for the use of the ship. *Clarke v. Battens*, 1 Kay & J. 242.

Upon motion by plaintiff claiming such a lien, a party who, without a lawful title, had procured himself to be registered as owner of a ship, was restrained by injunction from prosecuting a complaint made under section 30, against the plaintiff for wilfully detaining and refusing to deliver up the certificate of the ship's registry and from instituting any other proceeding against the plaintiff to compel him to deliver up the certificate. *Ibid.*

(P) COLLISION AND DAMAGE.

The 14 & 15 Vict. c. 79, a statute for consolidating the laws regulating steam navigation, &c., provides, in section 26, that the Admiralty shall make regulations, to be published in the *Gazette*, as to lights, and that all owners and masters or persons having charge of vessels shall be bound to take notice of the same, and in case of default, the master or other person having charge of any vessel, or the owner of such vessel, if it appear that he was in fault, shall pay a penalty of 20*l.* The 28th section provides, that any damage done to any property in consequence of the non-observance of the Admiralty regulations, is to be taken, in absence of proof to the contrary, to have been occasioned by the wilful default of the master or other person having charge of the vessel. The declaration set out the 26th section of the act, and stated that the Admiralty duly made a regulation that sailing vessels, at anchor in roadsteads, should exhibit a constant bright light at the masthead from sunset till sunrise. That the plaintiffs were possessed of a steam vessel proceeding in a roadstead, and that the defendant was possessed of a sailing vessel, then at anchor in the same roadstead, between sunset and sunrise, under the care of the defendant's servants. And it then was the duty of the defendant's servants to exhibit a bright light at the masthead of his vessel, and that they, not regarding their duty, neglected to exhibit such bright light at the masthead, and *by and through the carelessness* and neglect of the defendant in not exhibiting the light at the masthead, the plaintiffs' vessel ran foul of the defendant's and was damaged:—Held, that the declaration was bad; that the owner was not liable under the statute, unless he was in charge of the vessel; and that if the allegations with respect to the statute were struck out, the declaration would be bad, as it would be quite consistent with it that the damage was the consequence of the plaintiffs' own negligence. *The General Steam Navigation Co. v. Morrison*, 22 Law J. Rep. (N.S.) C.P. 179; 13 Com. B. Rep. 581.

The Admiralty regulations issued under the 14 & 15 Vict. c. 79, and which direct all sailing vessels to carry a light, are applicable to sailing vessels within the port of London, although the corporation of London, as conservators of the navigation of the Thames, have made in that port a bye-law, which directs lights to be carried by steamers, but does not provide for the case of sailing vessels. *Morrison v. the General Steam Navigation Co.*, 22 Law J. Rep. (N.S.) Exch. 233; 8 Exch. Rep. 733.

Notwithstanding the 28th section of the 14 & 15 Vict. c. 79, parties navigating vessels are bound to

keep a look-out in the same manner as before that statute. And if a collision takes place between two vessels, and the vessel injured is without the light required by the rules made under the act, the vessel inflicting the injury is liable, if the injury could have been prevented by proper care on her part. *Ibid.*

By a local act trustees were appointed for preserving a harbour, and the property in the harbour was vested in them. Power was given to them to elect a harbour-master and other officers, and to make bye-laws for the government of the officers and servants connected with the harbour, and in relation to its use and management. The harbour-master had authority to direct the situation in which vessels entering the harbour should be moored. The trustees were empowered to impose a tonnage-rate on vessels, and to borrow money on such rates, and to apply the proceeds in payment of the interest of money borrowed, and the costs and expenses attending the purposes of the act connected with the harbour and works belonging to it, and next in reducing the principal sums borrowed:—Held, that the trustees were not liable, collectively or individually, for damages sustained by a vessel in the harbour, whether such damage arose from its being placed in an improper place, or from the trustees permitting rubbish to accumulate in the harbour, whereby it became unsafe. *Metcalf v. Hetherington*, 24 Law J. Rep. (N.S.) Exch. 314.

Held, also, that the trustees would not be liable, even if they had funds in their hands, sufficient for and applicable to the purpose of cleansing the harbour. *Ibid.*

SHOOTING AT THIEVES.

A constable is not justified in shooting at a man whom he has seen stealing wood growing in a copse (which, if a first offence, is only a misdemeanour), although the constable has no means of arresting the man without firing, and although the stealing the wood in the particular instance amounted to felony, by reason of the man having been previously convicted several times for similar offences, under statute 7 & 8 Geo. 4. c. 29. s. 39, these convictions being unknown to the constable at the time. *Regina v. Dadson*, 20 Law J. Rep. (N.S.) M.C. 57.

SIMONY.

An agreement between two incumbents to exchange their respective livings in their present condition, and that one of them shall not call upon the other to pay for dilapidations, is not necessarily simoniacal, for the dilapidations in each living may be equal or nearly so, or of so insignificant an amount as to be not worth the expense of valuation. *Goldham v. Edwards*, 24 Law J. Rep. (N.S.) C.P. 189; 16 Com. B. Rep. 437.

If the agreement, as pleaded, be necessarily simoniacal, it is not necessary to allege that it was made "corruptly" in order to bring it within the 31 Eliz. c. 6. s. 8. *Ibid.*

SLANDER.

- (A) WHEN ACTIONABLE.
- (B) WHEN DAMAGE MUST BE PROVED.
- (C) PRIVILEGED COMMUNICATIONS.
- (D) EVIDENCE.

(A) WHEN ACTIONABLE.

To say, falsely and maliciously, of a trader, "He is indebted to me, and, if he does not come and make terms with me, I will make a bankrupt of him, and ruin him," is actionable without proof of special damage. *Brown v. Smith*, 22 Law J. Rep. (N.S.) C.P. 151.

(B) WHEN DAMAGE MUST BE PROVED.

A declaration in slander, after stating as inducement that the defendant intended to impute felony to the plaintiff, set out the slanderous words as follows:—"I (the defendant) have a suspicion that you (the plaintiff) and B have robbed my house (meaning thereby that the plaintiff had feloniously stolen certain goods of the defendant), and therefore I take you into custody":—Held, that the Judge rightly directed the jury in stating the question to be whether the defendant meant to impute an absolute charge of felony, or only a suspicion of felony, and that if the jury believed the latter the verdict ought to be for the defendant. *Tozer v. Mashford*, 20 Law J. Rep. (N.S.) Exch. 225; 6 Exch. Rep. 539.

Special damage, which is necessary in order to make words actionable, must be such as naturally or reasonably arises from the use of the words. *Haddon v. Lott*, 24 Law Rep. J. (N.S.) C.P. 49; 15 Com. B. Rep. 411.

The declaration alleged that the plaintiff, being the first inventor of a new manufacture, had duly applied for letters patent, and had left at the office of the Patent Commissioners a petition and declaration, and a provisional specification, under the Patent Amendment Act, 1852, and that the application and specification had been referred to the Solicitor General, who had permitted the title of the invention to be amended, and the plaintiff had given notice of his intention to proceed with the application. That the defendant, knowing the premises, maliciously and without reasonable or probable cause, pretended and represented to the Solicitor General that he had an interest in opposing the grant of the patent to the plaintiff, and maliciously, &c. published certain words, being a notice (set out) to the Solicitor General that the amended title might embrace an invention of the defendant for which he had applied for a patent; whereas the defendant was not, but the plaintiff was, the first inventor of the invention in question, and the defendant had never any interest in opposing the grant of a patent to the plaintiff; whereby the Solicitor General refused to allow the plaintiff's application for letters patent, &c.:—Held, that the declaration was bad; that the allegation of the refusal in the statement of special damage could not be called in aid to supply a substantial traversable allegation of the refusal; and that the special damage alleged did not appear to be the necessary or natural result of the facts stated in the declaration. *Ibid.*

A declaration for slander by charging a clergyman in holy orders with incontinency, is bad without

showing actual damage, or that he holds some office or employment producing temporal profit. *Galloway v. Marshall*, 23 Law J. Rep. (N.S.) Exch. 78.

The 61st section of the Common Law Procedure Act does not remedy such an omission. *Ibid.*

(C) PRIVILEGED COMMUNICATIONS.

The defendant having a suspicion that the plaintiff, who was his shopman, had in one instance embezzled money sent for him, and in the presence of A B charged him with embezzlement, and at the same time discharged him from his service. After his discharge, the plaintiff being about to enter into a fresh service, referred to the defendant for a character, but in consequence of what the defendant said, his intended master refused to engage him. Upon this the plaintiff's brother called upon the defendant and inquired why he had given the plaintiff such a character as prevented him from getting a situation, and in answer to these inquiries, the defendant said, "He has robbed me. I believe he has robbed me for years past: I can prove it from the circumstances under which he has been discharged by me."—Held, that the occasions upon which each of these statements was made, rendered them privileged communications, and that the fact of the first charge being made in the presence of a third party did not warrant the Judge in leaving the question to the jury, and that the excess of the defendant's statement on the second occasion did not raise any presumption of express malice. *Taylor v. Hawkins*, 20 Law J. Rep. (N.S.) Q.B. 313; 16 Q.B. Rep. 308.

A communication made *bond fide* in performance of a duty or with a fair and reasonable purpose of protecting the interest of the party making it, is privileged; and the onus of proving malice lies on the plaintiff. *Somervill v. Hawkins*, 20 Law J. Rep. (N.S.) C.P. 131; 10 Com. B. Rep. 583.

Before the question of malice can be submitted to the jury, the evidence must raise a probability of malice, and be more consistent with its existence than with its non-existence. *Ibid.*

The plaintiff who had been discharged on a charge of theft from the defendant's service, afterwards came to the defendant's house to receive wages due to him, and then had some communication with the defendant's servants, when the defendant said to his servants, "I have dismissed that man for robbing me: do not speak to him any more in public or in private, or I shall think you as bad as him."—Held, first, that this was a privileged communication; secondly, that there was no evidence of malice to go to the jury. *Ibid.*

(D) EVIDENCE.

In an action for slander, imputing to the plaintiff unnatural practices, to which there was only a plea of not guilty, the counsel for the defendant, on cross-examination, asked a witness, "Have you heard from other persons that the plaintiff is addicted to practices of this kind?"—Held, that the question was improper, as it was not confined to rumours existing before the words were spoken by the defendant. *Thompson v. Nye*, 20 Law J. Rep. (N.S.) Q.B. 85; 16 Q.B. Rep. 175.

Quære, however, whether the question could have been allowed if it had been so limited. *Ibid.*

SOLDIERS, ENLISTMENT OF.

The Mutiny Act and the Articles of War apply only to Her Majesty's forces. An enlistment on a Sunday is not void under 29 Car. 2. c. 7. A recruit received enlisting money, knowing it to be such, from a soldier who was employed by a non-commissioned officer in the recruiting service, and who had belonged to a regiment for a longer period than that within which he ought to have been attested according to the provisions of the Mutiny Act:—Held, that such soldier must be presumed to have been regularly attested. The fact that the soldier intended to have taken the recruit to be attested before a Justice who had no authority to attest affords no counter-presumption that the recruiting soldier had been himself improperly attested. *Wolton v. Gavin*, 20 Law J. Rep. (N.S.) Q.B. 73; 16 Q.B. Rep. 48.

The provision in the 55th section of the Mutiny Act as to the questions to be asked of a recruit before enlisting him, is directory only, and the omission to comply with it will not vitiate the enlistment. *Ibid.*

By section 57. of the Mutiny Act, if any recruit shall receive enlisting money, knowing it to be such, and shall abscond or absent himself from the recruiting party, and shall not voluntarily go before a Justice within four days to be discharged, such recruit shall be deemed to be enlisted and a soldier as fully to all intents and purposes as if he had been duly attested, and may be apprehended and punished as a deserter:—Held (*hesitante Erle, J.*) that a recruit who had not been discharged, and had absented himself more than four days after receiving the enlisting money, might be punished as a deserter, although he had never been attested. *Ibid.*

The 20th Article of War provides that no officer commanding a guard shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer who shall at the same time deliver an account in writing signed by himself of the crime with which the prisoner is charged:—Held, by *Lord Campbell, C.J., Coleridge, J., and Wightman, J. (dissentiente Erle, J.)* that a commanding officer receiving a soldier charged with desertion by a non-commissioned officer, who delivered a written signed charge of the crime, is justified under that article in detaining such soldier, although he was not taken before a civil magistrate and a warrant obtained for his detention. *Ibid.*

The 20th Article of War applies to military offences, including desertion; but by *Erle, J.* it applies only to those who are soldiers *de facto*, and not to those whose qualification as soldiers is disputed. *Ibid.*

SPECIFIC PERFORMANCE.

- (A) WHEN DECREED.
- (B) WHEN REFUSED.
- (C) PRACTICE IN SUIT FOR.

(A) WHEN DECREED.

The plaintiff agreed with a railway company that, on the following conditions, he would assent to the railway being made through his property: that

if the company should obtain their act they should pay him 1,000*l.* for all lands required for making the railway, and the further sum of 4,000*l.* for residential injury to the estate and hall of the plaintiff. The company amalgamated with another company, who formed the railway in another direction and did not pass through the plaintiff's property:—Held, upon demurrer to a bill for specific performance of the agreement, that there was sufficient evidence to shew that the defendants represented the persons who originally contracted with the plaintiff, and although no land was taken in pursuance of the agreement, the defendants were bound to pay the 4,000*l.* which must be considered as agreed to be paid for the plaintiff's assent to the undertaking. *Preston v. the Liverpool, Manchester, and Newcastle-upon-Tyne Junction Rail. Co.*, 21 Law J. Rep. (n.s.) Chanc. 61; 1 Sim. N.S. 586.

Specific performance of a contract for the sale of a barge, stores, &c., decreed in equity upon a claim. *Claringbould v. Curtis*, 21 Law J. Rep. (n.s.) Chanc. 541.

In a contract for sale the lands were described as partly freehold and partly leasehold. The title deeds did not clearly define the boundaries and extent of the two properties; but the uncertainty did not arise from an instrument incapable of legal construction in that respect:—Held, that such an uncertainty was not an objection to a decree for specific performance. *Monro v. Taylor*, 21 Law J. Rep. (n.s.) Chanc. 525; 3 Mac. & G. 713.

The vendor of leaseholds, held under an ecclesiastical corporation, previously to his contract for sale was in treaty with the lessors for a renewal of the lease, and continued such treaty after the contract:—Held, that this did not throw upon him the obligation of procuring such renewal for the benefit of the purchaser. *Ibid.*

A filed a claim for specific performance of a contract by B, C and D, stating in his claim that the defendants had by an agreement in writing contracted to demise a house to A for a certain term, at a stated rent, and that the plaintiff A had agreed by parol, at the same time, to pay to the defendants a premium of 200*l.* The claim prayed that the defendants might grant a lease, the plaintiff offering to pay the premium according to the parol agreement:—Held, on appeal, overruling the decision of the Court below, that the Statute of Frauds did not present an obstacle to specific performance if there were no fraud. *Martin v. Pycroft*, 22 Law J. Rep. (n.s.) Chanc. 94; 2 De Gex, M. & G. 785: overruling 21 Law J. Rep. (n.s.) Chanc. 448.

The defendants, at the hearing, alleging that the agreement was obtained by the plaintiff from one by fraud and from another by fraudulent misrepresentation, the cause was ordered to stand over that an oral examination of witnesses might take place under the provisions of the statute 15 & 16 Vict. c. 86; and such examination having taken place, upon which the allegations of fraud and fraudulent misrepresentation failed, the Court decreed specific performance. *Ibid.*

Where persons sign a written agreement, and there has been no circumvention, or fraud, or mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision be agreed to, which has not been inserted

in the document, if the party who should perform the omitted term consents to the performance of it. *Ibid.*

On claim by vendor for specific performance by purchaser, found by inquisition to have been lunatic at the time of the contract, the Court declared the contract to have been null and void, and ordered the residue of the deposit, after deducting the vendor's costs, charges and expenses, to be repaid to the committee of the lunatic's estate. *Frost v. Beavan*, 22 Law J. Rep. (n.s.) Chanc. 638.

A contracted to sell to B certain bleachworks and the machinery and fixtures belonging thereto, on the condition that B should take the machinery and fixtures at a valuation, and that, for the purpose of the valuation, A and B should each appoint a valuer, and that the valuers should appoint an umpire before entering on the business of the valuation, and that the price should be fixed on by the valuers, or the umpire in case they differed. A and B appointed valuers, but the valuers did not appoint an umpire. The valuers could not agree on their valuation. In a suit by B against A a specific performance of the contract was ordered, and the case was adjourned in order that the valuation might be made by the Court. *Jackson v. Jackson*, 22 Law J. Rep. (n.s.) Chanc. 878; 1 Sm. & G. 184.

Where a void cheque was given by purchasers and received by vendors for the consideration-money for an estate, and presentation of the cheque was delayed by the vendors until after an event, which never happened, at the request of the authorized agent of the purchasers, and the bankers became bankrupt:—Held, that, under the circumstances of the case, there was no laches in the non-presentation of the cheque, and no payment or equitable satisfaction of the cheque; and further, that the vendor was entitled, on a bill filed by him for specific performance of the agreement, to a decree for that purpose, and full payment of the consideration-money. *Lord Ward v. the Oxford, Worcester, and Wolverhampton Rail. Co.*, 22 Law J. Rep. (n.s.) Chanc. 905; 2 De Gex, M. & G. 750.

The Court of Chancery has jurisdiction to enforce the specific performance of an agreement by which a person has bound himself to execute a deed, although such deed may be a deed of separation between himself and his wife. *Wilson v. Wilson*, 23 Law J. Rep. (n.s.) Chanc. 697; 5 H.L. Cas 40.

In the draft articles of an agreement a mistake of a name had been made: a bill was filed for the specific performance of those articles. The Court of Chancery, on a consideration of what appeared in the bill and answer, and on a consideration of the articles themselves, directed the specific performance of them according to what appeared to be their plain intention:—Held, that the decree of the Court of Chancery was correct. *Ibid.*

Two persons, A and B, had been partners, and were as such jointly entitled to shares in a foreign company. On the dissolution of the partnership A assigned all his interest in the shares to B, and handed the certificates of the shares to him, and also covenanted for further assurance. B covenanted to indemnify A against certain liabilities of the firm. The transfer of the shares, in fact, required some further acts to complete it, which A refused to perform, on the ground that B had failed to perform his

covenant to indemnify A against the partnership liabilities, some of which he had had to discharge. B filed a bill for specific performance of the covenant for further assurance:—Held (overruling a decision of the Master of the Rolls, who refused relief on the ground that B must do equity by performing his covenant of indemnity before he could have the aid of the Court), that the plaintiff was entitled to a decree, the remedy of the defendant on the covenant of indemnity being at law. *Gibson v. Goldsmid*, 24 Law J. Rep. (N.S.) Chanc. 279; 5 De Gex, M. & G. 757; 18 Beav. 584.

“He who seeks equity must do equity,” applies only where a plaintiff acts inequitably in the matter in which he seeks the assistance of the Court, and does not warrant the Court to enforce upon a plaintiff the performance of acts which in nowise relate to the subject-matter of the suit. *Ibid*.

The plaintiff contracted to sell to the defendant a piece of land which was subject to certain covenants contained in the original purchase-deed. No notice was given of these covenants until after the contract was signed, and the defendant then refused to execute a conveyance containing such covenants:—Held, in a suit for specific performance, that the defendant was bound to elect either to rescind the contract or to execute a conveyance with the covenants. *Lukey v. Higgs*, 24 Law J. Rep. (N.S.) Chanc. 495.

Although the Court will not compel performance of a contract obtained from a person in a state of intoxication, yet where, after a contract fairly entered into with a man addicted to drinking to sell to the plaintiff leasehold premises for 735*l.*, another person, with notice of this contract, within a few days prevailed on the vendor to sell and execute an assignment thereof to him for 760*l.*, the Court decreed specific performance of the first contract. *Shaw v. Thackeray*, 1 Sm. & G. 537.

It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act, 3 Geo. 4. c. 126. s. 39, even where the offer required has not through inadvertence been made to such owner, and it is in evidence that the owner insists on his right, the purchaser making no objection to the title, and being content to take such estate as the trustees could convey. *Barrett v. Ring*, 2 Sm. & G. 43.

Agreement to grant a lease of copyhold premises for twenty-one years, and to put the same into repair, there being no evidence that to grant such leases would work a forfeiture, or that the licence of the lord could not be obtained.—Decreed to be specifically performed. *Paxton v. Newton*, 2 Sm. & G. 437.

Though the Court would not ordinarily decree specific performance of an agreement to repair, it is the habit of the Court to decree specific performance of agreements involving the execution of leases or other instruments containing covenants to repair. *Ibid*.

Property sold as copyhold turned out to be partly freehold:—Held, that the vendor could compel a specific performance, and that special conditions, providing that errors in the description should not invalidate the sale, and for a compensation, did not alter the case. *Ayles v. Cox*, 16 Beav. 23.

A tenant for life of a coal mine filed a bill setting out documents, which shewed this to be the state of his title, but by mistake alleging that he was tenant in tail. The prayer of the bill was to restrain the lessees of a continuous mine from trespassing upon his mine, and to obtain an account and payment of the proceeds of their alleged wrongful workings in it. After an interim order was obtained, the suit was compromised in October under an agreement, whereby the defendants were to pay the plaintiff 400*l.*, which he agreed to accept, for the full value of all coals to be raised from the mine in question, with costs to be taxed in the then Michaelmas term, and if reasonable security to the plaintiff's satisfaction were given, six months were to be allowed for the payment:—Held, first, that the erroneous allegation of title in the bill could not be regarded as having led to such a misapprehension of it as would prevent a Court of equity from enforcing the agreement for compromise. Secondly, that under the agreement the defendant was not entitled to have the plaintiff's title deduced and verified. Thirdly, that the compromise could not be enforced by petition in the original suit, but that a new suit was properly instituted for this purpose. *Richardson v. Egton*, 2 De Gex, M. & G. 79.

The executrix of a lessee agreed to sell to A the residue of her term (except a day), and the fixtures on the premises, for 400*l.* This agreement was entered into by the executrix without advice, and there was no written memorandum of it, except a letter written by the executrix to her own solicitor a few hours afterwards. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A, agreed with her for the purchase of the residue of the term for 550*l.* A, on hearing of this, offered the executrix, if she would complete her contract with him, 1,000*l.* as purchase-money, and indemnity against any proceeding on the part of the landlord. She accepted the offer, and demised the premises to A for the whole term wanting a day:—Held, first, that the original agreement (if any) with A was such in its nature and circumstances as not to be of any validity in equity, unless the price was shewn to be equal or more than equal to the value of the property. Secondly, that as this was not shewn, the landlord was entitled to a specific performance of his agreement, not only against the executrix but against A. *Goodwin v. Fielding*, 4 De Gex, M. & G. 90.

Quere—whether the letter to the solicitor was a sufficient memorandum in writing within the meaning of the Statute of Frauds. *Ibid*.

Where a purchaser, who was a solicitor, after viewing a farm, and being informed of the rent at which it was let, agreed to buy at 5,000*l.*—Held, first, that the difference between this price and 3,500*l.*, which the Court considered to be the value of the property, was not so great as to shock the conscience, and thus constitute of itself a defence on the ground of exorbitancy to a suit of the vendor, for a specific performance; secondly, that the omission on the part of the vendor to inform the purchaser of the result of a late valuation, or of the tenant having complained of the rent being excessive, and of the full amount not having been exacted, did not constitute a defence to such a suit; thirdly, that the refusal by the defendant to complete having

arisen from a cause other than that of insufficiency of title, he ought to pay the general costs of the suit, although the original decree directed an inquiry when the title was first shewn, and the report found it to have been first shewn in the Master's office. *Abbott v. Swoorder*, 4 De Gex & S. 448.

In a suit by the owner of leasehold premises against a purchaser to enforce the specific performance of a contract to purchase, it appeared that the original lessee had, in 1835, covenanted with the lessors in or before 1836 to build two houses on the property, worth 400*l.*, to the satisfaction of the lessor's surveyor. The lessee, instead of so doing, built, with the sanction of the lessor's surveyor, five houses, in the aggregate more than 400*l.*, but no two being worth that sum. The lessors thenceforth received the rents yearly accruing due on the premises:—Held, that, though the covenant had not been performed *modo et forma*, yet that it had been substantially performed, and the Court decreed specific performance. *Hume v. Bentley*, 5 De Gex & S. 520.

(B) WHEN REFUSED.

In consideration of a landowner withdrawing his opposition to an act for making a railway, the company covenanted to apply for an act enabling them to make a branch railway from their main line to the plaintiff's furnaces, and to make and maintain the same accordingly. The act for making the original railway passed, and the company afterwards obtained an act for making the branch railway, but did not proceed in the execution of the works until the time for the compulsory purchase of land had expired. The company then gave notice of their intention to apply to the legislature for an act to enable them to abandon the branch railway. Upon bill by the landowner against the company for specific performance of the contract to make the branch railway, and for an injunction to restrain the company from applying to parliament for an act enabling them to abandon the branch railway,—Held, that the Court had jurisdiction to restrain an application to parliament upon a proper case made; but the circumstance that the intended act would interfere with private rights arising either out of the tenure of land or out of contract, was no sufficient ground for the exercise of the jurisdiction; and the injunction granted by the Court below was dissolved. *Heathcote v. the North Staffordshire Rail. Co.*, 20 Law J. Rep. (n.s.) Chanc. 82.

The Court would not decree specific performance of a contract to make a railway. *Ibid.*

A, in a letter addressed to B, said he would let the coal at L B to B on the terms stated in the agreement in the hands of C. C had two papers in his hands. One was called terms for letting "coals, &c." at L B and G E; the other, instructions, &c. "to obtain coal in L B." A and another were, in fact, tenants in common in fee of the L B and G E property. B assigned his interest to P, who filed a bill for specific performance of the agreement by A and the other joint owner, but subsequently his bill was dismissed against the other owner. The prayer of the bill was that both might specifically perform the agreement, or that A might perform it if the claim should fail against both:—Held, that "coals," &c. was ambiguous, and that it was uncer-

tain which of the documents in the hands of C was meant. *Price v. Griffith*, 21 Law J. Rep. (n.s.) Chanc. 78; 1 De Gex, M. & G. 80.

Held, also, that there being no ground of impropriety or misrepresentation by A, the Court would not act against him as the owner of an undivided moiety by decreeing specific performance as to that share, with compensation for the other moiety which he was unable to demise. *Ibid.*

An agreement was entered into on behalf of, and was confirmed by, a railway company, in consideration of a landowner's opposition to the bill being withdrawn, to pay him 4,500*l.* as the purchase-money of land not exceeding eight acres to be taken by the company for the formation of their railway, and for consequential damages to the landowner's property. The railway was abandoned, and the landowner filed a claim for specific performance, and the same was decreed by the Court below; but, on appeal,—Held, that the plaintiff had means of complete redress at law, and that the claim must be dismissed. *Webb v. the Direct London and Portsmouth Rail. Co.*, 21 Law J. Rep. (n.s.) Chanc. 337; 1 De Gex, M. & G. 521.

A railway company, about to make a branch line, agreed with a landowner to take so much of certain specified lands as should be required for the branch line, at a stated price per acre, which price, as to one part, was to include consequential damages, in consideration of his withdrawing his opposition to the bill in parliament. The opposition was withdrawn, and the bill passed in July 1847. On the 1st of September following, a formal agreement was tendered to the company for their execution, but their solicitors altered it into a contract conditional on the formation of the line, and did not return it to the landowner's solicitors until the 7th of December 1848. Before this, the landowner, on the 18th of March 1848, had died, and on the 14th of October in the same year the company gave notice of their abandonment of the line. A claim for specific performance was filed by the devisees in trust of the will of the landowner, on the 18th of June 1850, but it was not brought to a hearing until the 21st of February 1852. The compulsory powers of taking land given by the act expired on the 9th of July 1850, but the time for the completion of the line would not terminate until the 9th of July 1852. The Master of the Rolls (on the authority of *Webb v. the Direct London and Portsmouth Rail. Co.*, since overruled) decreed specific performance; but, on appeal,—Held, that the plaintiffs could have complete relief at law, if they were entitled to have any; that the principle of mutuality wholly failed; and that their laches either from the passing of the act, or, at any rate, from the time of notice of abandonment of the line to the time of the filing of the claim, was fatal to the suit, and that specific performance could not be decreed. *Lord James Stuart v. the London and North-Western Rail. Co.*, 21 Law J. Rep. (n.s.) Chanc. 450; 1 De Gex, M. & G. 721; 15 Beav. 513.

W D, by deed, agreed to guarantee a composition of 1*s.* in the pound to all the creditors of his brother who should execute a release of their debts by a day named. A, a creditor, failed to execute the release by the day named, in consequence, as he alleged, of a parol agreement between him and the agent of

W D that he should be allowed to postpone his execution until certain legal proceedings had against third parties, the result of which might influence the amount of his debt. Upon bill by A, for specific performance, W D, by his answer, denied any such agreement:—Held, that the condition not being performed, the agreement never took effect as to A; and, further, that the agreement being to pay the debt of a third person was within the 4th section of the Statute of Frauds, and any alteration in its terms must be evidenced by writing; and no fraud being alleged, a parol agreement, if proved, would not be binding. *Emmet v. Dewhurst*, 21 Law J. Rep. (N.S.) Chanc. 497; 3 Mac. & G. 587.

Bill by a solicitor against his client for specific performance of a contract for sale by auction dismissed, with costs; the purchase being made by the solicitor (who had the conduct of the sale) whilst his client was a minor, and the sale not having been conducted with due regard to the interests of the client or the protection of the estate. *Cutts v. Salmon*, 21 Law J. Rep. (N.S.) Chanc. 750; 4 De Gex & S. 125.

The solicitor for the vendor, bidding in person at the sale on his own behalf, is bound to state that fact publicly, in order to exclude the inference that he is bidding on behalf of the estate. *Ibid*.

A reserved bidding is proper in the case of a sale of an infant's estate; but where there is no reserved bidding, that fact should be publicly stated. *Ibid*.

The non-payment by an under-lessee to the mesne landlord after demand of a proportion of a fine to the superior landlord, for renewal of the lease, will prevent the under-lessee from proceeding in equity against the mesne landlord for performance of his covenant with the under-lessee to renew the lease to the latter. *Chesterman v. Mann*, 22 Law J. Rep. (N.S.) Chanc. 151; 9 Hare, 206.

A strong case is required to induce the Court to refuse specific performance of an agreement for a lease by a landlord, on the ground that the tenant and proposed lessee has not adhered to the conditions which would be the subject of covenant on his part in the lease; but where a tenant, contrary to the terms of the draft lease, has neglected to insure for eleven years, has allowed the premises to go out of repair yearly for four years, and has refused to permit the lessor or his agents to enter and view the condition of the premises, after notice to repair, the Court will not, on bill filed by the tenant, after notice to quit has been given by the landlord, enforce specific performance of an agreement for a lease, notwithstanding a large sum of money has been laid out according to the agreement, and the premises occupied for upwards of thirty years under the agreement. *Gregory v. Wilson*, 22 Law J. Rep. (N.S.) Chanc. 159; 9 Hare, 683.

The defendant agreed to pay 625*l*. for a certain cottage, the plaintiff paying the expenses of the lease held by Mr. S:—Held, upon a bill for specific performance, that, independently of extrinsic evidence, this contract was not sufficiently explicit to satisfy the Statute of Frauds. *Cox v. Middleton*, 23 Law J. Rep. (N.S.) Chanc. 618; 2 Drew. 209.

Held, also, upon the evidence, that the vendor's misrepresentations as to the property precluded him from obtaining relief in this court. *Ibid*.

An under-lessee, for a term of years, put up the

under-lease for sale by auction, describing it as a lease, and subject to a condition that the lessor's title should not be inquired into. The purchaser, however, discovered that the property was included in the original lease with other property, subject to general covenants; although the rent was reserved separately in respect of the several parts of the property, and there was a provision restricting the right of re-entry to the part of the property in respect of which the rent should be unpaid or any of the covenants broken:—Held, that the vendor was not entitled to specific performance of the contract. *Darlington v. Hamilton*, 23 Law J. Rep. (N.S.) Chanc. 1000; Kay, 550.

Contractors agreed to make a railway according to a specification to be prepared by the engineer for the time being of the company, all differences as to the details of the arrangement to be determined by a referee, and a bond, in a stated sum, was to be given by the contractors to the company for the due performance of the works. The company filed a bill for specific performance, to which a demurrer was put in and allowed by one of the Vice Chancellors:—Held, on appeal, affirming the decision of the Court below, that the entire contract was one which the Court would not decree to be specifically performed, and that as the Court would not decree the performance of the entire contract, it would not decree the execution of the bond. *The South Wales Rail. Co. v. Wythes*, 24 Law J. Rep. (N.S.) Chanc. 87; 5 De Gex, M. & G. 880; 24 Law J. Rep. (N.S.) Chanc. 1; 1 Kay & J. 186.

The plaintiff, who had an annuity charged upon certain leasehold houses, was served with notice by a railway company of their intention to purchase the property. The company subsequently took a conveyance of the houses from a prior mortgagee, who had a power of sale. The plaintiff filed his bill, alleging a contract to purchase, and praying specific performance:—Held, (dissenting from *Walker v. the Eastern Counties Rail. Co.*) that such a bill could not be maintained. *Hill v. the Great Northern Rail. Co.*, 24 Law J. Rep. (N.S.) Chanc. 212.

W agreed with the owners of a colliery to take a lease of the same, the terms of which were to be settled by the award of two persons, who were named as arbitrators. The award was made on the 13th of April 1848, and on the 10th of June it was first brought to the knowledge of W, who, on the 8th of August, objected to its validity, but offered to enter into an arrangement. Subsequently, the agents of both parties went down into the mines with a view to re-value them for the purposes of the arrangement. W, who was in possession of the mines before the date of the reference, worked them until February 1849, when he abandoned them. In 1852 the lessors filed their bill for specific performance of the agreement:—Held, upon appeal, reversing the decree below, that the delay of the plaintiffs was a bar to the special relief sought, but that they were entitled to an account of coal raised by W. *Eads v. Williams*, 24 Law J. Rep. (N.S.) Chanc. 531; 4 De Gex, M. & G. 674.

Semble—it is no objection to an award, that an arbitrator has asked the opinion of a third party before making the award; but if in deference to that opinion he states the value contrary to his own conviction, the award is invalid. *Ibid*.

Semble—the award is invalid if both the arbitrators do not sign it at the same time. *Ibid*.

By the terms of the deed of settlement of a joint-stock salt company, it was declared that the company was formed for the purpose of manufacturing salt on their works, and on such other hereditaments near thereto as might be purchased, and for vending the salt. Power was given to the directors to sell, exchange and lease all or any of the partnership property, and to enter into any contract; and the receipt clause provided that no lessee or purchaser should be bound to ascertain the regularity of any proceeding under the authority of that deed. It was also provided that no new rules or regulations altering the fundamental constitution of the partnership should be binding, unless confirmed by two-thirds of the votes of the partners present at two successive general meetings. The company purchased works and carried on the manufacture of salt. In consequence of the rivalry of the Joint-Stock Alkali Company the business was carried on at a loss. After negotiation the managing director on behalf of the Salt Company, and a director on behalf of the Alkali Company, entered into and signed an agreement, dated in May 1846, whereby the former agreed to lease for the term of twenty-one years all their works to the latter at a specified rent. It was a term of the agreement that the lease should contain an option to the Alkali Company to purchase the works at any time within twenty-one years at a price named; the agreement was to be subject to the consent of the proprietors of the salt company. At a meeting of proprietors properly convened, held in June 1846, it was unanimously resolved that the agreement should be confirmed. The Alkali Company entered into possession of the works; disputes arose as to the state of the repairs, and the managing director for and on behalf of the Salt Company by bill alleged that the parties to the agreement were respectively duly authorized by their respective companies to enter into the agreement, and also the confirmation thereof by the general meeting of the Salt Company, and sought to enforce the specific performance of the agreement. The answer admitted the due authority of the director of the plaintiff's company to enter into the negotiation, and that the general meeting authorized its being carried out, and no objection was taken to the agreement as being *ultra vires*.—Held, that the directors had the power to lease or sell or to do both, but that the giving an option to the Alkali Company extending over twenty-one years to purchase or not at a price now fixed was beyond the powers of the managing body, and that a confirmation by a meeting of the shareholders could not effectually sanction the contract; also that the consent of every member of the company was necessary to give validity to the contract, and that this objection was available to the defendant at the hearing, notwithstanding the admissions in the answer, and that it had not been taken on the pleadings. The Court was willing to give the plaintiffs an opportunity to obtain the consent of each proprietor individually, but it being admitted that some of them were under disability it dismissed the bill without costs. The defendant's case was, that a verbal agreement was added to the written agreement as a part of it as to repairs, and that the plaintiffs had not done the repairs agreed on, which disentitled them to enforce specific performance; and he filed a

cross-bill to obtain discovery and evidence in support of this defence. This ground not being in accordance with the view which the Court took of that defence the cross-bill was dismissed with costs. *Clay v. Rufford*, 5 De Gex & Sm. 768.

Where specific performance of a binding contract is sought, and there is a reference to the Master to look into the title or to ascertain who the parties to the conveyance are, that reference enables the vendor to make good any defect in his own title, or to procure a conveyance up to the date of the Master's report and of the decree; and there are cases in which an act of parliament has been obtained to remove defects; but when the Court had come to the conclusion upon the evidence that there was no binding contract, and refused to decree specific performance on the ground that the assent of the proprietors was a term of the contract, and that at the hearing such consent was proved, the Court declined to refer it to the Master to inquire whether the required consent could be obtained, or to make any reference to the Master. *Ibid*.

Where a plaintiff has failed at the hearing to prove his title to a decree for the specific performance on a point not raised by the pleadings, the Court dismissed the bill without prejudice to any other bill that the plaintiff may be advised to file. *Ibid*.

Bill by a company for smelting and manufacturing iron against proprietors of coal mines adjoining their works for specific performance of an agreement to sell to the company at a fixed price per ton, all of certain beds of coal estimated to contain from 120,000 to 150,000 tons to be raised and delivered by defendants at the rate of fifty tons per week, and the company to drain the beds, and for an injunction to restrain defendants from selling any part to other persons. The bill averred that the coal was very conveniently situate with reference to the company's iron-works, which adjoined thereto, and that the company had the power by means of their engines and pits to drain the beds, and had occasion for a large quantity of coal of that particular description. Demurrer allowed merely on the ground of laches, the company having neglected to file their bill until eleven months after they discovered that defendants had ceased to deliver the coal, and were referred by defendants to their solicitors. *Pollard v. Clayton*, 1 Kay & J. 462.

In contracts relating to commodities fluctuating from day to day in market prices, the Court expects persons to be unusually vigilant and active in asserting their right to specific performance which it is inequitable to grant after such an interval, and when the parties may be no longer in the same position. *Ibid*.

Such a contract is a positive contract, and does not give jurisdiction to restrain sale to other parties. *Ibid*.

Leave to amend and account for laches refused on the ground that the agreement, notwithstanding it was to be performed not immediately, but by instalments, and at intervals extending over a long period, and notwithstanding the circumstances averred as to the vicinity of the coal and its convenience with reference to the company's works, and the importance to them of coal of that particular description, was an agreement for works of which the Court could not undertake the superintendence, for the applications to the Court would be incessant to secure due in-

dustry and exertion on the part as well of the plaintiffs as the defendants, and, *semble*, upon this ground alone the demurrer would have been allowed. *Ibid*.

Semble—the benefit to be derived from vicinity of defendant's coal to company's iron-works is one which can be estimated by damages, and, taken alone, is not a ground for specific performance. *Ibid*.

Observations on *Taylor v. Neville*, and the report of *Buzton v. Lister and Cooper*, 3 Atk. 383. *Ibid*.

The grantor of an annuity, which was the third incumbrance on his real estates, executed a trust deed (to which the annuitant was not a party), whereby the estates were conveyed to trustees on trust for sale to discharge the incumbrances according to their priorities, and the first trust of that deed was to pay the costs of the trustees in the conduct of the sale. After the execution of the trust deed the trustees applied to the annuitant for his consent to the sale. In answer to that application the solicitors of the annuitant offered to facilitate the sale, but asked for a copy of the trust deed, adding "When we have seen the deed we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." And in answer to a subsequent application they assented to the appropriation of a part of the rents towards rendering the property more eligible for sale. Part of the property was sold, the annuitant concurring in the sale, whereby a sufficient sum was realized to pay the prior incumbrances, but it being apprehended that the residue of the property would not realize enough to pay both the costs of the trustees and to redeem the annuity, the trustees applied to the annuitant for leave to retain in the first place out of the future proceeds of sale a sum sufficient to pay their costs. This being refused, and a bill being filed to compel the annuitant to join in the conveyances,—Held, under the circumstances, that he was not bound to do so, except upon the terms of having the annuity redeemed. *Crosse v. the General Reversionary and Investment Co.*, 3 De Gex, M. & G. 698.

On a vendor's bill for specific performance the opinion of the Court was much in favour of the title, the question on which turned on the construction of a particular will, but the Court being unable to found that opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy the Court that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial, and not merely idle litigation, refused to decree specific performance. *Pyrke v. Waddingham*, 10 Hare, 1.

A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the Court entertains doubts, but includes also a title which, although the Court has a favourable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons, for the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser if its own opinion in favour of the title should turn out not to be well founded. *Ibid*.

If the doubts as to title arise upon a question connected with the general law, the Court is to judge whether the general law on the point is or is not settled; and if it be not, or if the doubts as to the title may be affected by extrinsic circumstances,

which neither the purchaser nor the Court can satisfactorily investigate, specific performance will be refused. *Ibid*.

The rule rests upon the principle that every purchaser is entitled to require a marketable title. *Ibid*.

It is the duty of the Court on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen and were in course of litigation. *Ibid*.

Bill for the specific performance of an agreement made between patentees for the use of their respective patents, embodied in an order at *Nisi Prius*, the defendants admitting that they were bound by the agreement, and that it ought to be specifically performed, but disputing its meaning,—dismissed without costs, on the ground that the agreement was framed "in terms which were incapable of any certain construction. *Tatham v. Platt*, 9 Hare, 660.

A railway company having contracted with a party who, under a contract made some years previously, was a purchaser of the land which the company required for the railway, but who had not paid his purchase-money, and appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor and purchaser:—Held, that as the purchaser was not after the lapse of time, and under the circumstances, entitled in equity to a decree for specific performance of the contract against the vendor, the bill must be dismissed as against him with costs, and as against the purchaser without costs. *South-Eastern Rail. Co. v. Knott*, 10 Hare, 122.

The rights of parties to agreements to enforce a specific performance in equity are not co-extensive, for their respective rights depend upon their conduct; and the conduct of one may give him a right to apply to the Court, while the conduct of the other may debar him from that right. *Ibid*.

The Court refused to enforce specific performance of an agreement for a mere tenancy from year to year. *Clayton v. Illingworth*, 10 Hare, 451.

A agreed to sell to B a house and land, with a clause that in the event of there being any coals or ironstone under the land, a royalty of so much per ton was to be paid thereon, and that any mines required to be left by a certain railway company were to be paid for the same as if gotten out of the money received for them from the railway company. The Court refused to enforce specific performance of this agreement. *Williamson v. Wootton*, 3 Drew. 210.

Where the original agreement has been subsequently varied, unless there be certainty as to those variations as affecting the original agreement, so that both together should form one consistent agreement, the Court will not grant an injunction prayed for in a bill for specific performance. *The Paris Chocolate Co. v. the Crystal Palace Co.*, 3 Sm. & G. 119.

Specific performance refused where the parties had treated the non-performance of some of the stipulations as the subject of pecuniary compensation, where the other stipulations might reasonably be dealt with in the same way. *Ibid*.

In a suit for specific performance where possession and expenditure are fairly referable to an express

agreement with the landowner to give an adequate consideration, to be calculated on a principle sufficiently defined in the agreement, the Court will, in favour of the possession and expenditure, endeavour to decree a specific performance, but not where the plaintiff, after filing the bill, but before the hearing, has obtained, by an act of parliament, the means of securing and keeping his possession without the aid of the Court. *Meynell v. Surtees*, 3 Sm. & G. 101: affirmed 25 Law J. Rep. (N.S.) Chanc. 257.

A landowner offered a way-leave for a railway over his land to an iron mining company for sixty years, upon the payment of triple damages only. The company pending a suit by them for specific performance sold its lien to a railway company for public traffic, who procured an act authorizing them compulsorily to purchase the land in fee over which the way-leave had been granted:—Held, at the hearing, that there had been a variation as to the parties and the subject matter of the contract, and that there was no right to specific performance. *Ibid.*

A agreed to purchase part of an estate on the faith of representations made to him by the vendor's agent, that the vendor would do certain acts on the remainder of the estate. Those acts, however, were not done; in consequence of which the value of the land purchased was considerably diminished. A bill for specific performance filed by persons claiming under the vendor, was dismissed with costs. *Myers v. Watson*, 1 Sim. N.S. 523.

The Commissioners of Woods and Forests are not, under the 7 Geo. 4. c. 77, entitled to sue, or liable to be sued, for the specific performance of contracts entered into with or by them. *Nurse v. Lord Seymour*, 13 Beav. 254.

The Commissioners were authorized, with the consent of the Lords of the Treasury, to demise, or previous to any demise, to contract to demise. The bill alleged that the Commissioners having first obtained the consent required, determined to demise and afterwards contracted to demise to the plaintiff, and prayed a specific performance:—Held, on demurrer, that the bill could not be sustained. *Ibid.*

A suit for the specific performance of an agreement with a variation cannot be supported. *Ibid.*

An estate was devised to a *feme covert* for her separate use. She entered into a contract for sale and died, having devised the estate to her husband, who sued for a specific performance. The purchaser objected that the *feme covert* had neither power to enter into a contract, nor to devise the estate. The Court declined to compel a specific performance in the absence of the heir. *Harris v. Mott*, 14 Beav. 169.

The defendant agreed, in writing, to take shares in a joint-stock company (which were transferable), "and to execute the deed of settlement when required."—Specific performance was refused. *The Sheffield Gas Consumers Co. v. Harrison*, 17 Beav. 294.

A agreed to grant a lease to B, who knew that A held under a leasehold title:—Held, that B must be deemed to have known that A could only grant a lease with such restrictions as those under which he held. *Lewis v. Bond*, 18 Beav. 85.

Specific performance of an underlease refused, the intended lessee having, with notice, committed acts

which would have been a forfeiture of the original lease. *Ibid.*

The Court will not decree a specific performance which involves a breach of trust. *Man v. Topham*, 19 Beav. 576.

(C) PRACTICE, IN SUIT FOR.

In a suit for specific performance, instituted by a vendor, who has remained in possession, it is unusual and improper (unless in a special case) in decreeing specific performance to direct in the account of rents and profits that the vendor shall be charged with rents and profits which, but for wilful default, he might have received. In such a decree it is irregular, excepting upon a special case, to direct the allowance to the vendor for expenses of lasting repairs, or of income-tax in respect of such part of the property for which the vendor is charged an occupation rent. *Sherwin v. Shakespeare*, 23 Law J. Rep. (N.S.) Chanc. 898; 5 De Gex, M. & G. 517; 23 Law J. Rep. (N.S.) Chanc. 177; 17 Beav. 267.

The forms of decrees of the Court (which are the best exponents of the law, have long existed, and have worked through all difficulties, and proved effectual for the purposes of justice,) ought not to be departed from, or added to, or altered, unless in cases of special necessity. *Ibid.*

After decree against a purchaser for specific performance, the defendant made default in payment of the purchase-money,—Held, that the vendor was entitled to rescind the contract. *Foligno v. Martin*, 16 Beav. 586.

Where a defendant admits an agreement, if he means to rely on the fact of its not being in writing and signed, and so being invalid by reason of the Statute of Frauds, he must say so; otherwise he must be taken to mean that the admitted agreement was a written agreement good under the statute, or else that on some other ground it is binding on him. But where he denies, or does not admit an agreement, he need not plead the Statute of Frauds; the burden of proof is altogether on the plaintiff, who must then produce a valid agreement capable of being enforced. *Ridgway v. Wharton*, 3 De Gex, M. & G. 677.

Specific performance of an agreement to lease refused when the alleged contract was founded upon expressions in a letter written by the defendant's agent to the intended lessee, to the effect that instructions had been given for the preparation of the lease in conformity with terms arranged, no agreement having been actually signed. *Ibid.*

The owner of an estate in answer to an inquiry from an intended lessee, said, "A B manages all my affairs, and you are to treat with him." This does not imply that A B had authority to enter into a binding agreement—*semble*. *Ibid.*

STAMP.

- (A) AGREEMENTS.
- (B) BONDS.
- (C) CONVEYANCES.
- (D) DEEDS.
- (E) MORTGAGES.
- (F) SETTLEMENTS.
- (G) RECEIPTS.

- (H) ORDER FOR PAYMENT OUT OF PARTICULAR FUND.
 (I) NEWSPAPERS.
 (J) DENOTING STAMP.

(A) AGREEMENTS.

A declaration alleged, in substance, that the defendant obtained S D as a partner for the plaintiff in his business, upon the terms, amongst others, stated in the declaration; that the plaintiff afterwards paid to the defendant 25*l.* for obtaining the said partner, and it was then agreed between the plaintiff and the defendant, that the plaintiff should accept and deliver to the defendant a bill of exchange for 27*l.* 10*s.*, payable in eighteen months, upon condition that S D should accept the partnership beyond two years, but if S D, at the expiration of eighteen months, should give notice of his wish to retire from the partnership, and not rescind it, the said bill should be null and void; that in consideration of the plaintiff's delivering the said bill, accepted, to the defendant upon the said condition, the defendant promised, if he should negotiate it, and the said notice were given, and not rescinded, to indemnify the plaintiff from the payment of the said bill and all costs, &c.; that the defendant afterwards negotiated the bill; that the plaintiff had been compelled to pay the amount; that S D gave notice at the end of eighteen months of his wish to retire from the partnership, and did not rescind the same. Breach, that the defendant had not indemnified the plaintiff from the payment of the said bill. The defendant pleaded *non assumpsit* and a traverse of the condition upon which the bill was given; and at the trial the following unstamped document, signed by the defendant, was admitted, as part of the evidence on behalf of the plaintiff: "Mem.—I have this day received of Mr. Fenwick de Porquet a bill for 27*l.* 10*s.*, at eighteen months' date, on condition that Mr. Samuel Douglas accepts the partnership beyond two years; but should Mr. Douglas give notice at the expiration of eighteen months (the bill to be null and void), and not afterwards rescind the same":—Held, that the document had been properly received in evidence without an agreement stamp. *De Porquet v. Page*, 20 Law J. Rep. (N.S.) Q.B. 28; 15 Q.B. Rep. 1073.

In an action by a schoolmaster for a sum of money in lieu of three months' notice of the removal of the appellant's (the defendant's) sons from school, it appeared that the appellant's agent having expressed a wish to place the appellant's sons under the respondent's (the plaintiff's) care, received from the latter a prospectus, which stated that the terms were sixty guineas per annum, and that three months' notice or payment was required previously to the removal of the pupil. The respondent, at the time of delivering the prospectus, agreed, verbally, that the boys should be charged for at the rate of fifty guineas per annum each. The boys were, thereupon, sent to the respondent's school, and were taken away without the stipulated notice:—Held, that the prospectus was a proposal, and not an agreement, and that no stamp was necessary. *Clay v. Crofts*, 20 Law J. Rep. (N.S.) Exch. 361.

C & W being indebted to the defendant in 48*l.* 13*s.*, the following document was drawn up and delivered

to the plaintiff:—"To Messrs. C & W. I request you will supply A B (the plaintiff) with such parcels of cement as he shall require, to the value of 48*l.* 13*s.*, and charge the same to the amount standing with you to my credit (signed by defendant)." "To Mr. A B (the plaintiff). On the consideration above named, we agree to supply to your order, when you shall require it, cement at 1*s.* per bushel to the amount of 48*l.* 13*s.* (signed) C & W."—Held, that this was an agreement relating to the sale of goods, &c., and did not require a stamp. *Chatfield v. Cox*, 21 Law J. Rep. (N.S.) Q.B. 279; 18 Q.B. Rep. 321.

In an action by the plaintiff against a stakeholder to recover a sum of money deposited as a wager on a trotting match by the plaintiff, whose horse was beaten, the plaintiff, for the purpose of proving fraud, which consisted in one horse having been substituted for another, tendered in evidence an unstamped agreement relating to the match:—Held, that it was admissible without being stamped. *Holmes v. Sixsmith*, 21 Law J. Rep. (N.S.) Exch. 312; 7 Exch. Rep. 802.

By an agreement, which recited that A and others had applied to parliament for a bill to authorize them to reclaim from the sea certain waste land in which B and C claimed certain interests, and that B and C had objected to the bill, it was agreed that B and C should withdraw their opposition and promote the bill, and should respectively receive certain portions of the land when reclaimed; and that A and others should pay to B 1,000*l.* on the passing of the act. After a few weeks a memorandum was indorsed on the paper on which the agreement was written, to the effect that it was agreed that B and C were only severally and not jointly bound for the fulfilment of the written agreement; that the 1,000*l.* within mentioned to be paid to B was for costs and expenses of certain surveys, and that the written agreement for facilitating the bill was only to be in force for the then existing session of parliament. The agreement contained more than 1,080 words, and was stamped with a 3*s.* stamp. The memorandum contained less than that number, and was stamped with a 2*s.* stamp:—Held, that the memorandum did not incorporate the agreement so as to make it necessary to count the words of the agreement in the number of the words of the memorandum for the purposes of the stamp duty; and that even if it did incorporate it, there was no provision in the Stamp Act to justify the reckoning the words of the agreement in estimating the amount of duty to which the memorandum was liable; consequently, that the 2*s.* stamp was sufficient. *The Fishmongers' Co. v. Dimsdale* (in error), 22 Law J. Rep. (N.S.) C.P. 44; 12 Com. B. Rep. 557.

The defendant, in consideration of the plaintiff discounting for him a bill of exchange for 100*l.*, agreed in writing, if the bill were not paid at maturity, to pay the plaintiff interest at the rate of 1*s.* in the pound per month till the whole was paid. An action having been brought to recover 50*l.*, being interest for ten months during which the bill remained unpaid,—Held, that the subject-matter of the agreement being the payment of the interest, which was not of the value of 20*l.*, the agreement was admissible without a stamp. *Semple v. Steinau*, 22 Law J. Rep. (N.S.) Exch. 224; 8 Exch. Rep. 622.

In support of the plaintiff's claim for work done by him for the defendant, the following document written by the defendant, and signed by the plaintiff,

was offered in evidence: "I agree to build up eight cabins, &c. for the sum of 40*l*."—Held, that it required a stamp, either as an agreement, or as evidence of one. *Hegarty v. Milne*, 23 Law J. Rep. (n.s.) C.P. 151; 14 Com. B. Rep. 627.

(B) BONDS.

A, B and C bound themselves by a bond in the sum of 600*l*. to a joint-stock company. The bond recited that A and B had agreed to join with C as his sureties, subject to the conditions thereafter contained, in consideration of the company then advancing C the sum of 300*l*. The bond contained the following conditions: that if any of the said bounden parties should pay to the company the principal sum of 300*l*. by three equal yearly payments of 100*l*. each (on specified days), or so much of the said payments as should be owing on the day of the decease of C, which should first happen, and should, in the mean time, until the principal sum should so become due, and until it should be all paid, pay the company interest at the rate of 5*l*. per cent. upon the said principal sum of 300*l*., in equal half-yearly payments (on specified days), and that they also should in the mean time, and until the principal sum of 300*l*. should become due, and until the same, with interest, should be fully paid, well and truly pay the annual premiums which should during the continuance of the loan become payable on a certain policy of assurance, under the hands of three of the directors of the company, whereby the funds of the company were on payment by C or his assigns during his life of the annual premium of 23*l*. 14*s*. 7*d*., made liable to pay the company's executors, &c. after his decease the sum of 499*l*. 10*s*., which instrument had then been deposited as a collateral security for the payment of the principal sum of 300*l*. and interest thereon, and on the premiums which might be due and unpaid, provided the company might consider the policy as subsisting, notwithstanding any premium might not be paid. And if C should not during the continuance of the said loan do any act by which the policy might be avoided, and in case either A or B should during such time die or go abroad, if within a time therein mentioned either of them should obtain and substitute a new surety in the place of such surety so dying, &c. who should enter into a like bond, or in case A or B should give such additional security for the said principal sum, or so much as should then remain unpaid, and the interest thereof, or should forthwith pay upon demand the principal sum and interest, or so much as should be due, then the said bond was to be void, otherwise it was to remain in full force: provided that in case any of the events mentioned in the conditions indorsed on the policy should happen during the deposit of the policy, it should be considered as wholly void; and, lastly, that if default should be made in payment of the interest, or of either of the instalments or of the premiums, according to the said stipulations, the whole of the principal should thereupon become payable:—Held, *per Pollock, C.B., Alderson, B. and Platt, B.*, that the effect of the bond was to secure the payment of the principal sum of 300*l*. with interest only, and that the stamp of 6*l*., which covered the principal sum, was proper. Held, *per Parke, B.*, that the payment of the premiums also was secured by the bond. *The Prudential Mu-*

tual Assurance, Investment, and Loan Association v. Curzon, 22 Law J. Rep. (n.s.) Exch. 85; 8 Exch. Rep. 97.

(C) CONVEYANCES.

By a deed made between the Duke of B, of the first part, the Marquis of C, his son, of the second part, and A G R, of the third part, it appeared that the duke was entitled to certain estates for his life, with remainder to the Marquis of C, and that he was also entitled to certain other real and personal property, and that the real and personal property was subject to incumbrances amounting to 1,027,282*l*.; that the marquis covenanted with the duke to concur in raising on mortgage upon the property the sum of 1,100,000*l*. to be applied in payment of the incumbrances; that the sum of 1,100,000*l*. should be considered as the debt of the duke; that the marquis had proposed to the duke that the marquis should take to and absolutely purchase from the duke all the equity of redemption, estate, title, &c. to the real and personal property comprised in certain schedules to the deed, to which proposal the duke had acceded; that the duke granted to A G R all the lands, to hold the same subject to the charges in trust for the marquis, and that the real and personal property should be the primary fund for satisfying the debts and liabilities. There was also a covenant by the marquis that he would apply all the monies that should come into his hands in respect of the said estates, chattels, &c. towards the relief and indemnification of the duke. This deed having been stamped with the duty of 1*l*. 15*s*., and nine progressive stamps of 1*l*. 5*s*. each, and the opinion of the Commissioners of Inland Revenue having been desired on the question under the 13 & 14 Vict. c. 97, they were of opinion that the deed was chargeable under the 55 Geo. 3. c. 185. with the *ad valorem* duty of 1,000*l*., and with nine progressive duties of 1*l*. each as a conveyance upon the sale of property, but stated a special case for the opinion of this Court:—Held, first, *dissentiente Pollock, C.B.*, that the counsel for the appellant was entitled to begin. Held, secondly, that the Crown had the general right of reply; and, *per Pollock, C.B.*, in the Exchequer the Crown has the right to a general reply in all cases where the Crown has an interest. Held, lastly, that the Crown was entitled to the smaller duty only. *Chandos v. the Commissioners of Inland Revenue*, 20 Law J. Rep. (n.s.) Exch. 269; 6 Exch. Rep. 464.

The 48 Geo. 3. c. 149. s. 22. provides that in all cases of sale of any lands, &c., where a duty is imposed on the conveyance thereof, in the schedule to the act annexed, in proportion to the amount of the purchase or consideration money therein expressed, the full purchase or consideration money paid, or agreed or secured to be paid for the same, shall be truly expressed on the principal deed, whereby the lands, &c. shall be conveyed. The 55 Geo. 3. c. 184. s. 8. enacts that all the powers and provisions of the 48 Geo. 3. c. 149. shall be extended to that act, so far as they are applicable; and by the schedule imposes an *ad valorem* duty proportionate to the consideration money, whatever its amount may be, upon any "conveyance".... "upon the sale of lands," and also imposes an *ad valorem* duty upon any deed of partition, where any sum amounting to 300*l*., or upwards, is paid for equality of partition:—Held, that the

22nd section of the 48 Geo. 3. c. 149, incorporated into the 55 Geo. 3. c. 184, applies only to sales of lands, &c., properly so called, and does not extend to a deed of partition between several members of a family, by which the entirety of certain lands was conveyed to one of the parties in lieu of his undivided share in those and other lands, and in consideration of a sum of money paid by him for equality of partition. *Henniker v. Henniker*, 22 Law J. Rep. (N.S.) Q.B. 94; 1 E. & B. 54.

A deed of partition stated on its face only a nominal consideration for the conveyance of land in severalty to one of the co-tenants, and was stamped accordingly. In fact he had agreed to pay 600*l.* for equality of partition, and had given a bond to secure that sum:—Held, that neither the deed nor the bond was void by reason of the improper stamp. *Ibid.*

The assignment of a trade and the goodwill thereof is an assignment of property within the meaning of the Stamp Act, 13 & 14 Vict. c. 97, sched. tit. "Conveyance;" and is liable to an *ad valorem* duty. *Potter v. the Commissioners of Inland Revenue*, 23 Law J. Rep. (N.S.) Exch. 345; 10 Exch. Rep. 147.

(D) DEEDS.

A deed made between the Earl of Mount E of the first part; T G of the second part; the Plymouth Great Western Dock Company of the third part, and T P of the fourth part, recited (*inter alia*) that T G had, pursuant to an act of parliament, constructed certain piers, and was entitled to take tolls thereon, and that it had been agreed between T G and the Plymouth Great Western Dock Company that the said piers, &c. should be purchased of T G by the said Plymouth Great Western Dock Company, and that the consideration for the purchase should be the sum of 37,000*l.*, and that 10,000*l.* only, part of the said sum of 37,000*l.*, should be paid in gross by the said company, and that 15,000*l.*, further part of the 37,000*l.*, should be represented by an annual rent-charge of 750*l.*, subject to redemption at any time thereafter, on payment of 15,000*l.* after twelve calendar months' notice given by the company, and that 12,000*l.* residue of the 37,000*l.*, should be represented by an annual rent-charge of 600*l.*, subject to the power of redemption hereinafter mentioned. The said pier, &c. were for the consideration aforesaid, by the deed conveyed by T G to the said company, subject to the rent-charges of 750*l.* and 600*l.* before mentioned. The deed contained a proviso for redemption of the rent-charges of 750*l.* at the option of the company, pursuant to the agreement recited, and also a proviso that if at any time after the 29th of September 1858 T G, or his heirs or assigns, should desire to have the rent-charge of 600*l.* redeemed, and should give twelve months' notice to the company, the company should pay T G 12,000*l.* for the redemption or repurchase thereof, and a further proviso that, if no such notice should be given after the 29th of September 1858, then that the company might, at any time after the 29th of September 1863, redeem the said rent-charge of 600*l.* for 12,000*l.* on giving to T G twelve months' notice:—Held, that an *ad valorem* duty was payable as if the 12,000*l.* had been a payment in money; but that no *ad valorem* duty was payable in respect of the rent-charge of 750*l.* *The Plymouth Great Western*

Dock Co. v. the Commissioners of Inland Revenue, 22 Law J. Rep. (N.S.) Exch. 188.

(E) MORTGAGES.

An assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mortgage within the 55 Geo. 3. c. 184. sched. Part 1, and therefore requires an *ad valorem* stamp. *Caldwell v. Dawson*, 5 Exch. Rep. 1.

A being indebted to the defendant in 1841. 7*s.* 6*d.* mortgaged by deed certain furniture to him, and also assigned a policy of assurance, with a proviso for redemption on payment of the principal money and interest. It was also provided, that on default of payment the defendant should have the power of taking and selling the furniture, and of reimbursing himself thereof for all costs and expenses, and also for all sums expended by him in keeping the policy on foot. Then followed a covenant by A for repayment to the defendant of 1841. 7*s.* 6*d.*, and for payment to the insurance office of the premiums: that in case of avoidance of the policy, or the insolvency of the insurance company, A would insure in another office, and assign the new policy to the defendant: that in case of A's neglecting to pay the premium, the defendant might pay it to the office, and that the sums advanced by the defendant for continuing the insurance should be considered as principal monies and bear interest, and that the policy should be a security to the defendant for the repayment thereof, and should not be redeemed without payment to the defendant of the sum advanced and interest, as well as of the 1841. 7*s.* 6*d.*:—Held, that such mortgage was not a "security for the repayment of money to be thereafter lent, advanced or paid" to an amount "uncertain and without limit," within the Stamp Act, 55 Geo. 3. c. 184. sched. Part 1. tit. "Mortgage," and therefore that it did not require a stamp of 25*l.* *Lawrence v. Boston*, 21 Law J. Rep. (N.S.) Exch. 49; 7 Exch. Rep. 28.

Where A had entered into a bond as surety for B, and B, by a deed, assigned personal property to A for the purpose of indemnifying him against any liability by reason of his having become surety for B in the bond,—Held, that the deed required an *ad valorem* stamp as a "security for the repayment of money to be thereafter lent, advanced or paid" within the meaning of the 55 Geo. 3. c. 184. sched. "Mortgage." *Canning v. Raper*, 22 Law J. Rep. (N.S.) Q.B. 87; 1 E. & B. 164.

(F) SETTLEMENTS.

The 13 & 14 Vict. c. 97. enacts, in the schedule, 'Settlement,' that any deed or instrument whereby any definite and certain principal sum of money, or any definite and certain share in the funds of the East India Company or any other company, shall be settled, or agreed to be settled, upon any person, shall be liable to an *ad valorem* duty. A party by a marriage settlement assigned to trustees, on the usual trusts, a policy effected on his own life, and all monies assured or to become payable by or under the said policy:—Held, on appeal from the decision of the Commissioners of Inland Revenue, that this deed was not liable to an *ad valorem* duty under the above act. *In re Sanville v. the Commissioners of Inland Revenue*, 23 Law J. Rep. (N.S.) Exch. 270; 10 Exch. Rep. 159.

(G) RECEIPTS.

The following document was held to be admissible in evidence stamped as an agreement and not as a receipt:—I have received your cheque for 391l. 10s. 3d., being the payment for an overdue bill and interest, in the hands of the Derby and Derbyshire Bank, and I hereby undertake to procure and hand the said bill over to you, and I have now given you Messrs. Dixon's order for 500 tons of iron." *Von Dadelszen v. Swann*, 20 Law J. Rep. (N.S.) Exch. 50; 5 Exch. Rep. 825.

It is not necessary to affix the penny receipt stamp on a brief where counsel signs his name, acknowledging the payment of the fee. *In re Beavan*, 23 Law J. Rep. (N.S.) Chanc. 536; 5 De Gex, M. & G. 40.

(H) ORDER FOR PAYMENT OUT OF PARTICULAR FUND.

A, being entitled to the sum of 365l. payable to him by B, addressed the following note to B:—"I hereby authorize you to pay to C the sum of 36l., being the amount of my contract":—Held, that this document did not require a stamp, as "an order for the payment of a sum of money out of a particular fund," &c. in the schedule to the 55 Geo. 3. c. 184. *Diplock v. Hammond*; *The Governors and Guardians of the Poor of the Parish of St. Mary, Newington v. Hammond*, 23 Law J. Rep. (N.S.) Chanc. 550; 5 De Gex, M. & G. 320; 2 Sm. & G. 141.

(I) NEWSPAPERS.

The defendants were the publishers of a paper containing, amongst other things, public news, intelligence, and occurrences, called 'The Household Narrative of Current Events.' It was printed for the purpose of being dispersed and made public by sale in the ordinary way, and was published periodically, at intervals exceeding twenty-six days between the publication of each number; it did not exceed two sheets of the dimensions specified in the schedule A to the 6 & 7 Will. 4. c. 76, and was published for sale for a less sum than 6d.:—Held, *per Pollock, C.B., Platt, B. and Martin, B.* on an information against the defendants for penalties and newspaper duties, under the 6 & 7 Will. 4. c. 76. sched. A, that the criterion of a paper being a newspaper liable to stamp duty was the period of its publication; and that no paper was to be deemed a newspaper unless it were published at an interval of or less than twenty-six days—*Dissentiente Parke, B.*, who held, that the paper in question was a newspaper, its main or general object being to give to the public information as to recent events. *The Attorney General v. Bradbury*, 21 Law J. Rep. (N.S.) Exch. 12; 7 Exch. Rep. 97.

(J) DENOTING STAMP.

Documents stamped with a "denoting" stamp by the Commissioners, under the 13 & 14 Vict. c. 97. s. 14, cannot be objected to, when tendered in evidence, as being improperly stamped. *The Prudential Mutual Assurance Association v. Curzon*, 22 Law J. Rep. (N.S.) Exch. 35; 8 Exch. Rep. 97.

Where in an action on a bond the instrument is objected to at the trial as being improperly stamped,

and subsequently, but before the argument of the case *in banc*, it is stamped with a denoting stamp by the Commissioners, such stamping does not remove the objection to the sufficiency of the stamp. *Ibid.*

STATUTE, CONSTRUCTION AND OPERATION OF.

[See title TORQUAY MARKET ACT.]

The 34 Geo. 3. c. xcvi., an act for building a new shire hall for the county of Stafford, enacted (section 31), that when the said shire hall should be completed it should be for ever insured, supported, and maintained at the expense of the county of Stafford and the town of Stafford in the proportions following: that one-tenth part of the charges should be paid by the mayor, aldermen, &c. of Stafford, and the remainder by the inhabitants of the county; that it should be lawful for the county Justices to order the shire hall to be insured, supported, maintained, and repaired as they should think fit, and that they should and might order the expenses of the insurance and repairs to be paid in the proportions before mentioned. After the completion of the hall the sum of 1,000l. was, in pursuance of the act and of an order of county Justices, expended in insuring and supporting the hall, and a tenth part thereof ordered to be paid by the mayor, &c. of Stafford, and the remainder by the inhabitants of the county. Subsequently, a further sum of 28l. 2s. was ordered by the county Justices to be laid out in repairing the hall, and a tenth part of that sum was ordered to be paid by the mayor, &c., and the remainder by the inhabitants of the county:—Held, first, that the mayor, &c. were bound to pay their proportion of the 1,000l. actually expended, although they had not been summoned to oppose the order of Justices, nor had any notice that it was about to be made; and, secondly, that they were bound to pay their proportion of the sum of 28l. 2s., although that sum had not been expended before the action. *Hinckley v. the Mayor, &c. of Stafford*, 20 Law J. Rep. (N.S.) Exch. 171; 6 Exch. Rep. 279.

By a local paving act, 55 Geo. 3. c. xxv. s. 3, the Commissioners were to inspect "any street, square, or other public passage or place which now is or hereafter may be built upon, or in building," and if, upon inspection, they should be of opinion that the foot or carriage ways required paving, &c., they were to "give notice to the owners, &c. of any such land, tenement, &c. situate in any such street, square, or other passage or place," and to compel them to pay the expense of paving, &c.:—Held, that a bridge, which formed part of a public highway through streets communicating with each end of the bridge, and which was built of brick over a canal, and had brick walls from four to five feet high on either side, was not "a passage or place built upon" within the meaning of the act. *Arnell v. the Regent's Canal Co.*, 23 Law J. Rep. (N.S.) C.P. 155; 14 Com. B. Rep. 564.

An act of parliament, the 14 & 15 Vict. c. cv., was passed on the 21st of July 1851, called *The Governor and Company of Copper Miners' Act*, 1851, for arranging the affairs of the defendants; and its 22nd section provided that, after a certain reconveyance, the defendants should hold their pro-

party discharged from all rights and claims of all creditors and claimants. The 12th section referred to another action previously brought by the plaintiff against the defendants on the same contract, and which had been referred to an arbitrator, and provided that the plaintiff should be considered as a creditor for a certain amount till the award was made:—Held, that the 22nd section referred to debts or liquidated claims, and was not a bar to the action in respect of the damage which accrued after the passing of the act. *Wood v. the Copper Miners Co.*, 23 Law J. Rep. (N.S.) C.P. 209; 14 Com. B. Rep. 428.

By the Bristol Waterworks Act, 1846 (9 & 10 Vict. c. cxxiii.) the Bristol Waterworks Company had power to take water from the river Chew on paying compensation for it; but section 30. enacted that it should not be lawful for the company to divert, or take, or in any manner interfere with the water flowing, or passing, or which, but for the powers of this act, might flow or pass into the river Chew, unless and until water, after the rate of 12 cubic feet per second, for twelve hours of each and every day should be passing down the said river from and out of certain reservoirs for the use of mills. By a subsequent act (16 Vict. c. vii.) it was provided, that nothing in that act or in the Bristol Waterworks Act, 1846, should extend to authorize the company to purchase, take, use or interfere with any land, soil, or water, or any rights in respect thereof, belonging to the Duke of Cornwall without his consent testified in writing under his privy seal:—Held, that the company did not, by the exercise of the powers conferred by the first act, acquire any right as against the Duke of Cornwall to the water of the Chew, without obtaining the authority of the Duke of Cornwall in the manner provided by the last-mentioned act. *Attorney General of Prince of Wales v. the Bristol Waterworks Co.*, 24 Law J. Rep. (N.S.) Exch. 205; 10 Exch. Rep. 884.

Quere—whether the Common Law Procedure Act, 1854, s. 34, giving an appeal in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to shew cause be refused, or granted and then discharged or made absolute, applies to an information of intrusion. *Ibid.*

A private act of parliament, although declared to be a public act, cannot by any implication repeal a former private act; and such repeal can only operate if there be in the subsequent act words which will operate as an express repeal of the former act. *The Trustees of the Birkenhead Docks v. the Birkenhead Dock Co.*, 23 Law J. Rep. (N.S.) Chanc. 457; 4 De Gex, M. & G. 732.

An act of parliament, after reciting that certain lands in the neighbourhood of Leeds were in strict settlement, and that the ultimate remainder-man was an infant, and that many persons were desirous of erecting buildings on the said lands, and that it would be advantageous to the parties interested in the lands if the same could be sold and the proceeds be invested in other real estate, to be settled to the like uses, vested the lands in certain trustees on trust to sell the same, either together or in parcels; the purchase-mones to be paid into the Bank of England. The act contained no express power to expend any portion of the purchase-mones in setting out the lands or in making roads:—Held, that,

having regard to the objects of the act, namely, the sale of the property as building land, such power ought to be implied, and that the trustees and their agents ought to be allowed all sums properly expended by them in making roads to the several allotments and in bringing the land into a fit state for the market. *Cookson v. Lee*, 23 Law J. Rep. (N.S.) Chanc. 473.

Solicitors for trustees for sale purchased part of the trust property and mortgaged it to A & B. The purchase was set aside:—Held, that A & B, who had notice of the relation in which their mortgagors stood to the vendors, could claim no better title than their mortgagors. *Ibid.*

By the 6 Will. 4. c. 19. it was enacted, that thenceforth all the palatine jurisdiction of the Bishop of Durham and all *jura regalia* should be transferred to and vested in the Crown; and that nothing in the act contained should affect the right of any person holding a patent of any office, whether abolished by the act or not, to receive any fee or stipend granted by such patent, out of the revenues of the bishoprick; and that such revenues should continue and be subject to all the same fees and stipends in respect of any office in the said county of Durham as the same had theretofore been subject to. By the 6 & 7 Will. 4. c. 77, a portion of the revenues of the see of Durham were transferred to the Ecclesiastical Commissioners for England; and it was provided that the fees and stipends granted out of the revenues of the said see, by the last or any preceding Bishop of Durham to any officer of the county palatine, should be paid by the Ecclesiastical Commissioners, &c. Prior to the passing of the above acts, the Bishop of Durham, as lord of the palatine county of Durham, had and exercised by his letters patent the appointment of the Chancellor of the Palatinate, whose yearly stipend, amounting to 27l. 7s. 4d., was paid out of the revenues of the see. From 1787 to 1836, the Chancellor for the time being had received out of the revenues of the see, with the sanction of the bishop, the sum of 100l. for every session of his court, called “the new stipend,” and being in addition to the ancient yearly fees:—Held, that although the new stipend might not have been recoverable by the Chancellor in an action against the bishop, yet the act having transferred to the Crown the right of appointing the Chancellor with the same incidents and privileges, the stipend *de facto* passed with the office; and that the Ecclesiastical Commissioners were bound to pay the Chancellor 100l. for every sitting of the Court duly held by him. *Temple v. the Ecclesiastical Commissioners for England*, 23 Law J. Rep. (N.S.) Chanc. 673; 3 De Gex, M. & G. 418.

STOCK.

- (A) ACTION FOR RE-DELIVERY OF STOCK.
- (B) EFFECT OF CHARGING ORDER.
- (C) STOCK-JOBING ACT.

(A) ACTION FOR RE-DELIVERY OF STOCK.

Where A brought an action against B for not re-delivering certain mining shares lent by A to B, which were to be re-delivered on a certain day, and B

pleaded his discharge under the Insolvent Act,—Held, that the claim was not “a debt or sum of money due or claimed to be due” from B, with respect to which he was discharged by the adjudication; distinguishing *Utterson v. Vernon*. *Owen v. Routh*, 23 Law J. Rep. (N.S.) C.P. 105; 14 Com. B. Rep. 327.

It was admitted, that the proper measure of damages was the price of the shares at the time of the trial. *Ibid*.

(B) EFFECT OF CHARGING ORDER.

The 1 & 2 Vict. c. 110. s. 14. empowers a Judge to order that stock, &c. standing in the name of a judgment debtor or of any person in trust for him, shall stand charged with the payment of the judgment and interest, “and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor”:—Held (by *Lord Campbell, C.J., Wightman, J. and Crompton, J.*), that the meaning of this clause is to give the judgment creditor the same right under the charging order as against prior incumbrancers as he would have under a valid and effectual charge made at the same moment by the debtor himself. Therefore, where stock standing in the names of trustees in trust for A was charged by A as security for money lent to him by B, but no notice of this charge was given to the trustees, and subsequently C, a judgment creditor of A, obtained a charging order under the statute upon this stock, of which he gave express notice to the trustees, C's charge, created by the Judge's order, took priority of that to B, whose title had never been perfected by notice to the trustees,—Held (*Erle, J. dissentiente*), that the effect of the statute is only to give the judgment creditor with a charging order the same right as he would have under a lawful charge made by the debtor, and therefore, under the circumstances, C was not entitled to the stock as against B. *Watts v. Porter*, 23 Law J. Rep. (N.S.) Q.B. 345; 3 E. & B. 743.

(C) STOCK-JOBING ACT.

To an action for work done, commission, and money paid, the defendant pleaded that the plaintiff was a stock and sharebroker, and as such made contracts with divers persons for the defendant by way of gaming, contrary to the 8 & 9 Vict. c. 109, respecting the future market price of public and other stock, shares, scrip, and goods and chattels, whereby the defendant was to receive or pay the difference (as the case might be) between the price when the contracts were made and the price on a future day, as the plaintiff well knew; that the work done was in making the contracts; that the commission was claimed in respect of the same, and that the money was paid in discharging the differences:—Held, first, that the plea was no defence under the 8 & 9 Vict. c. 109. s. 18. Secondly, that it was no defence under the Stock-Jobbing Act, 7 Geo. 2. c. 8, as it did not shew that each contract related to the sale of public stock. *Knight v. Fitch*, 24 Law J. Rep. (N.S.) C.P. 122; 15 Com. B. Rep. 566.

Quere, per Jervis, C.J., whether the plea raised the defence under the latter act. *Ibid*.

STOPPAGE IN TRANSITU.

B & Co., merchants at Liverpool, sent orders to M & Co., merchants at Charlestown, to ship on account of B & Co. a cargo of cotton on board a vessel of B & Co.'s which was sent to Charlestown with an outward cargo, and also to receive the cotton. M & Co. thereupon purchased cotton from time to time and shipped it on board B & Co.'s vessel. The master of the vessel executed to M & Co. a bill of lading, which stated that the cotton was to be delivered at Liverpool “to order or to our assigns, paying for freight for the cotton nothing, being owner's property.” M & Co. indorsed the bill of lading, “Deliver the within to the Bank of Liverpool or order. M & Co.” Afterwards, M & Co. sent to B & Co. an abstract invoice of the cotton, in which they stated that they had shipped the cotton on board the vessel “by order and for account and risk” of B & Co. and addressed “to order”; and still later they sent to B & Co. a full invoice stating that the cotton was shipped “by order and for account of B & Co. and to them consigned.” M & Co. not having sufficient funds of B & Co. to pay for the cargo of cotton, drew bills on B & Co. for the amount, and wrote to B & Co. informing them of the drawing of the bills and desiring them to insure the cotton. M & Co. sold the bills they had so drawn to the bank at Charlestown, and delivered to the bank the bill of lading so indorsed as a security for the payment of the bills, which were ultimately dishonoured and taken up by M & Co. B & Co. became bankrupts before the arrival of the vessel. M & Co., by means of their agent, on its arrival put in a claim to the cargo. The assignees of B & Co. brought detinue against M & Co.'s agents, who pleaded that the bankrupts B & Co. were not possessed, and that the plaintiffs were not possessed as assignees:—Held, that M & Co. had never parted with the property in the cotton to B & Co. notwithstanding the delivery on board the vessel of B & Co., because M & Co. had at the time of the delivery reserved to themselves a *jus disponendi* and preserved their rights as unpaid vendors; which the captain acknowledged by signing the bill of lading making the cotton deliverable to their order or assigns, although in executing such a bill of lading the captain might have exceeded his authority. *Turner v. the Trustees of the Liverpool Docks*, 20 Law J. Rep. (N.S.) Exch. 393; 6 Exch. Rep. 543.

Held, also, that M & Co. did not by transferring bill of lading as security to the bank at Charlestown, lose their property in the goods so as to prevent their claiming them as against B & Co. or their assignees, and that the defence might be raised under the plea of not possessed. *Ibid*.

In 1845 the defendants, commission-agents in London, wrote to the plaintiffs, merchants of Madras, as follows:—“At the request of Messrs. K & L, of Glasgow, we beg to open a credit in your favour to the extent of 1,500*l.*, to be applied to the execution of an order they have given you for Madras handkerchiefs, and for cost of which, as produced, you draw on us at the customary date, on forwarding bills of lading to our order.” Two orders were subsequently given by K & L, and executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills drawn on

them in pursuance of the letter. In February 1847 K & L wrote to the plaintiffs, with a third order:—"You will draw for cost and consign goods as before." The plaintiffs accordingly shipped the goods on account of K & L, and sent to the defendants the invoice and bill of lading, inclosed in a letter, saying, "We have, as usual, drawn upon you at six months, for the equivalent of the amount of invoice." The bill of lading stated the goods to have been "shipped by the plaintiffs, and to be deliverable to the defendants or their assigns on payment of freight." The invoice stated that the goods were "consigned to the defendants, on account and risk of K & L." The defendants received the bill of lading and invoice together, on the 26th of August, and the goods arrived in London on the 21st of October. On that day the plaintiffs' agent received a bill drawn upon the defendants against the goods, but, on presentment, the defendants refused to accept it. On the 27th of October K & L stopped payment. The defendants took possession of the goods under the bill of lading, and sold them, and retained the proceeds. On the 4th of March 1848, the plaintiffs gave the defendants notice that they claimed to stop the goods *in transitu*, the bills not having been accepted. In an action to recover the proceeds of the sale as money received to the use of the plaintiffs,—Held, first, that it was a question for the Judge, and not for the jury, to decide what the contract between the parties was. Secondly, that the property in the goods vested absolutely in K & L upon the delivery on board the ship, and transmission of the bill of lading to the defendants; the acceptance of the bill not being a condition either precedent or subsequent. *Key v. Cotesworth*, 22 Law J. Rep. (N.S.) Exch. 4; 7 Exch. Rep. 595.

SUBPCENA.

[See WITNESS.]

SUIT AT LAW AND IN EQUITY.

The plaintiff, having sued at law and in equity for the same cause of action, was, after issue joined at law, ordered by the Court of equity to elect in which suit he would proceed, and he elected to proceed in equity, and withdrew the record at Nisi Prius. An order was afterwards made by the same Court for the defendant to pay the plaintiff his costs at law, which order was, on appeal, rescinded by the Lord Chancellor, who directed that the defendant should be at liberty to proceed at law. A Judge's order having been made for the plaintiff to pay the defendant's costs in the action,—Held, that this order was wrong, for that the plaintiff's election to proceed in equity did not amount to a discontinuance, and the defendant, if entitled to his costs at all, must apply to the Court of equity. *Simpson v. Sadd*, 24 Law J. Rep. (N.S.) C.P. 156; 15 Com. B. Rep. 757.

SUITORS' FEE FUND.

Before the creation of the office of Accountant General of the Court of Chancery in 1725 (by stat. 12 Geo. 1. c. 32.) the ushers of the Court used to re-

ceive and pay the monies of suitors, and to take for their own benefit all profits made of the sums in their hands; but since 1725 such profits belong to the suitors' fund. An usher of the court died in 1702, leaving a large sum due from the office, for which he was accountable, and a sufficient sum being recovered upon his securities to pay off all sums due on his account from the office, he then present demands were paid and a sum invested to meet the remaining debts, and the dividends were by successive orders paid to the usher's representatives not only till 1725, but down to 1853. In May 1854 the then representative of the usher petitioned for payment of the dividends, but the Court refused to make the order, being of opinion that they belonged to the suitors' fund. *Trevor v. Blucke*, 19 Beav. 373.

Order made for the payment out of the Suitors' Fee Fund Account of costs incurred by an officer of the court, in defending legal proceedings instituted against him in consequence of the performance of his duties. *In re Suitors of the High Court of Chancery, ex parte Allen*, 3 Mac. & G. 360.

SURGEON AND APOTHECARY.

Under the 15 & 16 Vict. c. 56, persons who were in business on their own account as chemists and druggists, either before the 18th of February 1843, or the 30th of June 1852, and have obtained a certificate of this fact, and of being qualified for admission as members of the Pharmaceutical Society, which certificate has been approved by the council of the society, are entitled to have their names placed upon the register of pharmaceutical chemists directed to be kept by that act, although they have never been examined under that act. *Regina v. Pharmaceutical Society of Great Britain*, 24 Law J. Rep. (N.S.) Q.B. 177.

TENANT FOR LIFE.

The tenant for life of the income of a testator's property is entitled to all bonuses accruing since his death and paid out of profits. *Murray v. Glassey*, 23 Law J. Rep. (N.S.) Chanc. 126.

An annuity was charged upon an estate which was subject to successive interests. Arrears having accrued in consequence of a deficient fund,—Held, that the arrears were not a primary charge on the interest of the tenant for life, but that they formed a charge on the estate, the interest of which alone must be kept down by the tenant for life. *Playfair v. Cooper* and *Prince v. Cooper*, 23 Law J. Rep. (N.S.) Chanc. 343; 17 Beav. 187.

Where a first tenant for life of an estate subject to a mortgage allowed the interest to fall into arrear, the second tenant for life was held not liable to discharge the arrears out of his income, but they were directed to be raised out of the inheritance. *Sharshaw v. Gibbs*, 23 Law J. Rep. (N.S.) Chanc. 451; Kay, 333.

A second tenant for life having expended money in repairs, which should have been executed by the first tenant for life, was held not entitled to have them charged upon the inheritance, there being no case of wilful waste as against the first tenant for life. *Ibid*.

A remainderman and also his mortgagee may require the tenant for life of an estate to produce the title-deeds to enable them to make the security available. *Davis v. the Earl of Dysart*, 24 Law J. Rep. (N.S.) Chanc. 381; 20 Beav. 405.

If the title of the remainderman is indefinite, and questions remain to be determined respecting it, then neither the remainderman nor the mortgagee will be entitled to the production of the title-deeds in a suit simply for that purpose. *Ibid*.

Trustees allowed a tenant for life to enter into possession, and she paid the interest of incumbrances, and expended money on improvements. The trustees did not call for an account of the rents, and the evidence both as to the income being insufficient to keep down the incumbrances, and as to the improved value of the estate, was unsatisfactory. The tenant for life purchased the property, and the trustees allowed her to deduct from the purchase-money the money expended in paying interest and in improvements:—Held, that she ought not to have been allowed those sums. *Dixon v. Peacock*, 3 Drew. 288.

THELLUSSON ACT.

A testator gave specific legacies of considerable value to the mother of B, and then gave to B a legacy of 5,000*l.* upon her marriage, with the accumulations of interest from his death. More than twenty-one years elapsed after the death of the testator, and B still remained unmarried:—Held, that the accumulation of interest after the expiration of twenty-one years was prohibited by the Thellusson Act, and that the case did not come within the exception contained in the 2nd section. *Morgan v. Morgan*, 20 Law J. Rep. (N.S.) Chanc. 109; 4 De Gex & Sm. 164.

A testator directed that his property should be accumulated for twenty-one years after his death, and then directed that after the said period of twenty-one years, such property should be accumulated during the minority of the person entitled to the expectant vested interest:—Held, that a direction to accumulate was good for only one of any of the four periods allowed by the Thellusson Act, and that the second direction to accumulate in the above proviso was void. *Wilson v. Wilson*, 20 Law J. Rep. (N.S.) Chanc. 365; 1 Sim. N.S. 288.

A testator gave a legacy of 5,000*l.* to A on her marriage, and gave the residue of his personal estate to B for life, with remainder to C, and died in 1825. Upwards of twenty-one years elapsed from the death of the testator, and A was not married. B died in 1838, and the twenty-one years from the death of the testator expired in 1846. At this time the legacy fund consisted, first, of the original legacy; and, secondly, of the interest on the legacy accumulation for the twenty-one years, called "the accumulation fund":—Held, that the interest of the 5,000*l.* accrued and to accrue between 1846 and the death or marriage of A, belonged to C; that the interest on such part of "the accumulation fund" as was produced between 1825 and 1838, accrued and to accrue between 1846 and the death or marriage of A, belonged to the personal representatives of B; and that the interest on the remaining part of

"the accumulation fund" accrued and to accrue in like manner, belonged to C. *Morgan v. Morgan*, 20 Law J. Rep. (N.S.) Chanc. 441; 4 De Gex & Sm. 164.

A testator directed by his will that the income of his property should be applied in payment of the premiums on certain policies of assurance for the lives of his sons, and that their interest in the policies should be settled on marriage on their respective wives and issue:—Held, that such direction did not constitute an accumulation of income within the meaning of the Thellusson Act. *Bassil v. Lister*, 20 Law J. Rep. (N.S.) Chanc. 641; 9 Hare, 177.

A testator gave the residue of his personal estate to trustees, in trust, to invest and accumulate the income from time to time during the life of his niece, and after her death to transfer the securities and accumulations to her children in equal shares, the shares of male children to be vested at twenty-one, and those of females at twenty-one or marriage. Then followed other provisions with regard to what the testator sometimes called the "portions" and sometimes the "shares" of such children, as to maintenance and education, and if the trusts for the benefit of the children of his niece should fail, there were similar trusts for the benefit of the children and issue of other parties, and failing those trusts, for his own next-of-kin. The testator's niece was still living, and had survived the period of twenty-one years from the death of the testator:—Held, that this provision was not one for raising portions within the meaning of the 2nd section of the Thellusson Act: that from the expiration of twenty-one years from the testator's death, the trust for accumulation was void; and that from that time till the death of the niece, the legal personal representative of the testator was entitled to the accumulations. *Bourne v. Buckton*, 21 Law J. Rep. (N.S.) Chanc. 193; 2 Sim. N.S. 91.

By a marriage settlement, dated in 1823, certain family estates at B, of which Lord B. was tenant for life in remainder, were limited to uses for raising 40,000*l.* as portions for the younger children of Lord B. to be payable and divided among such children as Lord B. should appoint; and in default of appointment, equally to be divided among them; and payable at the decease of Lord B. or during the lifetime of Lord B. with his consent. The Bishop of D, the great-uncle of Lord B. by his will, dated in 1825, reciting the settlement of 1823, bequeathed 15,000*l.* to trustees, upon trust to accumulate the same during the life of Lord B. or for such further period as should make up the space of twenty years from the testator's death, in order by means of the accumulated fund to exonerate the family estates of B. from the charge of 40,000*l.* with a proviso that, if before the expiration of the period of accumulation the accumulated fund should be of sufficient amount for answering the purpose aforesaid, then the accumulation should thereupon immediately cease. The testator then gave certain chattels to go as heir-looms with the settled estates, and bequeathed 30,000*l.* for building a mansion-house upon the same. The testator died in 1826. In 1847, being twenty-one years after the testator's death, the accumulated fund amounted only to 35,000*l.*, but at the time of the institution of the suit it amounted to 43,000*l.*:—Held, upon appeal, reversing the decision of the

Court below, that, as Lord B. took an interest under the will, the directions for accumulation were within the 2nd section of the 39 & 40 Geo. 3. c. 98. and valid for the whole period of Lord B.'s life. *Lord Barrington v. Liddell*, 22 Law J. Rep. (n.s.) Chanc. 1; 2 De Gex, M. & G. 480: overruling 10 Hare, 429.

To bring a case within the exception of the 2nd section, it is not necessary that the parent should take an interest in the estate or fund out of which the accumulations are directed; but it is sufficient that he take an interest generally under the instrument directing the accumulations. *Ibid*.

Semble—The exception in the 2nd section as to accumulation for payment of debts, is to be construed as extending to the payment of the debts of a stranger, as well as to the debts of the grantor, settlor, or deviser directing the accumulation. *Ibid*.

A gift to accumulate until a nephew or niece of testatrix shall attain twenty-one years of age, and then to be divided between such nephew or niece, and all the brothers and sisters, is not a portion under the Thellusson Act. Therefore, where such nephew or niece died under twenty-one years of age, and there was not any brother or sister born at the expiration of twenty-one years from the death of the testatrix, the residuary legatee was declared entitled to all the accumulations which accrued due after the expiration of twenty-one years from the death of the testatrix. *Jones v. Maggs*, 22 Law J. Rep. (n.s.) Chanc. 90; 9 Hare, 605.

A, the mother of B, by her will, directed trustees to invest 50,000*l.*, and to pay a competent part of the income for the benefit of B, for his life, and to invest the surplus of the income, to the intent that it might accumulate for the benefit of the persons who, under the will, should be entitled to it; and, after the death of B, to apply the said sum and accumulations, or a competent part, for the children of B. during their minorities, or until their portions should become payable; and, when the children should attain twenty-one, to divide the said sum and accumulations among such children equally. A died in 1831. B. was living;—Held, that the trust for accumulation came within the exception in the 2nd section of the Thellusson Act, and was not void. *Middleton v. Losh*, 22 Law J. Rep. (n.s.) Chanc. 422; 1 Sm. & G. 61.

A testator devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trust, out of the income to pay 40*l.* a year for the maintenance of his son D, until his death or recovery from a mental malady, and to accumulate the rest of the money; and directed them, if his son should so recover, to pay him all the accumulations, and, if his son should die without having so recovered, to apply the accumulations as therein mentioned, and appointed A, B, and C his residuary legatees. The son lived more than twenty-one years after the death of his father:—Held, that the trust for accumulation was void at the end of the twenty-one years from the death of the testator, and that the accumulations arising from the rents after that time belonged to the heir, and not to the residuary legatee. *Wildes v. Davies*, 22 Law J. Rep. (n.s.) Chanc. 495; 1 Sm. & G. 475.

Testator directed his residuary property to be accumulated during the lives of his children named

in the will, and the life of the survivor, and then to be divided equally amongst all his grandchildren, if more than one, and if but one, then all to that one grandchild:—Held, that the shares of the grandchildren were not portions within the 2nd section of the Thellusson Act. *Burt v. Sturt*, 22 Law J. Rep. (n.s.) Chanc. 1071; 10 Hare, 415.

A testator, after disposing of parts of his real and personal estate for the benefit of his granddaughter, F E for life, and after her death for her children at twenty-one, gave all the residue of his real and personal estate to trustees, upon trust to accumulate the income and transfer one moiety of the corpus and accumulations to the children of F E, and the other moiety to the children of his nephew C W C, such shares to be transferred to them at their respective ages of twenty-one years. The twenty-one years after the testator's death expired in 1847. Upon a bill filed by F E, who never had any children,—Held, that the direction to accumulate beyond the twenty-one years from the testator's death was void under the Thellusson Act; that such accumulations were not within the 2nd section of the act; that they were undisposed of; and that at the expiration of the twenty-one years the income of the real estate belonged to the testator's heir-at-law, and the income of the personality to the testator's next-of-kin. *Edwards v. Tuck*, 23 Law J. Rep. (n.s.) Chanc. 204; 3 De Gex, M. & G. 40: affirming 22 Law J. Rep. (n.s.) Chanc. 523.

A testator gave his real and personal estate to trustees, upon trust to pay an annuity to M P S, and, if she should have children, to raise 4,000*l.* for the younger children; and he gave the residue, "with the accumulations thereof, which I hereby direct my said trustee or trustees to place out on mortgages or in government securities," upon trust for the eldest son of M P S on his attaining twenty-one. At the expiration of twenty-one years from the testator's death, M P S was living, but had no child:—Held, (overruling the decision below), that this was an express direction to accumulate within the meaning of the Thellusson Act, 39 & 40 Geo. 3. c. 98. *Tench v. Cheese*, 24 Law J. Rep. (n.s.) Chanc. 716; 19 Beav. 3.

Semble—If a testator directs that to be done which, as by a necessary consequence, leads to an indefinite accumulation, he must, within the meaning of the statute, be taken to have directed accumulation. *Ibid*.

TITHES.

- (A) MODUS, EXEMPTION AND COMPOSITION.
- (B) COMMUTATION ACTS.
 - (a) *Award*.
 - (b) *Rent-charge*.
 - (c) *Merger*.
- (C) STATUTE OF LIMITATIONS.

(A) MODUS, EXEMPTION AND COMPOSITION.

For a time longer than that prescribed by the Tithe Commutation Act, 2 & 3 Will. 4. c. 100, an annual payment of 20*l.* had been paid to the rectors of the parish of W by the occupier of the land in R, a hamlet of that parish. This appeared from a

number of tithes from 1579 to 1823, and an account-book kept by a former incumbent, of the receipts and payments in respect of the parish, between the years 1767 and 1803. In many of the entries glebe lands in R were referred to, and the 20l. was said to be for the glebe and tithes, and upon a feigned issue under the Tithe Commutation Act, the jury found that the 20l. had been paid quarterly during the requisite statutable period, partly for tithe and partly for glebe, and not for tithe alone:—Held, that upon such finding the payment of 20l. could not be considered a valid modus in discharge of the tithes of R, within the 2 & 3 Will. 4. c. 100; nor could it be treated as having originated in an arrangement made before the disabling statutes, whereby such payment was agreed to be made in respect of the glebe and tithes, and the incumbent, with the consent of the patron and ordinary, alienated the glebe lands, and thus upheld as a valid discharge of the tithes; inasmuch as the facts shewed that subsequent to the disabling statutes, the glebe land remained in the ownership of the incumbent. *Young v. the Master, Fellows and Scholars of Clare Hall*, 21 Law J. Rep. (N.S.) Q.B. 12; 17 Q.B. Rep. 529.

Held, also, that the account-book of the former incumbent had been properly admitted in evidence. *Ibid.*

The parish of Prestbury contained twenty-eight townships, in twenty-four of which the lay rector was entitled to the tithes of corn and hay. In debt by the vicar for the treble value of hay-tithe not set out by the defendant, it was admitted that the vicar was entitled to the tithe of corn in the four townships, although no formal endowment was proved. A series of tithes was produced, between 1696 and 1778, in which the vicar was stated to be entitled to the tithes both of corn and hay. No payment or claim of hay-tithe was proved prior to 1808. In that year the vicar had claimed hay-tithe, which was paid by the occupiers of three of the townships, but in the fourth the payments were made subject to the result of a case laid before counsel. These payments were afterwards returned, but there was one unconditional payment. The lay rector had never received or claimed the hay-tithe. The *Valor Ecclesiasticus* of the 26 Hen. 8. stated the vicarage to be endowed with the tithe of corn, but did not mention hay-tithe:—Held, that there was evidence to warrant the jury in finding that the vicarage was endowed with the hay-tithe. Held, also, that the burthen of proof with respect to non-payment was upon the defendant, and that he had failed to establish a non-payment for the period prescribed by the 2 & 3 Will. 4. c. 100. *Pearson v. Beck*, 22 Law J. Rep. (N.S.) Exch. 213; 8 Exch. Rep. 452.

Some proceedings taken before the Tithe Commissioners, after the commencement of the action, as to the commutation of tithes for the four townships were given in evidence, to shew that exemption by non-payment was not then claimed:—Held, that the evidence was admissible, although entitled to very little weight. *Ibid.*

A rector of a parish in the city of London received for some years, without objection, a fixed sum by way of tithes of particular premises, and then filed his bill for an account:—Held, that the receipt of such fixed sum, though less than the annual

value, did not necessarily imply a composition; and that much stronger evidence would be required to establish such a payment as a composition than in the ordinary case of a money payment in lieu of tithes in kind. *Letts v. the London Corn Exchange Co.*, 21 Law J. Rep. (N.S.) Chanc. 684; 1 De Gex, M. & G. 398.

Quære—whether the rule requiring six months' notice for determining an ordinary composition for tithes in kind is applicable to the case of a composition for a money payment in lieu of tithes. *Ibid.*

Form of reference to the Master to take an account of tithes due under the 37 Hen. 8. c. 12, where the rent or annual value of the buildings and premises is increased by means of implements or fittings not titheable let or used therewith. *Ibid.*

(B) COMMUTATION ACTS.

(a) Award.

Under the provisions of the Tithe Commutation Act, 6 & 7 Will. 4. c. 71, the Tithe Commissioners have no power to decide the title to tithes as between rival claimants. *Shepherd v. Marquis of Londonderry*, 21 Law J. Rep. (N.S.) Q.B. 204; 18 Q.B. Rep. 145.

Where at the time of the making an award of a rent-charge in lieu of certain tithes under the act, a suit in equity was pending for an account of the same tithes, in which the question was as to the title of the claimant to receive the tithes,—Held, that the validity of the award was not thereby affected, such suit not being one "touching the right to any tithes," and "whereby the making of the award shall be hindered" within the meaning of the 45th section of the 6 & 7 Will. 4. c. 71. *Ibid.*

A writ of mandamus to the Tithe Commissioners stated that there were certain differences between certain landowners of the parish of H and the vicar, viz., as to old inclosed lands, whether they were wholly exempt from the render of great tithes and tithes of wool and lamb, or, if not exempt, whether they were subject only to the payment of 1s. per acre yearly, to wit, to the impropiator of the said parish for and in lieu of great tithes and tithes of lamb and wool; and as to new inclosed lands, whether they were wholly exempt from great tithes and tithes of wool and lamb; and commanded the Commissioners to determine the differences so pending. The return stated a meeting before the assistant Commissioner, at which the vicar claimed the tithes of wool and lamb, against which the agent for the impropiators protested, and the agent of the landowners contended that by a decree of the Court of Chancery in 1699 all the tithes of the parish had been commuted; that a further meeting was afterwards held for the purpose of determining certain differences whereby the making the award was alleged to be hindered, at which the vicar proposed that a feigned issue should be tried as to the right to the tithes of lamb and wool, the Commissioner first awarding a rent-charge in lieu of them to the party entitled; that the landowners insisted that those tithes were extinguished by an agreement and decree of the Court of Chancery, and that a difference was existing between the landowners, vicar and impropiator, and required the Commissioner to decide it; that it was arranged that if the parties would not try a feigned issue as to the title to the tithes of lamb and wool, the land-

owners should be at liberty to apply for a mandamus to compel the Commissioners to try the question whether the tithes of lamb and wool belonged to the vicar or to the landowners as impropiators of their respective lands, being a question of title. The return then stated a bill in Chancery filed by the vicar in 1812, against certain landowners for subtraction of tithes, in which a question was raised whether the lands were ever liable to payment of tithes of lamb and wool to the vicar, and a decree of the Court of Chancery in 1817, by which it appeared that the defendants set up an agreement of 1697, confirmed by a decree of the Court, and a subsequent agreement of the 16th of September 1707, as binding on the vicar, which he denied to be binding on him, and by which decree of 1817 the Court ordered the Master to take account of the tithes of lamb and wool as due to the vicar, dismissing his bill as to tithes of hay. The return then stated a bill in Chancery in the year 1819, by the impropiators against the vicar for the tithes of wool and lamb, which bill, as well as a petition for leave to file a supplemental bill, was dismissed. It then stated the perception of tithes of lamb and wool by the vicar, and that the Tithe Commissioners, considering that the above decrees had established the right of the vicar, in answer to a requisition from the landowners, declined to confirm the invalid agreements of 1697 and 1707, or to decide the question of title; that in 1845, a mandamus to compel them to confirm the agreements and to decide the existing differences issued, upon demurrer to the return to which judgment was given for the Commissioners, and that the assistant Commissioner in February 1850 made his final award, but the confirmation of it was delayed, in order to give the landowners an opportunity to make any further claim, and notice was given to the landowners of their intention to confirm the award. The return then set out the award, which found all the titheable lands in the parish subject to tithes in kind, stated who were the impropiators of the great tithes, that the vicar was in possession of the tithes of lamb and wool and entitled to the residue of the tithes, and awarded rent-charges to the impropiators and to the vicar for the time being, or party entitled, in lieu of tithes of lamb and wool, and another rent-charge to the vicar for other tithes. Upon demurrer to the return,—Held, that the question raised by the whole record was purely one of title between the impropiators and the vicar, and that no difference existed between the vicar and landowners by which the making of the award was hindered, nor any which the Commissioners had power to hear and determine. *Regina v. the Tithe Commissioners for England and Wales*, 21 Law J. Rep. (N.S.) Q.B. 208; 18 Q.B. Rep. 156.

Semble—that the writ itself shewed the dispute to be one as to title. *Ibid*.

In a suit for an account of tithes, the defendant set up an award, which declared that a certain sum should be paid in lieu of tithes, provided the whole lands were subject to tithes; but if only subject to tithes according to a specified terrier, then a different sum was awarded. The defendant's counsel also set up at the hearing the statute 53 Geo. 3. c. 127. as a bar to the recovery of tithes for more than six years. The statute was not pleaded by the answer of the defendant:—Held, that the award, not being

final, was void, but that the plaintiff was only entitled to an account of tithes for six years before the filing of the bill. *Goode v. Waters*, 20 Law J. Rep. (N.S.) Chanc. 72.

(b) *Rent-charge.*

A declaration stated that the plaintiff was lessee of a farm under the defendant, and that after the determination of the lease a sum of money became due and payable to the Ecclesiastical Commissioners for a tithe rent-charge upon the said farm, which the defendant, as owner, was liable to pay, but refused to do so, and that in consequence a distress was put in, and a stack of the plaintiff's, which was lawfully on the farm, was seized and sold, and the plaintiff claimed to be indemnified against the seizure and sale. Plea, that the defendant was not liable to pay the said tithe rent-charge as alleged, on which issue was joined. It was proved that the plaintiff had in his lease covenanted to pay the tithe rent-charge and had a right of onstand for his ricks, &c. till the May after the end of his term. The term expired at Michaelmas 1852, and the tithe rent-charge in question became payable on the 1st of October following, but by the custom of the country the tenant was bound to pay the tithe rent-charge falling due immediately after the end of his tenancy:—Held, that on this issue the defendant was entitled to the verdict, as the 6 & 7 Will. 4. c. 71. s. 67. creates no personal liability upon the owner of the lands charged with the tithe rent. *Griffenhoofe v. Daubuz*, 24 Law J. Rep. (N.S.) Q.B. 20.

(c) *Merger.*

The enactment of the Tithe Commutation Amendment Act (9 & 10 Vict. c. 73. s. 19), that every instrument purporting to merge any tithes, and made with the consent of the Tithe Commissioners, shall be absolutely confirmed and made valid, both at law and in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the tithe, but operates as well where such person has no estate in the tithe, as where his estate is insufficient to effect the merger. *Walker v. Bentley*, 9 Hare, 629.

The intention of the Tithe Commutation Acts is that the lands on which the apportionment of the tithe in each parish is cast, and these lands only shall be liable in respect of the tithe payable for any lands in the parish; and that lands on which no apportionment is cast shall not be liable to tithe. *Ibid*.

Lands which on the agreement and apportionment under the Tithe Commutation Acts (confirmed by the Tithe Commissioners) are treated as free from tithe, cannot be afterwards made subject to tithe. *Ibid*.

The intention of the legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had been made with the consent of the Tithe Commissioners, leaving the parties affected by an erroneous declaration to their remedy against the party making it; and such being the intention the merger is effected, although the sanction of the Commissioners has been erroneously given. *Ibid*.

(C) STATUTE OF LIMITATIONS.

The act, 2 & 3 Will. 4. c. 100, is unaffected by the provisions of the act 3 & 4 Will. 4. c. 27; the

interpretation clause of the latter act, although enacting that the word "land" shall in its meaning extend to tithes, has reference to an estate in tithes, and not to tithes as a chattel, and the 2nd section therefore does not embrace the case of a tender of tithes as a chattel by the person bound to pay to the tithe-owner. *The Dean of Ely v. Bliss*, 2 De Gex, M. & G. 459.

TORQUAY MARKET ACT.

The Torquay Market Act (15 & 16 Vict. c. cxxxviii.) enables the market company to erect a market-place, which was to be the only market-place in the parish of T, and authorizes the company to take tolls and stallages from persons using any shed or stall or convenience in the market-place, or bring commodities there for sale. Section 31. provides that any person, other than a licensed hawk or selling fish by wholesale from any boat alongside the quay, who should sell or expose for sale at any place within the parish of T (other than in the market-place or in his own house or shop) any article in respect of which any stallage or toll is authorized to be taken in the market-place, or for the sale or exposure of which in the market-place any shed, stall, &c. is appropriated, shall for every such offence forfeit and pay to the company a sum not exceeding 40s. :—Held, that this penalty could only be sued for by the market company, and that a conviction proceeding upon the information of any person not authorized by them was bad. *Regina v. Hicks*, 24 Law J. Rep. (N.S.) M.C. 94.

TREES.

Where prisoners were indicted for maliciously damaging trees growing in a hedge to an amount exceeding 5l., it was proved that they had injured trees to an amount of 1l., and that to repair the injury it was necessary to stub up the old hedge; and further, that putting in and protecting a new hedge would cost, including the 1l. for injury to the trees, a sum exceeding 5l.—Held, that there was no evidence of injury to the trees to the amount of 5l. *Regina v. Whiteman*, 23 Law J. Rep. (N.S.) M.C. 120.

TRESPASS.

[When it may be waived, see MONEY HAD AND RECEIVED.]

- (A) WHEN MAINTAINABLE.
- (B) PLEADINGS.
- (C) DAMAGES.

(A) WHEN MAINTAINABLE.

A party having mortgaged his premises to the plaintiff in 1846, and being allowed to remain in possession, let them in 1848 to the defendant. In October 1849, the plaintiff, without having made an entry on the premises, or having been otherwise in possession, brought ejectment against the defendant, who gave his consent to a Judge's order dated the 31st of October. The order directed proceedings to

be stayed till the 15th of November then next, the tenant in possession undertaking on that day to give up possession to the plaintiff, and that in default the plaintiff should be at liberty to sign final judgment and issue execution against the tenant for the costs of such judgment, execution, writ of possession, costs of levy, &c. On the 15th of November the plaintiff first entered into possession of the premises and brought an action for mesne profits accrued between November 1848 and the 15th of November 1849 :—Held, that the plaintiff not having been in possession of the premises prior to the 15th of November could not maintain the action, his entry on that day not having relation back to his title as mortgagee; and that the Judge's order made no difference in the case. *Litchfield v. Ready*, 20 Law J. Rep. (N.S.) Exch. 51; 5 Exch. Rep. 939.

The doctrine of entry by relation applies to the case of disseisor and disseisee only. *Ibid.*

C having mortgaged a piece of land to the plaintiff, the defendants, a railway company, afterwards occupied it by laying their rails upon it, and being subsequently called upon by the plaintiff for compensation, negotiated with him in respect thereof. The plaintiff had never been in possession of the land, but gave notice of the mortgage to the defendants, and then brought an action for use and occupation. The Judge directed the jury that the plaintiff was in a condition to waive the trespass, in respect of the occupation of the land by the railway company, and to bring an action for use and occupation :—Held, first, that there was evidence for the jury of the defendants having held the land on the terms of paying for it. Secondly, that the plaintiff being a mortgagee out of possession, and not having entered upon the land previously to the trespass, nor having a judgment by default, or a verdict in ejectment in his favour, was not entitled to maintain an action of trespass against the defendants. *Turner v. Cameron's Coalbrook Steam Coal, and Swansea and Loughor Rail. Co.*, 20 Law J. Rep. (N.S.) Exch. 71; 5 Exch. Rep. 932.

Quere—Supposing the plaintiff to have been in possession of the land, and the defendants to have trespassed thereon and occupied it to his exclusion for some time, whether he would be entitled to recover for use and occupation on the principle that he might waive the trespass and recover in assumpsit. *Ibid.*

If a servant of a corporation aggregate commit an assault by the authority of the corporation an action of trespass for assault and battery may be maintained against the corporation. It is not necessary that the servant should be authorized to do the act by instrument under the seal of the corporation. *The Eastern Counties Rail. Co. v. Broom* (in error), 20 Law J. Rep. (N.S.) Exch. 196; 6 Exch. Rep. 314.

If an assault be committed on behalf and for the benefit of a corporation aggregate, the corporation may ratify the act of the agent, and if they do so they render themselves liable to an action of trespass for the assault. *Ibid.*

If a servant of a railway company, acting on behalf of the company, assault and imprison a passenger to compel him to pay his fare for riding in the carriages of the company, the act of the servant is one which may be for the benefit of the company, and may be ratified by them. *Ibid.*

By the 11 & 12 Vict. c. 44. s. 1. it is enacted, that every action against a Justice for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, shall be an action on the case, and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause. Section 2. provides, that for any act done by a Justice in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby or by any act done under any conviction, &c., issued by such Justice in any such matter, may maintain an action against such Justice in the same form and in the same case as he might have done before the passing of the act:—Held, that the two sections must be read together, and that section 2. applies only to those cases where the act, in respect of which the action is brought against the Justice, is itself an excess of jurisdiction. *Barton v. Bricknell*, 20 Law J. Rep. (n.s.) M.C. 1; 13 Q.B. Rep. 393.

Therefore, where a Justice convicted the plaintiff in a penalty, and adjudged that it should be levied by distress and sale, but exceeded his jurisdiction in ordering the plaintiff in default of payment to be set in the stocks, which however was never done, but the penalty was levied by distress,—it was held, that an action of trespass for seizing the goods under the distress was not within section 2, and was not maintainable by reason of section 1. *Ibid*.

In trespass, three defendants, who were execution creditors, pleaded, first, not guilty, and, secondly, not possessed; and other defendants, who were bailiffs of the county court, pleaded, first, not guilty; secondly, not possessed; thirdly, no notice of action; fourthly, that the action was not commenced within three calendar months. It appeared that R had made a deed of assignment to the plaintiff of the goods in a certain house, to hold upon trust to permit and suffer R to hold the goods and premises until demand of payment of money which should become due, and with further trusts to sell if the money should not be paid. The execution creditors obtained judgment against R in the county court, and execution issued, and the goods mentioned in the assignment were seized. The plaintiff proved the seizure and sale, by the production of the writ, with the levy indorsed by the bailiff. The jury found that the assignment was not *bonâ fide*, that the bailiffs had been indemnified by the other defendants, and that the bailiffs acted *bonâ fide* believing that they were acting under the authority of the County Courts Act. A verdict was entered for the plaintiff on the first issue, for all the defendants on the second, and for the defendants who were bailiffs on the third and fourth issues:—Held, that a right to the present possession of the goods passed under the assignment, sufficient to entitle the plaintiff to maintain trespass. That where a sheriff or bailiff sets up a claim to goods taken in execution by him as against a third party, he must shew a judgment against the execution creditor, and that his production of the writ of execution alone is not sufficient for this purpose. That the question was properly left to the jury whether the bailiffs acted *bonâ fide* believing they were authorized by the County Courts Act; and that the circumstance of the indemnity being given to the bailiffs did not necessarily negative the *bonâ fides* of

their conduct. *White v. Morris*, 21 Law J. Rep. (n.s.) C.P. 185; 11 Com. B. Rep. 1015.

The entry of an heir relates back to the time of the right of entry, so as to support an action against a wrongdoer for a trespass committed after the accrual of the right and before actual entry. Therefore, an infant copyholder after actual admission may maintain trespass against the lord for wrongfully retaining possession after payment of the fine due on admission, and demand of admission, and before actual admission. *Barnett v. Earl of Guildford*, 24 Law J. Rep. (n.s.) Exch. 281; 11 Exch. Rep. 19.

(B) PLEADINGS.

In trespass for assault and false imprisonment, the defendant justified under an order made by the Judge of the Sheriff's Court of London for committing the plaintiff to prison for non-payment of an amount recovered against him in that court, and ordered to be paid by instalments. The plea first stated the various proceedings in the cause and court necessary to give the Judge jurisdiction, except that it did not allege that the plaintiff had been summoned to shew cause against the order of commitment being made, but it stated that the Judge duly and according to the form of the statute made the order of commitment. The replication averred that the Judge did not order the plaintiff to be committed to prison in manner and form as alleged in the plea:—Held, that this traverse only put in issue the fact of the order of commitment being made, and not its validity; and that it did not put in issue the question whether the plaintiff had been duly summoned. *Buchanan v. Kinning* (in error), 20 Law J. Rep. (n.s.) C.P. 252.

A declaration in trespass sufficiently describes the *locus in quo* by name, within the Reg. Gen. Hil. term, 4 Will. 4, by stating it to consist of "certain lands of the plaintiff covered with water, being the bed and channel of the river Tawe, and under the same, in the several parishes of L and L, in the county of G." *The Duke of Beaufort v. Vivian*, 21 Law J. Rep. (n.s.) Exch. 204; 7 Exch. Rep. 580.

In trespass to land, the *locus in quo* ought to be designated by abutments, or other description, as it stood at the time of the trespass, and not at the time of the declaration. *Humfrey v. the London and North-Western Rail. Co.*, 22 Law J. Rep. (n.s.) Exch. 149; 7 Exch. Rep. 325.

In an action by a reversioner, the *locus in quo* was described in the declaration as "abutment on the south and east on a close in the occupation and possession of the defendants." The defendants (a railway company) pleaded that they took possession of part of the said close, abutting on the south on the fence of their railway, under the provisions of the 8 & 9 Vict. c. 20. ss. 32, 33, which was the trespass complained of. It appeared at the trial that, at the time the trespass was committed, the close in question abutted on the fence of the railway, but that afterwards the defendants took possession of and purchased, under the provisions of the above act, a small part of it adjoining the railway, so that the plaintiff's description was correct at the time of the declaration, but not at the time of the trespass:—Held, that the plaintiff, not having new assigned, was not entitled to recover. *Ibid*.

(C) DAMAGES.

An assignment was made by B of all his goods and chattels to secure a debt, subject to a proviso in the deed of assignment, that everything therein contained should cease and be void upon payment of the debt on a day named in the deed, or at such earlier day as the parties to whom the assignment was made should appoint for payment, by a notice in writing twenty-four hours before the appointed day, interest in the mean time to be paid at certain periods named. There was also a stipulation that until default in payment of the debt or the interest, at the appointed days and times, contrary to the tenour and effect of the above proviso, it should be lawful for B to hold, use and possess the said goods and chattels without any manner of hindrance or disturbance:—Held, that B was entitled to maintain an action of trespass in respect of a seizure of the goods and chattels by the assignees, a sufficient notice not having been given as required by the above proviso; but that the proper measure of damages in the action was not the value of the goods seized, but B's limited interest in the goods at the time. *Brierly v. Kendall*, 21 Law J. Rep. (n.s.) Q.B. 161; 17 Q.B. Rep. 937.

—Trespass for breaking the plaintiff's house and seizing his goods. The defendants were the sheriffs of Middlesex, and Slowman a bailiff of the sheriffs. Slowman, severing from the other defendants, pleaded not guilty, and a justification under a *fi. fa.* upon a judgment recovered against the plaintiff, and a warrant from the sheriff to him and another bailiff. Replication, alleging a prior warrant from the sheriff to E J, another bailiff, a seizure of the plaintiff's goods under that warrant, and thereupon payment to and acceptance by the sheriff of the full amount in satisfaction of the writ. Rejoinder, that E J did not seize the goods, nor did the sheriff accept, *modo et forma*. On the trial, it appeared that under the warrant to E J, a seizure was made by E J's son, by the authority of E J. Afterwards, and before any sale, the plaintiff's solicitor went to the office of E J, and being unable to see E J, who was ill, he there paid the full amount in satisfaction of the execution to the son, who thereupon, in E J's name, withdrew the man whom he had left in possession, and gave notice to the execution creditor that the money was ready for him at his father's office. There was contradictory evidence as to the payment over of the amount to E J, who died on the same day, and the money was not paid to the execution creditor. The other defendants, as sheriffs, afterwards issued a fresh warrant to Slowman and Gover, another bailiff, treating the first warrant as a nullity; and the plaintiff's goods were again seized under it, and a man left in possession for several days by Gover, Slowman taking no part in the seizure. The jury did not agree as to whether the money had been paid over to E J, but they were of opinion that the son executed the warrant by the direction of E J; that he had authority from E J to act for him in his office, and that the money had been received under that authority. The learned Judge directed the jury that, being of that opinion, they might find a payment of the money to the sheriff, and thereupon a verdict was found for the plaintiff, damages 400*l.*:—Held, that there was evidence from which the

jury might infer that Slowman was guilty of committing the trespass. Secondly, that there was sufficient evidence of an execution *de facto* under the warrant to E J, and a payment to, and receipt by, the sheriff in satisfaction of it; and that any irregularity in executing the warrant to E J could not be taken advantage of by the sheriff. Thirdly, that as against the sheriff, the damages, under the circumstances, could not be considered excessive; but that as against Slowman they were excessive, except upon the doctrine that, in an action of tort, the measure of damages is the sum which ought to be awarded against the most guilty of several defendants; and as to the soundness of such a doctrine and its application, *quære*. *Gregory v. Cotterell*, 22 Law J. Rep. (n.s.) Q.B. 217.

TROVER.

- (A) WHEN MAINTAINABLE.
- (B) CONVERSION.
- (C) PLEADINGS AND EVIDENCE.

(A) WHEN MAINTAINABLE.

Judgment having been obtained against the plaintiff in 1844, he executed a bill of sale of his plate to M to defeat the execution. M afterwards took an assignment of the judgment, and in 1848 issued an execution against the plaintiff and seized his goods, whereupon the latter, for the purpose of defeating the execution of M, deposited the plate with the defendant:—Held, in an action of trover for the plate, that the defendant was entitled to set up the right of M to it. *Cheesman v. Excell*, or *Exall*, 20 Law J. Rep. (n.s.) Exch. 209; 6 Exch. Rep. 341.

A person entering a shop found on the floor a bundle of bank notes which had been accidentally dropped there by a stranger. The party who lost them could not be found:—Held, that, as against every one but the true owner, the property in the notes belonged to the finder and not to the owner of the shop, notwithstanding that the finder had immediately on picking up the bundle handed it over to the latter, with a view to its being restored to the true owner if he should return, and the owner of the shop had advertised the finding in the newspapers, the finder not having intended to waive his title, and having before he demanded the notes back, offered to repay the expense of the advertisements, and to indemnify the shopkeeper against any claim. *Bridges v. Hawkesworth*, 21 Law J. Rep. (n.s.) Q.B. 75.

Case for injury to the reversion in removing a granary, a threshing machine and certain rick stables, which were alleged to be affixed to, and forming part of, closes in the occupation of J M as tenant to the plaintiff, with a count in trover for converting the same things. Pleas—Not guilty; a denial that the closes were in the occupation of J M, and not possessed. The erections in question appeared to have been put up by the defendant's father, who was owner in fee of the farm, and that the farm and lands had been conveyed by the defendant and other devisees under his father's will to the plaintiff by indenture, executed by the defendant. The defendant was in occupation at the time of the conveyance under a demise from himself and his co-devisees.

The plaintiff had demised the farm to J M, who was in occupation, under that demise, at the time when the defendant made the removal:—Held, that the land, and everything attached to it, passed by the deed, and that the defendant had no tenant-right, either under a custom to that effect or otherwise, to remove the articles in question. *Wiltshire v. Cottrell*, 22 Law J. Rep. (N.S.) Q.B. 177; 1 E. & B. 674.

The granary was a wooden building, resting by its mere weight on saddles:—Held, that it was a chattel, and not part of the land, or so affixed to the freehold that its removal could be an injury to the reversionary estate: that it did not pass to the plaintiff under the word "fixtures" as used in the conveyance; and that it could not be recovered in trover, as the right of possession of it was in J M the tenant, and not in the plaintiff. *Ibid*.

In order to take fixtures out of the general rule which makes them the property of the owner of the freehold, it is necessary to bring them clearly within some of the established exceptions. *Wilde v. Waters*, 24 Law J. Rep. (N.S.) C.P. 193; 16 Com. B. Rep. 637.

A ladder fixed to the ground, and to a beam above, and which was the only means of access to a room above; a crane nailed at top and bottom to keep it in its place, but not let into the wall; and a bench nailed to the wall, were held not to be goods and chattels for which trover would lie after the expiration of the term. *Ibid*.

A mere refusal by the defendant to deliver to the plaintiff a chattel of his which is on the defendant's premises, is not evidence of a conversion; but a denial by the defendant of the plaintiff's right to it, or a refusal by which the defendant exercises a dominion over the chattel, is. *Ibid*.

Quere.—How an outgoing tenant is to get possession of a chattel which he has left on the premises after the expiration of his term, the incoming tenant refusing to allow him to enter on the premises. *Ibid*.

Trover for sand, ore, &c. A party claiming ownership in a field granted to the plaintiff a parol licence to search therein for minerals. The plaintiff, acting under this licence, dug pits in the field and threw up sand and gravel, mixed with ore, which the defendant took away, professing to act under the authority of a third party. Before the defendant took away the sand, gravel and ore, the party who gave the plaintiff the parol licence granted him a similar licence by deed:—Held, that, under these circumstances the plaintiff was entitled to maintain the action for the gravel, sand and ore, as against the defendant, who was a wrong-doer. *Northam v. Bowden*, 24 Law J. Rep. (N.S.) Exch. 237; 11 Exch. Rep. 70.

(B) CONVERSION.

A having lawfully received certain bills of exchange from B, a trader, C came to him, and stating that he was acting on behalf of Messrs. Y and Co. creditors of B, demanded the bills from A, and upon his refusal, said that B was about to be made a bankrupt, that the bills must be given up, and that if they were not A would be compelled to give them up by the Commissioner, and the expense would cost A 200l., and the Commissioner would be very

angry. A was at the time ill in bed, and being greatly alarmed gave up the bills:—Held, that this was no conversion by C, as trespass would not have been maintainable for the taking under these circumstances. *Powell v. Hoyland*, 20 Law J. Rep. (N.S.) Exch. 82; 6 Exch. Rep. 67.

It appeared, however, that afterwards, and before C had handed the bills to his principals, he was informed that the plaintiff was entitled to the bills, and possession of them was demanded on behalf of the plaintiff, but notwithstanding this, he delivered them to Messrs. Y & Co.:—Held, that this was a conversion. *Ibid*.

There is no conversion of goods for which trover will lie, unless there be a repudiation of the right of the owner, or the exercise of a dominion over them inconsistent with that right. *Heald v. Carey*, 21 Law J. Rep. (N.S.) C.P. 97; 11 Com. B. Rep. 977.

H, residing in Paris, despatched seven cases of goods by a railway, *via* Dunkirk to London, deliverable to N or order. One of the cases arrived at Dunkirk damaged. R, the agent of the railway and of the Dunkirk and London steamboats in connexion with it, had the damaged case inspected according to the law of France, and consigned it to the defendant, the broker for the steamboats in London, to hold at the disposal of N or order. N accepted a bill of lading for the case. On its arrival at London, no one having claimed the case within the time specified in the bill of lading, the defendant paid the duty on it, and removed it into a warehouse of B, and B removed it into another of his warehouses, without the defendant's knowledge. There it was burned by an accidental fire:—Held, that, whether the defendant was bound to pay, or justified in paying the duty, or not, there was no conversion by him:—Held, *per Maule, J.*, that there was no negligence on the part of the defendant. *Ibid*.

Case. Declaration that the plaintiff was possessed of a messuage, wharf and premises at Milton, in the county of Kent, abutting on a public navigable river, to wit, the Thames, and in a certain part of the said river called the Blockhouse Dock; that in this messuage, &c. he carried on the business of a block-maker; that the occupiers of the same had always for sixty years previous to the commencement of the suit been entitled to have access to and from the said river and the said Blockhouse Dock, and to land their timber, &c. at the said Blockhouse Dock, and that the defendant obstructed the said Blockhouse Dock by placing divers piles, &c. thereon, and deprived the plaintiff of free access thereto. The venue in the margin of the declaration was London. Plea.—Not guilty:—Held, first, that whether it was a local action or not (and *semble* it was), there was nothing in the declaration which made it necessary to prove that the cause of action arose in the city of London. *Simmons v. Lillystone*, 22 Law J. Rep. (N.S.) Exch. 217; 8 Exch. Rep. 431.

The second count was in trover for the conversion of certain timber. Pleas, not guilty; and, sixthly, a justification, that the defendant was possessed of a close and was digging a saw-pit therein, and because the goods in the second count mentioned were put and placed on the said close by the plaintiff, without the leave or licence of the defendant, and were so

buried therein that the said defendant could not make the said saw-pit without a little cutting and destroying the said goods, he, the defendant, did necessarily a little cut and destroy the same, &c. Replication, *de injuriâ*. At the trial it appeared that several spars used for bowsprits were placed on the plaintiff's land by the defendant; that the plaintiff covered them over with earth, and then directed a pit to be dug, and in order to dig the pit the spars were unavoidably cut asunder. The premises being close to the River Thames, some pieces of the spars were accidentally washed away:—Held, first, that there was no conversion of the timber; secondly, that it was a misdirection to leave to the jury the intention of the defendant in making the pit, for, assuming that the timber was wrongfully put on his land by the plaintiff, the defendant would be justified in cutting it, if he could not make the pit without doing so, whatever his intention might be; thirdly, that the plea was bad for not stating that the timber was buried by the plaintiff. *Ibid*.

(C) PLEADING AND EVIDENCE.

The plea of Not Guilty in trover puts in issue not merely the conversion in fact, but the wrongful conversion. The case of *Stancilffe v. Hardwicke*, 2 Cr. M. & R. 1; s. c. 4 Law J. Rep. (N.S.) Exch. 161, is in that respect overruled. *Young v. Cooper*, 20 Law J. Rep. (N.S.) Exch. 136; 6 Exch. Rep. 259.

In trover the plea of Not Guilty admits the property of the plaintiff. Therefore, evidence that the chattels had been given to the plaintiff by the defendants upon a certain condition, which had not been performed, and that the defendants retook them, is not admissible under that plea. *Young v. Cooper*, *supra*, 136, explained. *Jones v. Davies*, 20 Law J. Rep. (N.S.) Exch. 433; 6 Exch. Rep. 663.

Declaration for money had and received; plea, that the debt was for money due from the defendant jointly with A, and that the plaintiff had already sued A in trover and recovered judgment against him for 100*l.*, and that the causes of action for which the plaintiff then recovered judgment included all the present causes of action. The evidence was, that the defendant and A had wrongfully converted the plaintiff's goods by selling them, but that the defendant alone had received the proceeds, 150*l.*; that the plaintiff had sued A in trover, and recovered 100*l.* as the value of the goods at the time of the conversion. The plea was then amended by striking out the allegation that the debt was for money due from the defendant and A jointly, and substituting that the money sued for was money received as the proceeds of the sale of the goods in the declaration mentioned:—Held, first, that the amendment was right, and was rightly made without imposing on the defendant the costs of the day; and secondly, that the plea, as amended, was an answer to the plaintiff's claim for the whole proceeds of the sale. *Buckland v. Johnson*, 23 Law J. Rep. (N.S.) C.P. 204; 15 Com. B. Rep. 145.

Semble, per *Jervis, C.J.*, that judgment recovered in trover for the conversion of goods vests the property in the goods in the defendant from the time of the conversion. *Ibid*.

TRUST AND TRUSTEE.

(A) TRUST.

- (a) *Constitution.*
- (b) *Construction.*
- (c) *Breach of.*

(B) TRUSTEE.

- (a) *Appointment of.*
- (b) *Removal and Change.*
- (c) *Liability and Disability.*
- (d) *Powers, Rights and Duties.*
- (e) *Investment by.*
- (f) *Disclaimer.*
- (g) *Release of.*

(C) TRUSTEES' RELIEF ACT.

- (a) *Construction of.*
- (b) *Practice under.*

(D) CESTUI QUE TRUST.

(E) TRUSTEE AND MORTGAGEE ACTS.

- (a) *Construction of.*
- (b) *Practice under.*

(A) TRUST.

(a) *Constitution.*

[*In re Bloye's Trust*, 6 Law J. Dig. 701, 705: affirmed *Lewis v. Hillman*, 3 H.L. Cas. 607.]

A testatrix, by her will, gave 2,000*l.* stock to two trustees, in trust, to pay the dividends to the plaintiff for her separate use; and after making her will, she expressed her intention of giving a further sum of 2,000*l.* to the plaintiff upon the same trusts. One trustee died during the life of the testatrix; the surviving trustee transferred two separate sums of 2,000*l.* stock, at two different times, into her own name, and gave the plaintiff a power of attorney to receive the dividends upon both sums. There was evidence to prove that the trustee knew of the desire of the testatrix to give the second sum of 2,000*l.* to the plaintiff, and that the trustee had expressed her intention of carrying that desire into effect. The trustee afterwards became of unsound mind:—Held, that the second sum of 2,000*l.* so transferred by the trustee was sufficiently impressed with a trust in favour of the plaintiff. *Gray v. Gray*, 21 Law J. Rep. (N.S.) Chanc. 745; 2 Sim. N.S. 273.

A direction in writing, signed by A W, who was entitled to a sum in consols, and also to real estates, requesting M T (the person in whose name the stock was standing, and to whom the legal estate in the land had been conveyed) to hold it after the decease of A W for the benefit of his wife and children:—Held, to be a good declaration of trust within the 29 Car. 2. c. 3. s. 7, and not a testamentary writing. *Tierney v. Wood*, 23 Law J. Rep. (N.S.) Chanc. 895; 19 Beav. 330.

The reputed parent of an illegitimate child placed a sum of money in a bank, in the name of the uncle of the child, and stated at the time to a clerk at the bank that he intended the money for the child:—Held, on claim after the parent's decease, that a parol declaration of trust had been created in favour of the child. *Petty v. Petty*, 22 Law J. Rep. (N.S.) Chanc. 1065.

Courts of equity will not lend their assistance to enforce the specific performance of ordinary con-

tracts for the sale and purchase of chattels, unless there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject-matter is a personal chattel will not prevent this Court from enforcing the due execution of that trust. *Pooley v. Budd*, 14 Beav. 34.

Trusts may be constituted not merely by direct declaration of trust, but also by the constructive operation of the consequences flowing from the acts of parties. Thus equity will enforce the execution of a trust not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of it. *Ibid*.

A, who sold 500 tons of iron stacked on his wharf to B, in consideration of a bill accepted by a third party, gave an acknowledgment engaging to deliver it to the bearer, he (A) "having been paid for the same." B mortgaged the iron, and the bill having been dishonoured, A refused to deliver the iron. The mortgagee proceeded in equity to make A responsible for the iron:—Held, that A had no ownership or property in the iron so stacked, and was a trustee, and therefore a demurrer for want of equity was overruled. *Ibid*.

A trust for sale of real estate held not to authorize a mortgage. *Page v. Cooper*, 16 Beav. 396.

Real estate was conveyed to trustees upon trust "to sell and dispose" thereof, and out of the money to arise, "levy, raise and pay" two sums of 150*l*. and 1,000*l*., and invest the residue of the monies to arise for the husband and wife for their lives, and afterwards for their children, and in default, as the wife should appoint by will:—Held, that the trustees were not justified in raising these two sums by mortgage, inasmuch as a conversion of the estate into money, out and out, was intended. *Ibid*.

Lands bought by a father in the name of his son, —Held, under the circumstances of the case, not to amount to an advancement; but the Lord Chancellor declined to make an order to that effect on the petition of the father, though the petition was founded on the certificate of the Master under the 38th section of the Trustee Act, 1850. *In re Collinson: Collinson v. Collinson*, 3 De Gex, M. & G. 409.

The plaintiff, being possessed of shares in a public company, when in a state of extreme sickness transferred the shares into the name of the defendant: the plaintiff having recovered from his sickness, but having subsequently become lunatic; a bill was filed in his name by his committee to have the defendant declared a trustee of the shares:—Held, that as the plaintiff had survived the sickness during which the transfer was made, the gift could not operate as a *donatio mortis causa*, and it appearing that the gift had been received by the defendant upon the distinct understanding that it was to be absolute only in the event of the death of the plaintiff, held that the defendant must be considered as trustee of the shares for the plaintiff. *Staniland v. Willott*, 3 Mac. & G. 664.

A debtor being possessed of a policy of insurance on his life for 500*l*. in October 1837 assigned the policy and sum assured to one of his creditors as a security for 100*l*., with a declaration constituting the creditor, after securing his own debt, a trustee for M. At the date of this transaction the debtor was

indebted to other persons, and continued indebted to some up to the time of his death, and died intestate and insolvent in December 1837. The assignee of the policy received the 500*l*., and, after retaining the sum due to himself, paid the balance into court under the Trustees' Relief Act:—Held, that the trust in favour of M was void as against the creditors of the debtor at the time, and who continued so up to the debtor's death; but that subject thereto it was a good declaration of trust in favour of M. *In re Magawley's Trust*, 5 De Gex & Sm. 1.

A testator having nine children, by his will gave all his property to one of them, who, at the funeral, said he would divide the property equally between his brothers and sisters and himself, and that the whole should be sold, that it might not be said he had taken any more than the others. He subsequently acted in respect of a portion of the property according to the intention thus expressed; and with the assent of the other children, and at a valuation approved by them, he became the purchaser of a house and premises, part of the estate:—Held, with regard to the property which remained undivided, that the expressions of the devisee were no more than a promise to give and divide it amongst the brothers and sisters, and that as such promise it was *nudum pactum*, and did not amount to a declaration of trust in their favour. *Dipple v. Corles*, 11 Hare, 183.

A devise and bequest of the testator's residuary estate to two persons, with an oral intimation given by the testator to one (if not both) of the devisees that he had confidence in them, and was satisfied they would carry out his intentions, which they well knew, and an assent by one of the devisees to this intimation:—Held, to be an undertaking by the devisee that he would carry out the intention, and to be therefore a gift upon a secret trust. And it appearing that the trust was for the foundation of a Socialist School, and either charitable or illegal, the Court declared it void as to the real estate, mortgages and chattels real, and directed an inquiry into the nature of the trust contemplated. *Russell v. Jackson*, 10 Hare, 204.

Where it appeared that the gift was made upon the assent and consequent undertaking of one only of the devisees in trust to perform the illegal or void trust, the other devisee could not take the estate beneficially. *Ibid*.

In such a case, if the extent of the property intended by the testator to be subject to the secret trust be uncertain, it lies with the trustee who has taken the estate by means of his assent to the testator's design, to shew to what part of the property the trust does not extend. *Ibid*.

(b) Construction.

By a private act of parliament, it was enacted, that certain copyhold property should be vested in trustees, their heirs and assigns, to the uses and upon the trusts declared therein, which were to grant building leases; and every lease was to contain certain specified covenants; and the trustees were to sell the materials of a house already standing on the premises, and apply the proceeds in payment of the costs and charges attending the preparing, soliciting, and obtaining the act of parliament, and preparatory and incidental thereto, and the residue of such costs

and expenses was to be paid out of the rents and profits of the premises so to be demised, and was to be charged upon the premises:—Held, that the legal estate in the copyholds was vested in the trustees; that the costs incidental to obtaining the act of parliament were a charge upon the *corpus* of the estate, and the Court had power to direct a sale of the *corpus* for payment of such costs. *Dixon v. Wilkinson*, 22 Law J. Rep. (n.s.) Chanc. 981.

An objection as to the validity of the leases was overruled, on the ground that there was no one who, under the circumstances of the case, could challenge their validity. *Ibid*.

By act of parliament the power to present to a certain living was vested in a borough corporation (for whom trustees were afterwards substituted), and they were to appoint to the living a fit and proper person duly qualified according to law, provided that in such appointment such person should be preferred *ceteris paribus*, who should belong to a certain class. The words "*ceteris paribus*" were held to refer to the qualification before mentioned—the being fit and proper, and qualified according to law,—and not to the general qualifications of a clergyman. *Attorney General v. Earl Powis*, 24 Law J. Rep. (n.s.) Chanc. 218; Kay, 186.

At a meeting of the trustees to elect a clergyman for presentation to the living there were several candidates, A B and others being of the favoured class, and C D not being so. A B was proposed, but a majority voted against him. C D was then proposed, and obtained a majority of votes, and he was declared duly elected. Upon the election of C D being set aside, on account of his not being of the favoured class, it was held, that the trustees must proceed to a new election, A B's merits not having been considered with reference to those of the other candidates, excepting C D. *Ibid*.

A testatrix bequeathed funds standing in the name of A (her trustee) to B, C and D (her executors) upon certain trusts, and she directed A, within six months after her death, to execute a deed declaring that he, his executors, &c., would "thenceforth stand and be possessed" of the funds upon the trusts declared by her will:—Held, that A was a co-trustee of the funds under the will, and could not safely transfer them to B, C and D without the sanction of the Court. *Iredell v. Iredell*, 18 Beav. 202.

A, on going abroad, granted and assigned to B freehold and personal property upon trust for management and realization, and for payment of A's debts, and of the surplus to A. The deed contained full powers for settling demands. B communicated with the creditors upon the subject of the trust:—Held, that the creditors did not thereby acquire any right to sue the trustees for the purpose of having the trust performed. *Cornthwaite v. Frith*, 4 De Gex & Sm. 552.

The ultimate limitation in a settlement was to all the children, as well those already born as hereafter to be born, of A and B his wife. B was the settlor's sister, who had been married to A five years before the date of the settlement. They never had any legitimate children; but before their marriage B had several children still living, who were reputed to be her children by A:—Held, that these children were entitled to the property under the limitation. *Thorp v. Thorp*, 1 Kay & J. 438.

Semble—the construction of these words in a will would exclude illegitimate children born at the date of the will, because of the possibility that legitimate children might have been born before the testator's death. *Ibid*.

By a marriage settlement, the father of the intended husband agreed to settle a money bond and certain real estates on the intended husband and wife, during their joint lives; and after the death of the husband, if the wife should survive, on her for life, and after her decease or second marriage, upon the children; and it was agreed that if the husband should die before the wife, three trustees should be appointed to take care of the property for the child or children of the marriage. The marriage was solemnized, and there was issue of it. The husband's father died, leaving his son, the husband, his sole executor, who thereupon took possession of the bond, and deposited it with his bankers, who had no notice of the settlement, to secure a loan from them. The husband then died insolvent, leaving his wife surviving. In a suit concerning the trust property, trustees thereof having been appointed by the Court, —Held, that they might redeem the bond by raising money for that purpose out of other parts of the property included in the settlement. *Sharshaw v. Gibbs*, Kay, 333; 23 Law J. Rep. (n.s.) Chanc. 451.

(c) Breach of.

By an ante-nuptial settlement the trustees were empowered, with consent of the parties, to sell out the trust fund, and invest the proceeds upon real securities. By a memorandum executed contemporaneously with and indorsed on the settlement, the parties requested the trustees to advance the trust monies to the owners of Vauxhall Gardens upon mortgage as first, second, or third mortgagee:—Held, that "the owners" meant owners at the date of the settlement and memorandum, and that an advance to the three owners originally without security, and the subsequent acceptance of a mortgage with a joint and several covenant from two of the three owners, one having then retired, was a breach of trust, and the trustees were ordered to bring the fund into court. *Fowler v. Reynal*, 21 Law J. Rep. (n.s.) Chanc. 121; 3 Mac. & G. 500.

The bill alleged that some of the plaintiffs were children of another plaintiff, and that they and certain defendants were the only children of the marriage. The answer did not deny the allegation, but stated that the defendants did not know that these were all the children, and raised no objection for want of parties on this ground; no evidence was gone into to prove the relationship. The Court refused to entertain an objection taken for the first time on the rehearing that some of the plaintiffs had not proved their title. *Ibid*.

A trustee, at the request of his *cestui que trust*, a married woman, who was entitled for her life to the dividends of a sum of 4,000*l.* consols, sold out the trust fund, and invested it upon a railway debenture. Upon a suit by her to have the fund re-invested in stock, —Held, that railway debentures were not real securities contemplated by the deed, and that he must replace the stock and account for the dividends as if it had not been sold; that no costs ought to be given on either side, as he had

acted only as requested by the plaintiff; and that the costs of the parties entitled in remainder must be paid by the plaintiff. *Mant v. Leith*, 21 Law J. Rep. (N.S.) Chanc. 719; 15 Beav. 524.

A trustee of a marriage settlement, who allowed a sum of 350*l.* to remain in the hands of a trading firm for a period exceeding fifteen years after the death of the tenant for life, but who eventually, and before the bill was filed, paid the principal, with 5*l.* per cent. interest:—Held, liable to account, with annual rests, and also to the costs of the suit. *Jones v. Foxall*, 21 Law J. Rep. (N.S.) Chanc. 725; 15 Beav. 388.

The Court will discountenance all attempts to convert offers of compromise, by letter, into admissions prejudicial to the parties using them. *Ibid.*

Observations as to the limited purpose for which such letters may be used. *Ibid.*

A testator gave to his wife the interest to arise from a sum of stock for her life, and afterwards he gave the principal to a trustee for the benefit of certain persons mentioned. The widow joined in selling out part of the stock and lending it to the trustee, on the security of a deposit of the deeds of an estate belonging to him; the trustee became a bankrupt without replacing the money lent to him:—Held, that the deposit was a personal security to the widow in respect of the breach of trust; that the money was not invested on the security of the property, and that it could be sold without the *cestuis que trust* being parties to the sale. *Groom v. Booth*, 22 Law J. Rep. (N.S.) Chanc. 961; 1 Drew. 548.

By a deed, under which new trustees of a settlement were appointed in the place of the original trustees, it was recited, that they had "consented and agreed" to become such trustees for the purposes of the settlement. The trust property was then assigned to them, in the usual manner, to be held upon the trusts of the settlement. A breach of trust was committed, and the property was lost:—Held, that there were no words in the deed appointing new trustees which would import a covenant to perform the trusts, and that the claim against the trustees did not constitute a specialty, but only a simple contract debt. *Wynch v. Grant*, 23 Law J. Rep. (N.S.) Chanc. 834; 2 Drew. 312.

Trustees of a marriage settlement held a bond of the husband for securing 2,000*l.* six months after the marriage. The trusts were to permit the money to remain on this security with the written consent of the wife and her husband, or to call in and invest the same upon government security with the like consent. The trustees, without any written consent, permitted the money to remain upon the bond, and the husband became bankrupt. A composition was made by him of 16*s.* 6*d.* in the pound, and paid to the other creditors, and the fiat was annulled, the trustees being consenting parties. They did not receive the composition of 16*s.* 6*d.* on the 2,000*l.*, and the husband again became bankrupt. The trustees after the first bankruptcy obtained the wife's written consent that the money should not be called in. The whole was ultimately lost, although it was proved that 16*s.* 6*d.* in the pound might have been recovered:—Held, affirming a decision of one of the Vice Chancellors (but one of the Lords Justices doubting), that the trustees were liable for the whole

amount of the 2,000*l.* *Wiles v. Gresham*, 24 Law J. Rep. (N.S.) Chanc. 264; 5 De Gex, M. & G. 770; 23 Law J. Rep. (N.S.) Chanc. 667; 2 Drew. 258.

In 1826, a debt due from a firm at Calcutta was assigned to trustees in England, in trust, to call in and invest on Indian securities and accumulate. The debtors became bankrupts in 1830, and the trustees not having in the mean time taken proper steps to call in the money, a considerable portion of the debt was lost:—Held, that they were liable for the breach of trust, and ought to make good the accumulation which would have been produced; secondly, that one of the trustees, who had been abroad with his regiment during that period, was equally liable; but, thirdly, that they were to be excused during such a reasonable time as was necessary in order to communicate between England and India. *Byrne v. Norcott*, 13 Beav. 336.

Generally where trustees are guilty of a breach of trust they must pay the costs of a suit to repair it. *Ibid.*

Trustees lent trust monies on a second mortgage of house property greatly out of repair, and the principal part was lost. Held, that they were liable as for a breach of trust, notwithstanding a trustee indemnity clause declaring they should not be liable for the insufficiency or deficiency in value of any securities, except through their wilful default. *Droster v. Brereton*, 15 Beav. 221.

In charging trustees for breaches of trust and the costs of suit, it is immaterial how the trust was created, and whether for valuable consideration, or by the voluntary gift of the trustees themselves. *Ibid.*

Two trustees having power to alter and vary a trust fund, sold it out for that purpose, but allowed the produce to be received by one alone:—Held, that the other, who failed to shew that the fund was properly invested, was bound to pay the amount into court. *Wiglesworth v. Wiglesworth*, 16 Beav. 269.

A B was tenant for life of a trust fund, with a general power to appoint by will, and in default it was settled on the plaintiff. A B ordered the trustees to pay over the fund to her on indemnity, and she afterwards appointed the fund to the plaintiff and others, who filed a bill to make the trustees liable for a breach of trust:—Held, that by the appointment the fund became assets for answering A B's liabilities, of which the indemnity was one, and that therefore the trustees were not liable. *Williams v. Lomas*, 16 Beav. 1.

Relief may be had for a breach of trust committed by two trustees, against one in the absence of the representatives of the other. *Strong v. Strong*, 18 Beav. 408.

Two trustees having properly sold out trust money, one of them handed the cheque for the proceeds to the other, who misapplied it. Held, that they were both liable. *Trutch v. Lamprell*, 20 Beav. 116.

It is a contradiction in terms to say that a trustee who acts is not an active trustee; and a defence, by a trustee, that he only acted for conformity's sake, is unavailing. *Ibid.*

A trust fund settled on husband, wife and children in succession, was received by the husband, and lent

by him to his brother. A bill by one trustee against the other trustee, the husband and wife, and omitting the brother and children, held sustainable, and a decree was made against the husband, reserving all rights against the brother and the trustees. *Hughes v. Key*, 20 Beav. 395.

The co-trustee, who had not joined as co-plaintiff, refused his costs. *Ibid*.

There is no such general rule as that a wrong-doer cannot file a bill. Therefore, if A and B, two trustees, have committed a breach of trust, and are equally liable, but B received the produce, A may sustain a bill against B alone to recover the amount for the benefit of the trust. *Baynard v. Woolley*, 20 Beav. 583.

A trustee is bound to preserve evidence of his acts. A trustee by omitting to invest a sum of money, sufficient to pay an annuity of 100*l.* a year to a party for life, is liable, when the parties in remainder become entitled to the fund, to make good any rise in the stock, assuming it had been purchased; and although the principal sum directed to be invested was paid, and a release obtained, still it was set aside and the difference in value was directed to be paid to the *cestuis que trust*, who were illiterate and ignorant of their rights. *Aspland v. Watte*, 25 Law J. Rep. (N.S.) Chanc. 53; 20 Beav. 471.

A breach of trust will constitute merely a simple contract debt, unless there is something in the creation of the trust to raise a liability on covenant against the trustee. *Adey v. Arnold*, 2 De Gex, M. and G. 432.

A testator by his will gave the residue of his property to three trustees, whom he appointed executors, upon trust to sell and invest the same, and pay the income thereof to his widow for life, and after her decease to his children, who were all infants at the time of his death. The eldest child attained twenty-one in the year 1839, and the youngest in 1846. The three executors proved the will, but one of them almost exclusively acted. The money, which was the proceeds of the estate, was suffered, by two of the executors, to remain in the hands of the third, who ultimately became insolvent. On the youngest child attaining twenty-one, he, on behalf of himself and his brothers and sisters, attempted to obtain payment from the acting executor, and in 1848 wrote to him a letter consenting to receive payment of the amount, then admitted to be due, by annual instalments. In 1849, and shortly before the insolvency of the acting trustee, a bill was filed by all the children against the three trustees, for the purpose of making them each responsible:—Held, that inasmuch as it was the duty of the three trustees to have explained to their *cestuis que trust* what their rights were, and they had not done so; there was nothing in the conduct of the children to deprive them of their remedy against the three trustees, who were accordingly declared to be jointly and severally liable to make good the deficiency. *Burrows v. Walls*, 5 De Gex, M. and G. 233.

Slaves in the West Indies were bequeathed to executors upon trust for a niece of the testator for her life, with remainder to her children. The executors having renounced and disclaimed, administration with the will annexed was granted to the niece, who afterwards married a minor. Before the hus-

band had attained twenty-one, the husband and wife executed a settlement reciting that the husband was, in right of the wife, possessed of the slaves theretofore the property of her late uncle, but not in any manner referring to the will. The settlement purported to assign the slaves to trustees in trust to sell and invest the proceeds, and pay the income for the separate use of the wife for life without power of anticipation, with trusts by way of remainder to the children of the marriage. Before the husband came of age, the husband and wife sold the slaves without noticing the settlement in the contract, but paid part of the purchase-money to one of the trustees of the settlement, the other trustee not concurring in or being in fact aware of the sale or payment. An amicable bill was then filed on behalf of the infant children of the marriage to have the trusts of the settlement carried into execution, or a new settlement made in conformity with an offer of the husband to execute such settlement on receiving 3,500*l.* out of the wife's fortune. This bill contained an allegation that the proceeds of the slaves had been invested in the names of the trustees. The trustees by their answer admitted the truth of this allegation. The husband and wife, answering separately, disputed the validity of the settlement, and stated that the wife was not intended to be bound by it, but the husband offered to execute a settlement on the above terms. The decree declared the settlement void, and directed a new settlement to be made upon the footing of the husband's offer. A settlement was accordingly executed, and the 3,500*l.* paid to the husband. Afterwards it was discovered that the admission in the trustees' answer was incorrect, the trustee who received the proceeds of the slaves having applied the money to his own use, and having by false statements induced his co-trustees to believe and upon their answer admit that the investment in their names and his had been made as there stated. His circumstances were such that any attempt to recover the amount at any period would have been hopeless. More than twenty years after the wife was aware of these circumstances, she instituted a suit against the co-trustees to make them personally liable for the breach of trust:—Held, first, that the above facts, independently of the admission of the co-trustees in their answer, did not render them personally liable in respect of the proceeds of the sale of the slaves, the title of the settlors not having been such as to enable the trustees legally to possess themselves of the fund. Secondly, that in the circumstances of the case that admission did not create any such liability. *Derbishire v. Home*, 3 De Gex, M. & G. 80; 5 De Gex & S. 702.

Semble—that a clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence. *Ibid*.

Semble—that in the circumstances above stated the administratrix committed a breach of trust by marrying without providing for the security of the trust property. *Ibid*.

Semble—that having, by her separate answer in the first suit, stated that the first settlement was not intended to be binding upon her, she could not afterwards sue the trustees for non-performance of the trusts of it. *Ibid*.

Semble—that her having concealed from them the

nature of her title when she assumed to settle the funds would of itself have been a defence to such a suit. *Ibid.*

A policy of insurance on his own life was effected by a defaulting trustee with the sanction of the Master on a proposal to compromise a suit for restoring the trust fund, but the trustee died before the Master made his report or finally approved of the proposal for compromise:—Held, that the proceeds of the policy were not general assets of the trustee, but primarily applicable to compensate the loss by the breach of trust. *Ward v. Ward*, 2 Sm. & G. 125.

One of three trustees, who was alleged to have participated in a breach of trust clearly committed by the others, being also executor of a *cestui que trust*:—Held, that a legatee of the *cestui que trust* was entitled to maintain a bill against the three trustees to recover the funds lost by the breach of trust. *Sandford v. Jodrell*, 2 Sm. & G. 176.

Under a marriage settlement containing the usual powers of sale and exchange, with power to the trustees (of whom one was a minor), with the consent in writing of the wife, to lend the whole or part of the proceeds to the husband on his bond, the trustees, in order to make the loan, inconsiderately sold the estate under the power to the family solicitor, who, as owner thereof, raised a sum of money by way of mortgage, of which part was paid to the husband. The solicitor afterwards re-sold the estate, no money being paid to the husband, who, for valuable consideration, mortgaged it to other persons, and soon after became insolvent. On a bill being filed by the infants interested under the settlement impeaching the sale,—Held, that they were entitled to have the inheritance reconveyed free from incumbrance to the use of the settlement. *Robinson v. Briggs*, 1 Sm. & G. 188.

The solicitor having funds in his hands the property of another client, applied them in discharging the prior mortgage for raising the money lent to the husband, and as owner of the estate executed a mortgage to his client for the amount advanced:—Held, there being an infirmity in his own title, he could convey no valid equitable interest to his mortgagee. *Ibid.*

The husband, as purchaser from the solicitor, being in treaty for a loan on mortgage of the estate, abstracts were delivered which disclosed the marriage settlement, the conveyance to the solicitor as purchaser under the power, the covenant to re-purchase by the husband, and the deed of confirmation by the infant trustee. The mortgage being completed,—Held, that the abstract disclosed what ought to have put the mortgagees on inquiry, and that they were affected with notice. *Ibid.*

The duties of trustees selling under a trust or power to sell are not properly discharged by selling to the family solicitor without proper caution and previous inquiry as to the value, the sale being a contrivance to raise money to lend to one of the *cestuis que trust*, to whom the trustees had power to lend it. *Ibid.*

Trustees with a power to sell and to invest the proceeds in government or real securities, sold the estate, and received only part of the purchase-money, but executed a conveyance to the purchaser, on the back of which was indorsed a receipt for the whole sum,

which was signed by them all. This deed and the other title-deeds they retained as a security for the unpaid purchase-money with interest, and they entered into a written agreement with the purchaser that the deeds should remain with them as such security, and that he should, if required, execute a proper mortgage. This agreement was signed by the purchaser and by the trustees in whose custody the deeds were placed. Eight years afterwards the purchaser paid the principal and interest of his debt to this trustee, and received from him the deeds, including the conveyance with the receipt indorsed:—Held, that by such payment the purchaser did not discharge himself of his liability incurred by a participation in the breach of trust, and the trustee who received the money having misapplied it and absconded, the purchaser was made to pay it over again. *Webb v. Ledsam*, 1 Kay & J. 385.

(B) TRUSTEE.

(a) Appointment of.

[*Earl of Lonsdale v. Beckett*, 6 Law J. Dig. 699; 4 De Gex & S. 73.]

The ordinary words "becoming incapable," in a power to appoint new trustees of a settlement, do not include the case of a trustee who becomes bankrupt, absconds, and goes out of the jurisdiction of the Court. *In re Watts*, 20 Law J. Rep. (N.S.) Chanc. 387; 9 Hare, 106.

E M N and his wife, under a power in their marriage settlement, directed the trustees, after the decease of the survivor of them, to receive a sum of 3,000*l.* and pay it to their three daughters equally. F M N, one of the daughters, upon her marriage with S D, assigned all her interest in the appointed fund, by way of settlement, to C R and T L. Upon C R requiring to be discharged from being a trustee, T L, who had never accepted the trusts, executed a deed of disclaimer, upon which B W N and J N were appointed trustees in the place of C R and T L, and C R assigned the trust fund to them, but the trustees of the original settlement alleged that T L had accepted the trusts, and that B W N and J N were not trustees, and they refused to pay the share of F M N to them:—Held, upon a bill filed by B W N and J N, that they were duly appointed trustees; and, upon an objection for want of parties, that the *cestuis que trust* and T L were not necessary parties to the suit; that the capital and dividends of F M N's share ought to be transferred to the trustees; that the costs of the suit ought to be paid out of the trust funds; and that the defendant was not entitled to any costs of the objection for want of parties, but that the plaintiffs were entitled to their costs out of the trust funds. *Noble v. Meymott*, 20 Law J. Rep. (N.S.) Chanc. 612; 14 Beav. 471.

A testator, by his will, appointed A and B to be his trustees; he then directed that "if the trustees hereby appointed or to be appointed as hereinafter is mentioned, should die," &c. it should be lawful for other trustees to be appointed as therein mentioned. A died in the lifetime of the testator:—Held, that, under the power, a new trustee could be appointed in the place of A. *In re Hadley's Trusts*, 21 Law J. Rep. (N.S.) Chanc. 109; 5 De Gex & S. 67.

A testator, by his will, appointed A and B to be his trustees, and directed that if his trustees thereby

appointed should die, or desire to be discharged from, or refuse or decline to act, it should be lawful for the surviving or continuing trustee or trustees, or if there should be none such, then for the trustee so desiring to be discharged, or refusing or declining to act, to appoint new trustees. A died:—Held, that B, declining to act, except for the purpose of appointing new trustees, had the power of appointing new trustees in the place of A and B. *Ibid.*

A settlement contained a proviso that in case either of the trustees should die or become unwilling to act, the acting trustees or trustee, or the executors or administrators of any surviving trustee, might nominate a fit person or persons in his or their place. On the death of one trustee, the survivor executed a deed, by which, after reciting that he was desirous of retiring from the trust, and that he had appointed another person to be a trustee in his place, he conveyed the estate to the new trustee upon the trusts:—Held, that the surviving trustee had power to nominate a sole trustee to act in his place, and that the appointment by recital was good. *Miller v. Priddon*, 21 Law J. Rep. (N.S.) Chanc. 421; 1 De Gex, M. & G. 335: affirming 18 Law J. Rep. (N.S.) Chanc. 226.

Held, also, that a receipt signed by more persons than one, that one having power to give receipts, was a valid receipt by that one. *Ibid.*

A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act within the terms of the power to appoint new trustees, and an application to the Court is proper. But if a breach of trust has been committed, this Court, though it sanctions the appointment of a new trustee, will make no order as to the trust property. *In re Harrison's Trusts*, 22 Law J. Rep. (N.S.) Chanc. 69.

Under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106. s. 130.) every Vice Chancellor has jurisdiction to remove a bankrupt trustee, and appoint a new one in his stead. *In re Heath*; *In re Ginder's Settlement*, 22 Law J. Rep. (N.S.) Chanc. 110; 9 Hare, 616.

The original trustees of a settlement, desiring to be discharged, under a power authorizing "the surviving or continuing trustees or trustee, or the executor or administrator of the last acting trustee, to appoint any other person in the stead of the trustee or trustees so dying," &c., will not be allowed by one deed to appoint two other persons to be trustees. *Stones v. Rowton*, 22 Law J. Rep. (N.S.) Chanc. 975; 17 Beav. 308.

Leasehold property in England was assigned to A upon certain trusts, and by the deed of assignment it was declared that, if A should be incapable of acting B might appoint another trustee in his place. A went to reside abroad permanently:—Held, that A was incapable of acting within the meaning of the terms of the power. *Mesnard v. Welford*, 22 Law J. Rep. (N.S.) Chanc. 1053; 1 Sm. & G. 426, *nom.* *Mesnard v. Welford*.

A party accepting the office of trustee, though the form of appointment is legally followed, does so at his peril. If he is a stranger to the *cestui que trust*, it is his duty to communicate with them before accepting the office. *Peatfield v. Benn*, 23 Law J. Rep. (N.S.) Chanc. 497; 17 Beav. 522.

A defaulting trustee, pending a suit for an account and for the appointment of new trustees, appointed

another person trustee; he accepted the office without any communication to the *cestui que trust*. Upon a supplemental bill his costs were refused, but he was not made to pay any. *Ibid.*

A claim for the appointment of new trustees allowed to proceed in the absence of a personal representative of a deceased person, where such person had an interest in the trust funds in the event of the death of his child (the infant plaintiff) under twenty-one, but had died indebted and without any other property. *Magnay v. Davidson*, 9 Hare, App. lxxxii.

The representative of a deceased trustee, who is called upon to transfer the trust property to new trustees is not entitled to be furnished at the expense of the fund with a duplicate of the instrument appointing such new trustees, nor is he entitled at the expense of the fund to an attested copy of the deed creating the trust. *Warter v. Anderson*, 11 Hare, 301.

Where three trustees were named in a settlement, with a power to the *cestui que trust* to nominate, constitute or appoint any person or persons in the place of the said present or other trustee or trustees who should die, &c.:—Held, that an appointment of two persons only in the room of the three original trustees was a valid appointment. *In re Poole Bathurst's Estates*, 2 Sm. & G. 169.

The appointment of a new trustee under a power pending a suit for administration, is not necessarily invalid. *Graham v. Graham*, 16 Beav. 550.

A power "for the surviving or continuing or other trustee or trustees" to appoint new trustees in the place of a trustee or trustees dying or desiring to be discharged, or refusing or declining to act:—Held to authorize the appointment, by the survivor of four trustees, who was desirous of being discharged, of four new trustees. *Lord Camoys v. Best*, 19 Beav. 414.

(b) Removal and Change.

A trustee desiring to be discharged from his trust, without any changes as to the position of the trust property, or the persons with whom he was associated, and seeking the aid of the Court for that purpose, will not be allowed any costs, but will not be compelled to pay any. *Porter v. Watts*, 21 Law J. Rep. (N.S.) Chanc. 211.

A trustee cannot from mere caprice retire from the performance of his trust without paying the costs occasioned. But circumstances arising in the administration of a trust which have altered the nature of his duties, justify him in leaving it, and entitle him to his costs. *Forshaw v. Higginson*, 20 Beav. 485.

A trustee was desirous of retiring, and was justified in so doing, though, from private circumstances, his *cestui que trust* having prevented him from retiring, he instituted a suit to administer the trusts, he was allowed his costs. *Ibid.*

A trustee, desirous of retiring by reason of his want of confidence in his co-trustee, cannot safely effect his object by getting such co-trustee to appoint a new trustee in his place, under a power vested in him for that purpose. *Ibid.*

(c) Liability and Disability.

When a trustee, having good reason to doubt the

validity of an appointment of the trust funds, thinks proper to act upon it, he will be affected by all the consequences which follow upon the act. *Harrison v. Randall*, 21 Law J. Rep. (n.s.) Chanc. 294; 9 Hare, 397.

The Court will not undo part only of one entire transaction. Therefore, where *cestuis que trust* sought to impeach an appointment under one deed, without seeking to impeach a subsequent appointment, which was directly connected with the former, and by which they were benefited, the Court dismissed the bill with costs, but without prejudice to a new bill being filed. *Ibid*.

J H, being possessed of the moiety of an estate in Jamaica, by his will appointed J P his executor and trustee, with power to manage, conduct, carry on, and improve his estate. In 1830 J P took a lease of the other moiety, and covenanted to keep it in the same cultivation, order, repair, and condition, and thenceforward managed the entirety on account of the trust estate. In 1835, in a suit by the *cestuis que trust* under the will of J H, Patey & Co. were, by an order of Court, appointed managers and receivers, and both moieties were managed for the trust estate until 1842. No rent had been paid since 1835, and the estate was in a state of utter ruin. Upon petition in the cause by the owners of the other moiety,—Held, that though the taking of the lease was not authorized by the will, yet as it was concurred in by the *cestuis que trust* and sanctioned by the Court, and had proved beneficial to the trust estate, it must be considered as binding on the *cestuis que trust*, and that the trust estate was liable for the rent in arrear and the dilapidations. *Neate v. Pink. Ex parte Fletcher and Yates*, 21 Law J. Rep. (n.s.) Chanc. 574; 3 Mac. & G. 476.

A, a woman, being entitled to a bond debt due to her from B, by a settlement made on her marriage, and dated in 1829, assigned it to a trustee upon trust for A for her life, for her separate use, with remainders over. In 1836, a part of the debt was paid to A and her husband. In 1842, C was appointed sole trustee of the settlement. In 1843, A charged her life interest in the bond debt in favour of D, by way of collateral security for a debt due from her husband to D. In 1843, B died, and A took out administration to B. Bill by D against C to enforce the security, charging him with wilful default for omitting to get in the part of the debt paid to A and her husband, and the residue of the debt due from the estate of B:—Held, that C was not liable, and the bill was dismissed. *Thackwell v. Gardiner*, 21 Law J. Rep. (n.s.) Chanc. 777; 5 De Gex & S. 58.

By a marriage settlement a debt due from the firm of H & Sons was assigned by B, the creditor, to H and N, upon trust, during the life of B, to permit the same to remain in the hands of the partners of the firm until H and N, or the survivor, should be requested by B to call in the same, and upon the receipt of such request, or upon B's death, upon trust to call in the debt and invest the same, &c.; and it was provided that the trustees might at any time, with B's consent, after giving to H or any of his partners three months' notice, call in the debt; and, further, that the trustees should not, so long as the sum should, with B's consent, remain in its then investment, be answerable for the insufficiency thereof. The firm stopped payment and made a composition with their creditors, and B thereupon requested

the trustees to call in the money. N accordingly required H to pay the money, and upon his refusal filed a bill against H and the *cestuis que trust*, to have the trusts executed and for his own indemnity. The other partners of the firm were not made parties:—Held, that H must be considered either as not having done his duty in getting in the fund, or that he had got the money, and that in either case he was liable, and a decree for payment was accordingly made against him. *Norton v. Steinkopf*, 20 Law J. Rep. (n.s.) Chanc. 35; Kay, 45.

A deceased official assignee in bankruptcy and insolvency paid from time to time to his two bankers to his own account as a private customer, and without anything to shew that the whole monies were not his own, various sums of money, part of which were trust monies and part his own property; he drew from each of these accounts monies for his own private purposes and for the purposes of the trusts. At the time of his death, there were balances in his favour in each banking account. In a creditors' suit, instituted by his successor in the office of official assignee, the plaintiff claimed the whole of the balances as belonging to the trust estates, but the Master of the Rolls held, that the monies not being "ear-marked," the plaintiff was not entitled in preference to the general creditors on the estate. On appeal by the plaintiff,—Held, that he was entitled, as against the executors of the deceased official assignee and the general creditors on his estate, to such part of the balances as consisted of trust monies, notwithstanding any difficulties which might arise in consequence of the trust monies having been mixed up with the private monies of the deceased official assignee. *Pennell v. Deffell*, 20 Law J. Rep. (n.s.) Chanc. 115; 4 De Gex, M. & G. 372.

A, a husband, and B, his wife, conveyed real estate belonging to the wife to trustees upon trusts for sale, and directed them to invest the purchase-money in certain specified securities, and to stand possessed of them upon trust for such persons as B should, by deed or will, appoint, and, in default of appointment, to pay the income to B for life, for her separate use, and, after her death, to stand possessed of the capital for her next-of-kin under the Statutes of Distributions as if she had died intestate and not under coverture. The trustees, with the assent and knowledge of B, put out the money on securities not authorized by the deed of trust, and the whole was lost. B did not give any writing to the trustees as to the disposition of the trust money. After the money was lost, B appointed the fund to her infant children, and, shortly after, a bill was filed by these children against the trustees to make good the loss:—Held, that the plaintiffs had no claim against the trustees, and the bill was dismissed. *Brewer v. Swirles*, 23 Law J. Rep. (n.s.) Chanc. 542; 2 Sm. & G. 219.

The trustees of a marriage settlement sold part of the trust property, which was then mortgaged to them to secure the purchase-money. Upon the death of the husband and wife, one of their children became absolutely entitled to the property. That child died and appointed executors. The mortgage money was afterwards paid off, and thereupon the reconveyance was executed by the surviving trustee of the settlement, but the mortgage money was paid to one of the executors of the deceased child, who also acted as the solicitor for the surviving trustee. This exe-

cutor misapplied the money, and it was lost:—Held, that the surviving trustee was not liable for the loss, since the trusts were at an end; and the executor of the child who was absolutely entitled was the proper person to receive the money. *Waugh v. Wyche*, 23 Law J. Rep. (N.S.) Chanc. 833; 2 Drew. 318.

Where one person intrusted with sums of money to invest for the benefit of another, has signed an agreement admitting an amount due on investments made, equity will compel their transfer. *Stanton v. Percival*, 5 H.L. Cas. 257.

A trustee is not in all cases to be made liable upon the mere ground of having deviated from the strict letter of his trust, for such deviation may be necessary or beneficial to the interests of the *cestuis que trust*, but when a trustee ventures to deviate from the letter of his trust he does so under the obligation and at the peril of afterwards satisfying the Court that the deviation was necessary or beneficial. *Harrison v. Randall*, 21 Law J. Rep. (N.S.) Chanc. 294; 9 Hare, 397.

The existence of a suit in which an appointment of trust funds made in execution of a power is brought before the Court, and directions consequential thereon are obtained, and the trustees retire and are succeeded by others, but in which material facts connected with such appointment of the trust funds are not brought to the knowledge of the Court, does not protect the retiring trustees from the liabilities which result from such facts if they involve a breach of trust, but, on the contrary, renders such breach of trust less excusable. *Ibid*.

Certain policies of insurance effected by a father on his life as a provision for his daughters were assigned to a trustee upon trust for such of the daughters as the father should appoint, and certain estates were demised to the same trustee upon trust out of the rents and profits to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premiums, and the father appointed the bonuses which had accrued upon the policies to three of his daughters, and the three daughters soon afterwards authorized the trustee to receive the sum paid by the office for the bonuses, and invest part thereof as a fund to keep down the premiums, and a part of the sum was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made in favour of the other daughters of the residue of the sums to be received on the policies, and which was intended to equalize the shares:—Held, that the first appointment was a fraud upon the power, its immediate object being to relieve the father, and its necessary consequence to relax the diligence of the trustee to enforce the rights of the daughters against the father, and that the application of the trust funds in pursuance of the appointment by the trustee, who knew that the appointment was fraudulent, was a breach of trust for which he was responsible to the objects of the power. *Ibid*.

An executor and trustee having for several years retained funds in his hands uninvested which he ought to have invested,—Held, not to be chargeable with interest at 5l. per cent., or upon the principle of annual rests, but with simple interest only at 4l. per cent., there being no circumstances to lead to the conclusion that he had made any profit by his misconduct. *Attorney General v. Alford*, 4 De Gex, M. & G. 843.

The principle applicable to charging executors and trustees with interest in such cases considered. *Ibid*.

The Court will only charge an executor or trustee with the interest which he has received, or which he ought to have received, or which it is fairly to be presumed that he did receive; and misconduct on the part of an executor or trustee will not, generally speaking, warrant such a presumption. *Ibid*.

A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it. *Richardson v. Jenkins*, 1 Drew. 477.

The words "covenant or agree" are not necessary in the trust in a trust deed to constitute a specialty contract. A declaration by a trustee that he will stand possessed on certain trusts, &c. is sufficient. *Ibid*.

A creditor by bond, in which the heirs are named, takes priority over a specialty creditor under a security in which the heirs are not expressly named. *Ibid*.

Trustees are liable for not taking proper steps to get the trust fund transferred into their names. *M'Gachen v. Dew*, 15 Beav. 84.

Tenant for life, who had obtained the benefit of a breach of trust, made responsible upon a bill for that purpose instituted by the trustees. *Ibid*.

Two classes of trustees had committed a breach of trust:—Held, that the *cestuis que trust* might proceed against the one class without making the other class parties. *Ibid*.

Trustees in whom an estate is vested ought not to cut down ornamental trees, alleged to be prejudicial, without first applying to the parties beneficially interested for their assent, or to the Court for its authority; and the onus of shewing that the trees are prejudicial lies on the trustees. *Campbell v. Allgood*, 17 Beav. 623.

A perpetual injunction was granted against trustees who cut down three ornamental trees, and failed in proving to the satisfaction of the Court that they were prejudicial to the residence. *Ibid*.

A bill filed against trustees and the tenant to prevent equitable waste was dismissed, with costs, as against the tenant, it not being shewn that he had committed or intended to commit any waste, though some had been committed by the trustees at his request. *Ibid*.

Upon assenting to a specific bequest given to them in trust, executors forthwith became trustees. *Dix v. Burford*, 19 Beav. 409.

A testator bequeathed a mortgage secured by a conditional surrender, and which had become absolute, to his two executors upon trust to continue and hold it on certain trusts. The executors assented to the legacy, but did not procure themselves to be admitted, and by reason thereof one of them was enabled to receive the money and release the estate. The money being misapplied,—Held, that the co-executor had become a trustee, and was liable for his default. *Ibid*.

The ordinary trustee indemnity clause affords no security to a trustee who neglects to take the necessary steps to secure the trust fund. *Ibid*.

An informal document signed by a trustee who was indebted to the trust, construed to amount to an equitable mortgage in favour of the trust, not-

withstanding a denial by the answer. *Baynard v. Woolley*, 20 Beav. 583.

Where a trustee indebted to the trust becomes bankrupt, it is his duty to prove the debt, and if he neglects so to do, he is liable for the loss, notwithstanding his certificate. *Orrett v. Corser*, 21 Beav. 52.

A plaintiff sued his trustee to make him responsible for a trust fund, which had been wrongfully paid to the plaintiff's father. The plaintiff had, as one of the next-of-kin of his father, received two-thirds of his estate.—Held, that the father's assets in the hands of the plaintiff were primarily liable to make good two-thirds of the trust fund, in exoneration of the trustee. *Ibid*.

(d) *Powers, Rights and Duties.*

A marriage settlement contained a power for the two trustees and the survivor of them, and the executors or administrators of such survivor, to sell certain estates with the consent of the husband and wife. The settlement contained no power of appointing new trustees. One trustee died, the other trustee went to reside abroad, and, upon a bill filed for that purpose, two new trustees were appointed under an order of the Court.—Held, that the trustees appointed by the Court had no right to execute the power of sale. *Newman v. Warner*, 20 Law J. Rep. (N.S.) Chanc. 654; 1 Sim. N.S. 457.

A devised freehold and leasehold estates to B and C, their heirs, executors, administrators and assigns, with a power for B and C, or the survivor of them, his heirs, executors and administrators, to sell the devised property. A survived B, and died, leaving C his heir-at-law, and having by his will devised all his trust estates to C and D, and appointed them his executors.—Held, that neither C alone, nor C and D together, had the power of selling estates devised by A. *Wilson v. Bennett*, 21 Law J. Rep. (N.S.) Chanc. 741; 5 De Gex & S. 475.

A testator bequeathed leasehold premises, held for lives, to trustees, upon trust, out of the rents and profits respectively, to pay and perform the rents and covenants, and if they thought it advantageous, that they should endeavour to effect renewals of the subsisting leases, or any of them, as they should think proper; and if they in their discretion should think fit or expedient, but not necessarily or peremptorily, effect and keep on foot insurances on the lives of the *cestui que vie*, or any of them, and should effect such insurances in such sum as in the opinion of the trustees should be sufficient to enable them whenever a life dropped to effect a renewal, and should out of the rents and profits, or by mortgage thereof, or of any part thereof, raise money sufficient to effect the renewal of the leases so often as advisable. The testator died in 1849 leaving a son and two daughters, the latter of whom had issue. He was possessed of divers leasehold estates held at different rents, for various terms of years, if certain persons should so long live. Renewals of these leases had been made, but none of them contained any clause of renewal. Upon a special case under 13 & 14 Vict. c. 35,—Held, that a trust had been created, and that there was an imperative duty to renew if reasonable terms could be obtained; that they were not to sacrifice the tenants for life to the persons entitled in reversion: that they had a discretion to exercise in order

to keep the estate in its present condition: that the trustees had a discretion to raise money by insuring the lives out of the rents and profits, or by mortgage, and that they were bound to exercise their discretion. *Mortimer v. Watts*, 21 Law J. Rep. (N.S.) Chanc. 169; 14 Beav. 616.

A testator devised real estate to A and B, their executors, administrators and assigns, for the term of 500 years, upon trust to raise by sale or mortgage the sum of 2,400*l.*, and directed them to put out the same on Government or real securities and call in and replace out the same from time to time, and to pay the income to C for life, and after her death to pay the principal to such persons as C should appoint by will, and in default of appointment to C's children. The will did not contain a power for the trustees to give receipts. A and B mortgaged the estate to C for 2,400*l.*, and C assigned the mortgage to D.—Held, that a power for A and B to give receipts for this sum might be implied, and that D was entitled to the mortgaged premises as against the persons claiming under the trusts of the testator's will. *Lock v. Lomas*, 21 Law J. Rep. (N.S.) Chanc. 503; 5 De Gex & Sm. 326.

In this case, if C had paid the money to A and B he would not have been bound to see to the application of it; and if the mortgage deed to C was regular on the face of it, D would not have been affected by any breach of trust in which A, B and C might have been implicated. *Ibid*.

Where a trustee accepts the trust of a fund, with the knowledge that it is doubtful whether it ought to be held upon such trust, he is nevertheless entitled to come to the Court for its direction whether the trust ought to be executed.—Held, by *Lord Justice Turner*; *Lord Justice Knight Bruce* entirely dissenting. *Neale v. Davies*, 23 Law J. Rep. (N.S.) Chanc. 744; 5 De Gex, M. & G. 258.

Where trustees accept such a trust, with knowledge of the doubt, and, with the same and no more knowledge, are called upon to part with the fund, by the *cestui que trust*, they are bound in morality to do so; and an adverse claimant would have no claim against them personally after they had parted with the fund in conformity with the trusts on which they accepted it—per *Lord Justice Knight Bruce*. *Ibid*.

The question having been raised in a suit between the trustees and *cestui que trust* of the deed, one of the Vice Chancellors refused to pronounce a decree, but ordered the cause to stand over, with liberty to the plaintiff, the *cestui que trust*, to amend by adding parties; and, their Lordships differing in opinion, the order of the Court below was affirmed. *Ibid*.

A trustee, upon a deed of indemnity being executed, lent settled monies upon the mortgage of a living and a policy of assurance, the premiums of which were to be paid out of the tithes, &c. The trustee was appointed sequestrator of the living, but he neglected to pay the premiums out of receipts from the living, and borrowed money of third parties to pay them, and pledged the policy as a security for the money so borrowed. Upon a bill by the *cestui que trust*, who were the parties entitled to the money to arise from the policy,—Held, that the trustee had no right to borrow money upon security of the policy; that he could not pledge it; and that the parties advancing the money had no charge or

lien upon the policy by virtue of the securities they had taken. *Clack v. Holland*, 24 Law J. Rep. (N.S.) Chanc. 13; 19 Beav. 262.

A testator gave a power of sale to two trustees and the survivor, "his heirs, executors and administrators;"—Held, that a title dependent on a sale by the devisee in trust of the survivor, was too doubtful to force on a purchaser; and secondly, that the defect was cured by the release of all the *cestui que trust* to the representatives of the surviving trustee. Consideration of the cases of *Cooke v. Crawford* and *Tilley v. Wolstenholme*. *Macdonald v. Walker*, 14 Beav. 556.

A power to trustees "to sell and dispose of" the testator's real estate and to give receipts, does not authorize a partition. *Brassey v. Chalmers*, 16 Beav. 223.

On a mortgagee of settled estates requiring to be paid off or to have the interest increased, the tenant for life proposed a new mortgage at the same rate. The trustees insisted on being the proper persons to carry the transactions into effect, and prepared another mortgage, but at a higher rate, and in order to raise the expense thereby incurred, they proceeded to sell the estates under the ordinary powers of sale and exchange in the settlement, whereupon the tenant for life filed a bill to restrain the sale:—Held, that the conduct of the trustees was unjustifiable, and that they ought to pay all the costs of the suit. *Marshall v. Sladden*, 4 De Gex & Sm. 468.

The non-interference of the trustees for a long period does not preclude them, or their representatives, from sustaining a suit for carrying the trust into effect so long as the trust subsists. But *semble*, on the contrary, it is the duty of the trustees, or their representatives, to take steps for enforcing the trust. *Hughes v. Wells*, 9 Hare, 749.

Where there was a devise and bequest of freehold and other property, and all other the testator's real and personal estate to two persons, their executors and administrators, upon trust, by sale or otherwise, at their discretion, to raise and invest a certain sum of money, and apply the interest in the maintenance and education of the testator's daughter until her age of twenty-one, and then to pay the same to her for her separate use; one of the devisees in trust after the death of the other, but during the lifetime of the daughter, and whilst, therefore, it was necessary that the charge should be raised, proceeded to sell the estate:—Held, on an objection to the title, that the surviving devisee in trust might exercise the option of selling and the power of sale; and that an application in such a case for the direction of a Court of equity was unnecessary. *Lane v. Debenham*, 11 Hare, 188.

Power given by a will to trustees, at their discretion, to apply during the life of testator's wife, any part, not exceeding one moiety, of the annual income of the trust estate for or towards the maintenance and education of his daughter, or otherwise for her benefit, in such manner as the trustees should think proper, may be exercised, notwithstanding bill filed by trustees to have the trusts of the will performed and carried into execution under the direction of the Court. *Sillibourne v. Newport*, 1 Kay & J. 602.

By deed, power was given to the trustees or trustee for the time being, at their or his entire dis-

cretion, to pay certain rents for the benefit of one, two, or more of the children of A B, the tenant for life; and there was a power to the surviving or continuing trustee to appoint new trustees. The trustees all died without appointing new trustees, and new trustees were appointed by the Court:—Held, that they had the discretionary power given to the original trustees. *Bartley v. Bartley*, 3 Drew. 384.

(e) Investment by.

Trustees under a will had an option to invest the testator's estate either in 3l. per cents. or on real security, but neglected to do so, leaving the fund in some other state of investment:—Held, overruling a decree at the Rolls, that the *cestui que trust* had not the option of charging them with the money and interest, or to claim the amount of 3l. per cents. because the *cestui que trust* never had the right to compel the purchase of 3l. per cents. and that the trustees were chargeable only with the money and interest. *Robinson v. Robinson*, 21 Law J. Rep. (N.S.) Chanc. 111; 1 De Gex, M. & G. 274: overruling 18 Law J. Rep. (N.S.) Chanc. 73; 11 Beav. 371.

The trustees having this option to invest either in 3l. per cents. or on real security,—Held, overruling the same decree, that the tenant for life was entitled to interest for one year after the death of the testator at 4l. per cent. on the money the property would have produced if sold at the end of that year, until the produce was invested in the 3l. per cents. not exceeding the amount of interest actually received. *Ibid.*

Turnpike road bonds, secured by a mortgage or charge on tolls and toll-houses, are real estate, and held so to be, overruling the same decree; and although the tenant for life was declared entitled to the interest on them, the Court, considering the social changes resulting from the formation of railways, directed a reference to the Master, to inquire whether it was expedient to leave assets so invested. *Ibid.*

A party having paid in money, in obedience to a decree of the Court below, and the decree being varied in such a way that he is entitled to have that money paid out, the same can be directed in the order on the appeal to be so paid out without any petition being presented for that purpose. *Ibid.*

Semble—that where trustees are bound to invest in 3l. per cents. and 3l. per cents. have fallen instead of risen in value, they are chargeable with the money and interest, instead of 3l. per cents., at the option of the *cestui que trust*. *Ibid.*

The Court also, after reviewing the former decisions, laid down the following propositions:—First, where trustees improperly retain balances or cause or permit trust money to be lost, they are chargeable for the same with interest at 4l. per cent. Secondly, where trustees have money in their hands, which they are bound permanently to invest for the benefit of their *cestui que trust*, the rule of the Court is generally that they shall invest in 3l. per cents.; therefore, if they neglect to do so, and there is no express direction not to do so, or there is an express trust that they shall do so, in the latter case, and *semble* as to the two former cases, it is in the option of the *cestui que trust* to charge them either with the principal sum retained and interest, or with the

amount of 3*l*. per cents. which would have been purchased if the investment had been made. Thirdly, where trustees lend, or use trust money in trade, they are chargeable not only with the money and interest, but with the profits made in the trade, the interest generally being 5*l*. per cent. *Ibid*.

A power in a settlement authorized the trustee to invest money upon real securities in Ireland. He accordingly advanced 8,000*l*. upon renewable leaseholds which were subject to a large head rent. After payment of the head rent and the usual outgoings, the net surplus rent was insufficient to pay the interest, and the estate became greatly depreciated in value. Upon a bill, by an appointee of a portion of the trust monies, to make the trustee responsible for a breach of trust,—Held, that he was justified in advancing the money upon renewable leaseholds; that he could not delegate his trust; and, as the plaintiff had not acquiesced in the investment, and the trustee had taken an inadequate security, he was held personally liable to replace the plaintiff's share of the trust fund, and to pay the costs of the suit. *M'Leod v. Annesley*, 22 Law J. Rep. (N.S.) Chanc. 633; 16 Beav. 600.

The Court will deal with an isolated share of a trust fund independent of other parties interested, though it forms a portion of a joint investment. *Ibid*.

When the trustees of a will have power to continue the testator's assets in the then securities, and to postpone the conversion so long as they shall think reasonable, the tenant for life of the income cannot insist upon the continuance in the securities against the judgment of the trustees. *Murray v. Glasbe*, 23 Law J. Rep. (N.S.) Chanc. 126.

By a marriage settlement certain sums of money were assigned to trustees upon trust, with the consent of the husband and wife or the survivor, to lay out the trust funds in the purchase of leaseholds. By a subsequent clause it was provided that it should be lawful for the trustees, and they were thereby required at any time during the lives of the husband and wife, with their approbation in writing, to invest the trust-money in the purchase of leasehold lands, messuages or tenements:—Held, that it was imperative upon the trustees, if required by the husband and wife, to invest the money upon leasehold houses. *Cadogan v. the Earl of Essex*, 23 Law J. Rep. (N.S.) Chanc. 487; 4 Drew. 227.

A testator gave his trustees power to sell his property and to invest the proceeds in such manner as they should approve. The will also contained a proviso, that the trustees should not be answerable or accountable for any diminution in the trust funds by reason of insolvency or insufficient security, fire, &c. which might happen, without their wilful default. The trustees lent part of the trust funds upon a security which turned out to be insufficient, and the money was lost:—Held, that the trustees were not exonerated by the will from exercising a careful discretion as to the sufficiency of the investment; that they had not properly ascertained the real value of the property; that there had been no acquiescence by the *cestuis que trust* in the investment in question; and that the estate of the trustees was liable to make good the amount lost. *Shetton v. Ashmall*, 24 Law J. Rep. (N.S.) Chanc. 277; 3 Drew. 9.

Where trustees, who had no express authority to invest trust funds upon mortgage, so invested the same at the instance of some of the *cestuis que trust* for life, and a loss was occasioned, the trustees were held liable to make good the loss to the trust in the first instance, but such *cestuis que trust* were declared liable to the extent of their actual receipts to recoup the trustees. *Raby v. Ridehalgh*, 24 Law J. Rep. (N.S.) Chanc. 528.

A testator, who died in 1796, gave his personal estate to his widow for life, with remainder to B. B died in 1826, and the widow in 1849. The plaintiffs then filed a bill against the representatives of the executors, to make them liable for investing in 5*l*. per cents. instead of in consols, &c. In 1837 the plaintiffs had notice of the state of the investment:—Held, that they were barred by laches and lapse of time. *Browne v. Cross*, 14 Beav. 105.

It is the duty of a trustee who executes a power to shew that he has complied with the exigencies required by it. So where he varies the investment of the trust fund, the burden of proof lies on him to shew that it is a fit and proper investment. Lynch's act (4 & 5 Will. 4. c. 29.) only relieves a trustee from any liability in respect of an investment in Ireland instead of England, and, therefore, where, upon petition under the act, the Court sanctioned an investment which was made without proper evidence of value and without the consent of the necessary parties, and there was a loss, the trustees were held liable for the breach of trust. *Norris v. Wright*, 14 Beav. 291.

Pending a suit to make trustees liable for the improper investment of trust monies on an Irish estate, the property was put up for sale under the Incumbered Estates Act, and an order was made giving the trustees liberty to buy, which they did:—Held, that this order did not relieve the trustees from any liability in the cause, although it was not expressed to be made "without prejudice." *Ibid*.

Whether a trustee is justified in lending trust money on a second mortgage without obtaining the legal estate—*quere*. *Ibid*.

An estate of the value of 80,000*l*. was subject to a first mortgage of 40,000*l*., and to two others for 11,000*l*. and 6,800*l*., and between the second and third there was a dispute as to priority. A trustee advanced 1,908*l*. trust-money on the security of an assignment of an equal amount of the 6,800*l*.:—Held, that this was a breach of trust. *Ibid*.

Rule as to charging executors and trustees with interest on balances and at what rate, and whether with annual rests. *Knott v. Cottee*, 16 Beav. 77.

An executor and trustee who was directed to invest in Government Stocks of Great Britain, or upon real security, and accumulate the surplus after maintaining infants, invested the estate in the foreign funds. It was held, that the investment was improper, and he was charged with 4*l*. per cent., with annual rests. *Ibid*.

In 1846 an executor invested part of the assets in Exchequer bills: they were ordered into court, and sold in the same year at a loss. In 1848, it was declared by the decree, that the investment was improper; but at that time the price of Exchequer bills had risen, so that there would have been no loss if they had been retained there:—Held, that the executor ought to be charged with the amount im-

properly invested, and credited with the produce of the Exchequer bills in 1846. *Ibid.*

Costs of an administration suit given to an executor, though charged with the consequences of an improper investment. *Ibid.*

Trustees were empowered, with the consent of the wife, to lend the trust monies to the husband. The wife authorized an immediate loan of part, and of the remainder at such times as the husband might require, and the husband covenanted to pay in six months. The money was not called in, and was lost by the insolvency of the husband:—Held, first, that the wife's consent could not be given prospectively; and, secondly, that the trustees were not bound to call in the money at the end of six months. *Child v. Child*, 20 Beav. 50.

The plaintiff, a tenant for life, having received 5l. per cent. on an investment which she knew to be and insisted was improper, was ordered to account for the excess beyond 4l. per cent. for the benefit of the trust. *Baynard v. Woolley*, 20 Beav. 583.

A widow, a tenant for life, desiring an increase of income, induced a trustee to invest out of a trust fund a sum exceeding two-thirds of its value on mortgage of copyhold house property at interest at 5l. per cent. After the rents had become insufficient to pay the interest, her daughter, on her marriage, became entitled to one-fourth of the trust fund. The trustee having stated to the husband and wife the deficiency in the widow's income and its cause, they accepted a small sum of money in hand in lieu of their one-fourth, and made no objection for ten years, when the widow died. Becoming then entitled to the remaining three-fourth parts of the fund, they sought, by suit, to charge the trustee with the deficiency:—Held, that they had so far acquiesced in the investment and could not complain of it. *Farrar v. Barraclough*, 2 Sm. & G. 231.

It is not a breach of trust for a trustee to take a mortgage not containing a power of sale. *Ibid.*

(f) Disclaimer.

The fact of a surviving trustee under a will dying without proving or acting in the will, will not prevent the legal estate in the trust property devised to him from vesting in him, unless he has actually renounced probate of the will or disclaimed the trusts by deed. And the devisees of the trust estates of such trustee, acting under his will, cannot, by disclaiming the trust of the original testator's will, divest themselves of the legal estate in the trust property thereby devised by their testator. *King v. Phillips*, 22 Law J. Rep. (n.s.) Chanc. 422.

A devise to trustees to the use of A for life with remainders over. The trustees disclaimed. Under a mistaken idea that the trustees had the legal estate, an order of the Court was obtained to appoint new trustees, and the heir conveyed to them. A then conveyed his life estate to a mortgagee, and afterwards took a re-conveyance from him:—Held, that A was in by the devise within the 1 Will. 4. c. 47, and an order was made for him to convey to a purchaser. *Beale v. Tennent*, 1 Drew. 65.

(g) Release of.

The Court looks with considerable jealousy at a release executed by a young lady at, or shortly after attaining twenty-one, upon a settlement of accounts

between her and her trustees. *Parker v. Bloxam*, 20 Beav. 295.

A testator died in 1809; his granddaughter came of age in 1829; she then executed a release and married in 1836; her father died in 1850, and in 1852 she instituted a suit to make his estate liable for the profits made by him (he not being a trustee) by the employment of part of the trust monies in trade. The Court held, under the circumstances, that, assuming her right, there was nothing to justify the delay in instituting the suit. *Ibid.*

A trustee paying the trust money in strict accordance with the tenour of the trusts, is not entitled to a release by deed; *secus* if he be called upon to depart from the strictly expressed trusts. *King v. Mullins*, 1 Drew. 308.

Where a trust was created by parol for A for life, and to provide for her funeral expenses, remainder to her two children, and the tenant for life and remainder-men called for payment,—Held, that the trustee might lawfully insist on a release under seal. *Ibid.*

(C) TRUSTEES' RELIEF ACT.

(a) Construction of.

Parties claiming the benefit of the Trustees' Relief Act must be within the express words. *In re Buckley's Trust*, 22 Law J. Rep. (n.s.) Chanc. 934; 17 Beav. 110.

Purchasers of an estate charged with the payment of two sums of 500l. will not be allowed to pay the money into court in exoneration of the estate; and having done so, upon their applying to have it invested, the money was ordered to be repaid to them, upon their paying the costs of the petition. *Ibid.*

(b) Practice under.

A transfer of a fund paid into court under the Trustees' Relief Act can only be directed by an order made on a petition. *In re Masselin's Trusts*, and *Harrison v. Masselin*, 21 Law J. Rep. (n.s.) Chanc. 53.

Trustees and executors of personal estate situate wholly in the diocese of C. sold and realized the same. The will was proved in the diocesan court. One of the trustees and executors died in the lifetime of the other, and on the death of the other trustee and executor letters of administration to his estate were taken out in the same court by A, B and C. One of the parties entitled to a share, under the will of the testator, died intestate, possessed of no other property, and letters of administration to his estate were taken out by his next-of-kin in the same court. A, B and C paid the share into court, under the statute 10 & 11 Vict. c. 96. The person entitled to the share petitioned for its payment out of court, and the same was directed, notwithstanding that prerogative letters of administration were not taken out. *In re Knowles*, 21 Law J. Rep. (n.s.) Chanc. 142; 1 De Gex, M. & G. 60.

A was entitled to a share of the produce of certain chattels and of no other property. She was domiciled in the diocese of L, and the chattels were in the same diocese. A died intestate. The chattels were sold by the trustee, and A's share of the money was paid into court under the provisions of the statute 10 & 11 Vict. c. 96. After this, letters of administra-

tion to A's estate were taken out in the diocese of L, and on an application for the payment of this fund out of court to the administrator, the same was ordered, the Court holding that a prerogative administration was not necessary. *In re Spencer*, 21 Law J. Rep. (N.S.) Chanc. 314; 1 De Gex, M. & G. 311; 9 Hare, 410.

A sum of money having been paid into court under the Trustees' Relief Act, a petition was presented by the tenant for life for payment of the dividends:—Held, that the corpus of the fund was not liable to bear the costs of the application. *In re Bangley's Trust*, 21 Law J. Rep. (N.S.) Chanc. 875.

It is not necessary, except under special circumstances, to set out in a petition under the Trustees' Relief Act the whole of the affidavit filed by the trustee on payment of the fund into court. *In re the Trusts of Curtois's Will*, 22 Law J. Rep. (N.S.) Chanc. 1045.

Upon a written and reasonable application from claimants residing abroad, the Court will postpone the drawing up of an order for payment out of court of money paid in under the Trustees' Relief Act. *In re Trusts of Hodson's Will*, 22 Law J. Rep. (N.S.) Chanc. 1055.

Money was paid into court by the trustees of a marriage settlement, under the statute 10 & 11 Vict. c. 96. A petition was presented for payment of the money by a party who claimed by a title adverse to the settlement:—Held, that a bill must be filed, as the Court would not adjudicate upon a conflict between claimants supporting and disputing the settlement. *In re Fozard's Trust*, 24 Law J. Rep. (N.S.) Chanc. 441: on appeal from 1 Kay & J. 283.

Where, under the Trustees' Relief Act, money is paid into court "upon the trusts of a will," it involves the general administration of the estate, and the Court will not order it to be transferred to a particular account, except at the request and on the responsibility of the trustee. *In re Wright's Trusts*, 15 Beav. 367.

Trust monies being paid into court under the Trustees' Relief Act,—Held, that the costs of an application for payment of the income to the tenant for life ought to be paid out of the corpus. *In re Field's Trust*, 16 Beav. 146.

On a petition presented under the Trustees' Relief Act for payment of trust funds out of court, the statements in the affidavits made on payment of the trust money into court should be set out in the petition, as these statements form the only declaration of trust under which the Court can act. *In re Levett's Trust*, 5 De Gex & S. 619.

Some portions of a trust fund payable by instalments, were paid by the trustee into court, under the Trustees' Relief Act. Upon a petition seeking payment of the fund so paid in, the trustee was ordered to pay the future instalments, from time to time as he should receive them, to the *cestui que trust* whose title was clear. *In re Wright's Settlement*, 1 Sm. & G. App. v.

A fund bequeathed in aliquot parts, on distinct trusts, ought not to be paid in by the trustees to the joint account of the several trusts, but ought to be carried to separate accounts. *In re Tillstone's Trust*, 9 Hare, App. lix.

Under the Trustees' Relief Act the Court has power to decide all questions that may arise concerning the fund in court, just as in a suit, and may, if necessary, direct any issue to determine the sanity of any person, or for like purposes. *In re the Trusts of Allen's Will*, Kay, App. li.

A suit is necessary if there are creditors or other unascertained claimants of the fund. *Ibid*.

(D) CESTUI QUE TRUST.

The doctrine, that a *cestui que trust*, who is in possession with the consent or even the mere acquiescence of the trustee, must be regarded as his tenant at will, applies only to the case where the *cestui que trust* is the actual occupant. If he is merely allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenant, he stands in the relation of an agent or bailiff of the trustee. If, therefore, the actual occupier is, under such circumstances, permitted to occupy for more than twenty years without paying rent, or acknowledging title, the trustee is barred by the 3 & 4 Will. 4. c. 27. *Melling v. Leake*, 24 Law J. Rep. (N.S.) C.P. 187; 16 Com. B. Rep. 652.

Right of a party entitled contingently in remainder, to have the trust fund brought into court at the hearing, though there be no imputation against the trustees. *The Governesses' Benevolent Institution v. Rusbridger*, 18 Beav. 467.

Purchase-money proved to have been left in the hands of the purchaser as an indemnity in the year 1796, but for which a receipt was indorsed on the conveyance, the evidence being in the recitals of the deed contemporaneous with the purchase, and executed in order to enable the purchase to be completed, and these recitals stating trusts of the fund under which the plaintiffs were entitled in remainder after two life estates, the last of which expired in 1845:—Held, that as the plaintiffs' title in possession did not accrue till 1845, they were entitled, on a bill filed in 1852, to have the trust fund made good out of the assets (real estate) of the purchaser, who had died in 1811. *Hawkins v. Gardiner*, 2 Sm. & G. 441.

(E) TRUSTEE AND MORTGAGEE ACTS.

(a) Construction of.

New trustees of stock appointed under the 18 & 14 Vict. c. 60. have not the right, under the act, to a transfer of the stock directly to them, but the right only to call for a transfer from the old trustees, or, if they should be incapable or refuse to make such transfer, to exercise the powers of the act which provide for such cases. *In re Smyth's Settlement*, 20 Law J. Rep. (N.S.) Chanc. 255; 4 De Gex & S. 499.

Copyhold estates were sold for payment of legacies under an order of court which directed all proper parties to join in surrendering the property. The purchasers of three lots paid their purchase-money into court, and required a surrender to be made to them. The legal estate was vested in a married woman, who wrote to the purchasers of two of the lots disputing the legality of the sale, and refusing to convey, but she gave no refusal as to the other lot. Her husband, who was interested in the estate through her, gave no refusal as to any of the lots. Upon a petition by the plaintiffs, under the 18 & 14

Vict. c. 60.—Held, that the refusal enabled the Court to make an order that the married woman or some person in her place should surrender; but that where there had been no refusal the Court would not make any order either on the husband or the wife. *Rowley v. Adams*, 20 Law J. Rep. (N.S.) Chanc. 436; 14 Beav. 130.

Held, also, that if the husband and wife had refused to execute a proper deed, this Court would have made an order vesting the estate in the purchasers, but that the notice served did not enable the Court to make the order. *Ibid.*

Held, also, that the husband and wife could not raise any objection to the petition for multifariousness, though it was presented by several parties having several interests. *Ibid.*

The Trustee Act, 1850, does not give jurisdiction to the Court of Chancery to exercise a power of appointing new trustees vested in a donee, who is willing to execute the power, however irregularly the donee may have previously intended to exercise it; nor jurisdiction to remove a trustee willing to act, although previously desirous of retiring. *In re Hodgson's Settlement*, 20 Law J. Rep. (N.S.) Chanc. 551; 9 Hare, 118.

Semble—The same notices and precautions required by the statute previously to removing trustees of the legal estate in lands and hereditaments, trustees of stock, or a chose in action, are requisite before applying to the Court of Chancery to exercise a legal power of appointing trustees vested in the donee of the power. *Ibid.*

Therefore, on petition under the Trustee Act, 1850, for appointment of new trustees, where a continuing trustee was at first desirous of retiring, but afterwards was willing to remain, and the donee of the power of appointment at first refused to exercise the power without a consideration being paid to him, but afterwards consented to execute it, the petition was dismissed, but without costs. *Ibid.*

The 32nd section of the Trustee Act, 1850, held applicable to the case where all the original trustees had disclaimed. *In re Tyler's Trusts*, 21 Law J. Rep. (N.S.) Chanc. 16; 5 De Gex & S. 56.

A mortgagee in fee died intestate as to the mortgaged premises, but appointed an executor. His heir-at-law could not be found or was unknown. The mortgage money was still due, and was not intended to be paid off, but the executor, wishing to make a transfer of the mortgage, petitioned, under the 19th section of the 13 & 14 Vict. c. 60, the Trustee Act, 1850, for an order vesting the mortgaged premises in him.—Held, that the Court has jurisdiction upon such a petition to make the order, and that the legislature did not mean to confine its authority to the case of a simple "re-conveyance." *In re Boden's Estate*, 21 Law J. Rep. (N.S.) Chanc. 316; 1 De Gex, M. & G. 57; 9 Hare, 820; overruling *In re Meyrick's Estate*, 20 Law J. Rep. (N.S.) Chanc. 336; 9 Hare, 116.

A sum of stock was standing in the names of A and B, in trust for C for life, with remainders over. A and B refused to pay the dividends to C. On a petition presented by C under the Trustee Act, 1850, that the right to receive the dividends accrued and to accrue might be vested in her,—Held, first, that under the 23rd and 24th sections, an order might be made as to the dividends already accrued,

notwithstanding the refusal of the two trustees; and, secondly, that no order could be made as to the future dividends. *In re Hartnall's Trusts*, 21 Law J. Rep. (N.S.) Chanc. 384; 5 De Gex & S. 111.

Stock was standing in the names of A and B upon trust for C for life, with remainders over. By an order made in a cause instituted by C against A and B, with respect to the stock, it was ordered that A and B should transfer the stock to the credit of the cause. A refused to make the transfer. A petition was presented by C under the Trustee Act, 1850, and in the cause, praying that the right to transfer the stock might be vested in B alone.—Held, that the Court had not jurisdiction to make the order. *Mackenzie v. Mackenzie*, 21 Law J. Rep. (N.S.) Chanc. 385; 5 De Gex & S. 338.

A mortgage in fee was made of real estate. The mortgagor died, having devised the estate to an infant. A claim of foreclosure was filed by the mortgagee against the infant, and an order for sale was made therein. A petition for a vesting order, under the 7th section of the Trustee Act, 1850, was dismissed, on the ground of its being unnecessary. *In re Williams*, 21 Law J. Rep. (N.S.) Chanc. 487; 5 De Gex & S. 515.

The Court will not, under the Trustee Act, order the removal of a trustee merely on the ground of his having gone out of the jurisdiction. *In re Mais*, 21 Law J. Rep. (N.S.) Chanc. 875.

The Court will not, on motion or petition under the Trustee Act, 1850, or without suit, declare the infant heir of a deceased partner trustee for the surviving partner of such of the partnership assets as consisted of freehold and copyhold estate vested in the partners as tenants in common, the share in which of the deceased partner the survivor under a power in the partnership deed had elected to take at a valuation. *In re Burt*, 22 Law J. Rep. (N.S.) Chanc. 153; 9 Hare, 289.

Leases were granted to A B for certain terms of years. He subdemised to C D for the terms, less ten days. C D mortgaged to E F & Co. for securing money, and subdemised for the last-mentioned terms, less one day, with a power of sale, and covenanted to assign the last day of each term to a purchaser. The mortgagees (E F & Co.) sold to G H, and assigned the mortgage terms. G H then bought of A B the improved ground rents, and took an assignment of the leases granted to him. C D, the mortgagor, being abroad, G H petitioned under the Trustee Act (13 & 14 Vict. c. 60.) that the Court would declare the last day of each of the terms, created by the underlease to him, vested in the petitioner; but the Court, concurring in the opinion of one of the Vice Chancellors, dismissed the petition. *In re Propert's Purchase*, 22 Law J. Rep. (N.S.) Chanc. 948.

Order made under the Trustee Act, 1850, appointing a new trustee, and vesting the trust premises in him jointly with the continuing trustee in a case where one of the three trustees was lunatic, and though the will contained a power to appoint new trustees. *In re Davies*, 3 M. & G. 278.

The Trustee Act, 1850, does not give to the Lord Chancellor of Great Britain sitting in lunacy jurisdiction over lands in Ireland. *Ibid.*

Semble—that the Lords Justices intrusted, by warrant under the sign manual, to make orders in

lunacy, have jurisdiction to make a vesting order under the Trustee Act, where the heir of the surviving trustee is of unsound mind; but for greater certainty the Lord Chancellor made the order. *In re Waugh's Trust*, 2 De Gex, M. & G. 279.

A debtor, resident in India, pledged shares held by him in a joint-stock banking company in England, with a creditor in England, with authority, by letter, to sell, which was communicated to, and recognized by, the banking company. The creditor, in exercise of the authority, sold the shares to a purchaser. Upon the petition of the purchaser:—Held, that the shares were “stock,” and that the debtor in India being constructively a trustee, was a trustee for the purchaser within the Trustee Act, 1850, and the Court made an order directing a specified person to transfer the shares to the petitioner. Under the 1 Will. 4. c. 60, the Court was prohibited from making any order upon such a petition until the rights of the petitioner had been ascertained by suit, but the Trustee Act, 1850, contains no such prohibition. *In re Angelo, ex parte Frith*, 5 De Gex & S. 278.

A testator devised his freehold estates to his granddaughter for life, with remainder to all her children as tenants in common in fee on their attaining twenty-one. In a suit for the administration of the testator's real and personal estate, certain parts of the real estate had been contracted to be sold by order of the Court to provide a fund for payment of costs. The only two infant children of the granddaughter were parties to the suit. On their petition in the cause and under the Trustee Act, 1850, praying a declaration that the petitioners and the unborn children of the granddaughter would, on attaining twenty-one, be trustees of the estates devised to the children of the granddaughter for the purpose of the decree, and that their respective rights might be vested in the respective purchasers or that some person might be ordered to convey for them:—Held, that the 29th and 30th sections of the Trustee Act, 1850, did not apply, and that the infants were not constructive trustees, and the Court refused to make any order. *Weston v. Filer*, 5 De Gex & S. 608.

Before the passing of the 15 & 16 Vict. c. 55, the Court had no authority to make a vesting order with regard to stock held by an infant sole trustee, who was out of the jurisdiction of the Court. *Cramer v. Cramer*, 5 De Gex & S. 312.

The infant heir of a person who has died intestate, leaving real estate, which he had in his lifetime contracted to sell, is not a constructive trustee for the purchaser within the Trustee Act, 1850, unless he has been declared to be so by a decree of the Court. *In re Carpenter*, Kay, 418.

The Court has authority to make a vesting order under the Trustee Act, 1850, in cases where there is nothing to prevent a conveyance of the trust property to the trustees appointed by the Court. *In re Manning's Trusts*, Kay, App. xxviii.

A & B being trustees, the Master found that it was uncertain whether A was living or dead; but B was living; afterwards B died:—Held, that A was not sole trustee within the Trustee Act, 1850; and the 22nd section of the act did not apply. *In re Randall's Will*, 1 Drew. 401.

(b) Practice under.

Petition for the appointment of new trustees and
DRAST, 1850—1855.

a vesting order under the 13 & 14 Vict. c. 60. The trust fund was a sum of stock, and no representation had been taken out to the surviving trustee. The Court refused to make the order. *In re Frost's Trust*, 20 Law J. Rep. (n.s.) Chanc. 112.

The surviving trustee of a settlement having refused to transfer certain trust funds to two new trustees duly appointed, it was held, that the new trustees were to be considered the persons “absolutely entitled” under the act, and if the old trustee refused, upon their application, to transfer, for the space of twenty-eight days, the Court, upon a petition by such new trustees, would direct the secretary of the Bank of England to transfer the funds to them. *In re Russell's Trust*, 20 Law J. Rep. (n.s.) Chanc. 196; 1 Sim. N.S. 404.

In cases where a new trustee is appointed under the Trustee Act, 1850, to act jointly with continuing trustees, the provisions of the act in respect of vesting orders are inapplicable, and the proper order to make is for the person approved of by the Master, to convey the trust property to the new and continuing trustees. *In re Watts*, 20 Law J. Rep. (n.s.) Chanc. 337; 9 Hare, 106.

A vesting order under the Trustee Act of 1850 is not applicable where a new trustee of real estate is appointed by the Court to act jointly with a continuing trustee, the effect of such an order being to sever their joint tenancy; therefore, in such cases a conveyance of the real estate to the use of the new and continuing trustee is requisite. *In re Plyer's Trust*, 20 Law J. Rep. (n.s.) Chanc. 529; 9 Hare, 220.

Demise of lands to trustees for 1,000 years on certain trusts. Petition for the appointment of new trustees:—Held, that the reversioner ought to be served with the petition. *In re Farrant's Trust*, 20 Law J. Rep. (n.s.) Chanc. 532.

The Court made an order, upon one petition, for the appointment of new trustees in the place of retiring trustees and a lunatic trustee, and that the trust estates should vest in the new trustees; but directed that the order should be entitled both in Lunacy and in Chancery, and be entered in the Registrar's book. *In re Davison*, 20 Law J. Rep. (n.s.) Chanc. 644.

Whether, under the 7th section of the Trustee Act, 1850, real estate can be ordered to go to uses to bar dower in favour of the *cestui que trust—quere*. *In re Howard*, 21 Law J. Rep. (n.s.) Chanc. 437; 5 De Gex & S. 435: (such an order was subsequently made by Kindersley, V.C. in *In re Lush's Estate*, 5 De Gex & S. 435, note (a).)

A petition, under the Trustee Act 1850, stated that A had mortgaged lands to B in fee; that B had died, having by his will devised the lands to infants, and appointed C his executor; that a contract had been entered into by C with a railway company for the sale of a part of the lands at a certain price, and that, for the purpose of carrying out the contract, it was necessary to get in the legal estate. The petition prayed the legal estate might be vested in C, and that the railway company might pay the costs of the petition. The railway company appeared at the hearing, but objected to pay the costs:—Held, that the Court had no jurisdiction to make any order either in favour of, or against the company. *In re Rees' Devises*, 21 Law J. Rep. (n.s.) Chanc. 687.

In cases where new trustees are appointed under

the Trustee Act, 1850, the real estates subject to the trust ought to be conveyed to them by deed, and the vesting order ought only to be resorted to when it is inconvenient to obtain a conveyance. *Langhorn v. Langhorn*, 21 Law J. Rep. (N.S.) Chanc. 860.

A testator bequeathed property to A and B equally, and appointed an executor and an executrix. The executrix married, and the property was laid out in stock in the names of the executor and executrix "the wife of C." C, the husband, in 1839, went abroad, and had, down to 1852, never been heard of, and was not known whether to be alive or dead. A attained twenty-one, and he and the executor and executrix petitioned under the statute 13 & 14 Vict. c. 60, for a declaration that C was a trustee within the meaning of the act, and a direction that the right to transfer was vested in the executor and executrix and an official of the Bank, and that half the fund might be transferred by them into the name of A: the Court declared C to be a trustee, and that the right to transfer was vested in the executor alone. *Ex parte Bradshaw, in re Dennison's Trust*, 22 Law J. Rep. (N.S.) Chanc. 180; 2 De Gex, M. & G. 900.

In the appointment, under the Trustee Act, 1850, section 28, of a new trustee of copyholds, where the consent of the lord of the manor is not obtained, the customary heir of the last surviving trustee will be ordered to do all such acts as will duly vest the copyholds in the new trustee. *In re Hey's Will*, 22 Law J. Rep. (N.S.) Chanc. 248; 9 Hare, 221.

Where a peer of parliament had been ordered to execute a deed charging certain estates and property with a jointure, of which estates and property he had been declared a trustee, so far, for his wife, on his refusal to execute, a person was appointed to do so in his place and stead. *Wellesley v. Wellesley; Mornington v. Mornington*, 22 Law J. Rep. (N.S.) Chanc. 966; 4 De Gex, M. & G. 537.

The Court will not, as a general rule, receive the evidence of the solicitor in the matter, as to the fitness of persons proposed to be appointed new trustees. *Grundy v. Buckeridge*, 22 Law J. Rep. (N.S.) Chanc. 1007.

An order made under the Trustee Act, 1850, that the legal estate outstanding in a trustee should vest to uses to bar dower in favour of a purchaser. *Davey v. Miller*, 22 Law J. Rep. (N.S.) Chanc. 1054; 1 Sm. & G. App. xix.

Three trustees of a marriage settlement were originally appointed; one died and one absconded. Upon an application to the Court under the Trustee Act, an order was made to vest in two new trustees, jointly with the survivor, such estate as was vested in the absent and continuing trustees. *Smith v. Smith*, 24 Law J. Rep. (N.S.) Chanc. 229; 3 Drew. 72.

In appointing new trustees the Court is not limited to the number originally nominated. *Plenty v. West*, 16 Beav. 356.

It is not necessary for the lord of a manor to appear in court to consent to a vesting order under the Trustee Act (13 & 14 Vict. c. 60. s. 28). *Ayles v. Cox*, 17 Beav. 584.

After a decree for the sale of an intestate's copyhold estate in lots, but before the sale, the infant heir of the intestate was admitted:—Held, that a petition for a vesting order was properly presented by the purchaser, whose money was in court, and

that the costs of the order were to be borne by the vendors, and to be paid out of the purchase-money of the particular lot, and not out of the fund in court generally. *Ibid*.

On a petition to appoint new trustees under the Trustee Act, all the *cestuis que trust* and the old trustees were required to appear. *In re Sloper*, 18 Beav. 596.

Two trustees of real estate were appointed by the Court in the place of one, on petition under the Trustee Act, 1850; and the property being small, without a reference, on an affidavit of the fitness of the two persons proposed as trustees. *In re Tunstall's Will, ex parte Tunstall*, 4 De Gex & Sm. 421.

The Lord Chancellor declined to order the transfer of funds, standing in the joint names of a lunatic and another, to the party claiming such transfer, without a previous reference to the Master. *In re Were*, 3 Mac. & G. 233.

Copyhold premises were surrendered in 1829 by a debtor to the use of his creditor, his heirs and assigns, upon trust that he, his heirs, executors, administrators or assigns, should sell the same, and out of the proceeds should pay to himself, his executors or administrators, 200l. then due and interest. The creditor died in 1831. In 1851 his personal representative contracted to sell the copyhold premises for 100l. The customary heir of the creditor was an infant. On the petition of the personal representative of the creditor, it appeared that the debtor had died intestate, that there was no personal representative, and that proof of the title of the customary heir would be very expensive. The Court made an order vesting the legal estate in the copyhold premises in the purchaser, without any service either on the customary heir or on the personal representative of the debtor. *In re Wise, ex parte Wise*, 5 De Gex & S. 415.

Persons entitled to six seventh parts of a trust fund applied to have a new trustee of the fund appointed:—Held, that *prima facie* all the persons beneficially interested must be before the Court, and that though circumstances might render such an application impossible, yet no such impossibility being suggested, these persons were not entitled to apply, and the Court declined to make the order asked, without service on the person entitled to the remaining seventh part. *In re Richards's Trust*, 5 De Gex & S. 636.

A trustee having refused to convey certain shares to new trustees duly appointed, a notice was served upon him under the 24th section of the Trustee Act, 1850, and on a petition being afterwards presented, which was not served on the recusant trustee, the Court made a vesting order. *In re Baxter's Trusts*, 2 Sm. & G. App. v.

TURNPIKE.

A turnpike act, passed in 1840, and which was to be in force for thirty-one years, provided that it should not be lawful to continue or erect any turnpike-gate across the roads *in the town of T*, or in any other town through or into which the said roads might pass or be made:—Held, that the prohibition

extended to the erection of a gate within the limits of the town of T as it existed at any time during the operation of the act, and not merely at the time when the act passed. *Regina v. Cottle*, 20 Law J. Rep. (N.S.) M.C. 162; 16 Q.B. Rep. 412.

On the trial of an indictment against the turnpike trustees for erecting a gate within the town of T, the Judge directed the jury that the word "town" was to be taken in its popular sense of a collection of houses, and that they were to consider whether the spot where the gate stood was so surrounded by houses that the inhabitants might fairly be said to dwell together, the fact of the houses being separated by gardens not preventing them from lying together:—Held, not to be a misdirection. *Ibid*.

The General Turnpike Act, 3 Geo. 4. c. 126, by section 55. enables turnpike trustees to let the tolls by auction, and prescribes certain requisites to be pursued on such lettings, and by section 57. "all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike roads, signed by the trustees letting such tolls, or by their clerk and treasurer, shall be good and valid notwithstanding the same may not be by deed or under seal":—Held, that an agreement, signed by the clerk to the trustees, which recited that A B was the highest bidder for, and had become the rentor of, certain tolls, and stated that the clerk on behalf of the trustees did thereby agree to let, and A B did thereby agree to take, the tolls and toll-house, was a sufficient compliance with the statute. *Shepherd v. Hodsman*, 21 Law J. Rep. (N.S.) Q.B. 263; 18 Q.B. Rep. 316.

Held, also, that the 8 & 9 Vict. c. 106. s. 3, which provides that a lease required by law to be in writing of any tenements or hereditaments shall be void unless made by deed, does not apply to agreements for letting tolls under the 3 Geo. 4. c. 126. *Ibid*.

The 49th section of the Turnpike Act (3 Geo. 4. c. 126.) provides that any mortgagee of tolls, toll-gates, &c., may obtain possession of the said toll-gates, &c., in order to pay the principal and interest due to him by an ejectment on his own demise, without joining the other mortgagees; but the person who has so obtained possession is to apply the tolls received to the use and benefit of all the mortgagees *pari passu*, in proportion to the sums due to them respectively. The lessor of the plaintiff, a mortgagee of tolls, brought ejectment against the trustees under this section upon his own demise. After the action was commenced, one of the trustees, who was also a mortgagee, brought another ejectment, laying the demise on a day prior to that in the present action, upon which judgment was confessed by the trustees before the trial of the present action:—Held, that notwithstanding this, the plaintiff was entitled to have the verdict entered for him at the trial. *Doe d. Butt v. Rous*, 22 Law J. Rep. (N.S.) Q.B. 111; 1 E. & B. 419.

If a turnpike road be out of repair, a single Justice has no power under the General Highway Act, 5 & 6 Will. 4. c. 50. s. 94, to summon the surveyor or other officer of the turnpike road to appear before the Justices at a special sessions for the highways. *Regina v. the Justices of St. Albans*, 22 Law J. Rep. (N.S.) M.C. 142.

The Justices at such special sessions have no authority to make an order on such officer of the

turnpike-road to repair the road, or to pay money to be applied to the repairs of it, if the turnpike trust funds are insufficient, nor without giving such officer an opportunity of shewing the condition of the funds. *Ibid*.

The 4 & 5 Vict. c. 59. enabling Justices to order the parish surveyor to pay a sum out of the highway rate for the maintenance of a turnpike-road, if they find that the funds are insufficient for its repair, does not alter the duty of the turnpike trustees, or give them a right to apply their funds otherwise than as directed by their local act. *Regina v. the Trustees of the South Shields Turnpike Roads*, 23 Law J. Rep. (N.S.) M.C. 134; 3 E. & B. 599.

The trustees of a turnpike road have no power, either under that act or the 13 & 14 Vict. c. 79. s. 4, to apply their funds in payment of arrears of interest upon monies secured upon the tolls in priority to the necessary repairs of the road. *Ibid*.

The hamlet of W, within and part of the parish of B, was, by a local act, constituted the town of W, and placed under the management of Commissioners, and the surveyor of the highways was required to pay a proportion of the highway rates of the parish to the Commissioners, W continuing liable to contribute to the parish rates. By another local act, 7 Geo. 4. c. x., "for maintaining a turnpike road from W to L, and groynes, embankments and other sea defences, for protecting such road and the lands adjoining from the future encroachments of the sea," trustees were appointed to carry the act into effect, with power for such purpose to levy and assess rates upon the owners of the land; and by section 47. the powers and authorities conferred by the former local act were not to be affected, except that the Commissioners were to be relieved from maintaining and protecting so much of the road as was within W. The Public Health Act, 11 & 12 Vict. c. 63, was afterwards applied to W, and a local board was appointed, which was to execute the office and have all the powers, &c., of surveyors of highways, except where such powers, &c., might be inconsistent with the act, and the inhabitants of any district were not to be liable to highway rate or other payment, not being toll, in respect of making or repairing roads or highways within any parish, township or place, situate beyond the limits of such district. Portions of the turnpike road being out of repair, and the revenues accruing to the trustees under the local act being insufficient to keep it in repair and preserve the embankments, &c., an order was made, under 4 & 5 Vict. c. 59, upon the surveyor of the highways of B for payment of a portion of the highway rates to the trustees, to be laid out in the repair of the portion of the turnpike road within the parish of B; and this order being appealed against,—Held, first, that the road in question was a turnpike road, within the 4 & 5 Vict. c. 59. Secondly, that, by the 7 Geo. 4. c. x., the management of the road was transferred from the Commissioners to the turnpike trustees, the latter having the ordinary right to seek relief from the parish in case of the deficiency of funds, and the parish being liable to an indictment for non-repair of the road. Thirdly, that, under the Public Health Act, the part of the parish without the district of the local board, in case of the deficiency of turnpike funds, was liable to contribute to the repair of any part

within the parish and not within the district, whilst the district alone was liable to contribute to the repair of any part of the road within it; the former powers of the surveyor of the parish to make a highway rate no longer existing, and the two parts of the parish being entirely distinct for the purpose of contributing to the repair both of the turnpike road and of the general highways.—Held, also, that the local board of health were made the surveyors of the highways within the district, and empowered to make a highway rate for the purpose of contributing towards the deficiency of the turnpike funds; and that the order appealed against was therefore invalid. *Regina v. the Trustees of the Worthing and Lancing Turnpike Roads*, 23 Law J. Rep. (N.S.) M.C. 187; 3 E. & B. 989.

Turnpike trustees, under the powers conferred by a turnpike act, borrowed on mortgages of the tolls several sums of money, which were properly expended in carrying out the purposes of the act. The mortgages were dated in 1815, 1824, and 1832. By a subsequent act, 3 Will. 4. c. lxxx, the former act was repealed; and section 2. provided, that out of the monies already received by virtue of the repealed act, and then in the treasurer's hands, or out of the first monies which should be produced or received by virtue of the repealing act, the trustees "shall in the first place pay and discharge all the costs and expenses relative to the obtaining and passing of this act, together with lawful interest for the same, and the remainder of such monies shall (after payment of the necessary expenses of erecting or repairing toll-gates, toll-houses, and milestones, and for books, &c., and other expenses incidental to the execution of this act) from time to time be applied in keeping down the interest of the principal monies advanced or borrowed on account of the said road, and which may be borrowed on the credit of this act, and in amending, making, altering, turning, widening and keeping in repair the said road, and in otherwise putting this act into execution; and, lastly, in repaying the principal monies already borrowed or to be borrowed." On the mortgages of 1815 there was due in 1825 an arrear of four years' interest, which remained unpaid in 1842. In 1842, 1843, and 1852 the trustees made payments on account of this arrear of interest (in 1852 to the amount of 97l. 10s.), still leaving an arrear of about two years' interest. The interest on these and the other mortgages becoming due between 1825 and 1852 had been regularly paid. Only 2l. of the funds in the hands of the trustees had been applied to the repair of the road. The last audited accounts in 1853, after crediting the payments on account of the arrear of interest, shewed a balance against the trust of 5l. 13s. 7½d. On the 8th of November 1853 an order of Justices was made, under the 5 & 6 Will. 4. c. 50. s. 94, reciting that the road was out of repair, and that the trustees had made default in repairing it, as by previous order they had been required to do, and directing the sum of 74l. 2s. 1½d. to be paid out of the turnpike trust fund to the assistant surveyor of the highways to be expended on the repair of the road:—Held, that, looking to the whole scope of 3 Will. 4. c. lxxx, the words in section 2. "keeping down the interest of the principal monies borrowed," meant the payment of interest periodically as it became due; and

to that extent the trustees were empowered to expend the funds derived from the tolls, before applying any portion to the repair of the road; but that the act did not authorize the payment of old arrears of interest whilst the road was out of repair, and therefore that the order of Justices was valid, it appearing (as was necessary to give the Justices jurisdiction) that, disallowing the payments made in respect of the old arrears of interest, the trustees had in hand more than the sum they were ordered to pay for the repair of the road. *Regina v. Hutchinson*, 24 Law J. Rep. (N.S.) M.C. 25.

UNDUE INFLUENCE.

L F requested her nephew, J L L, to come and reside with her, and while so doing she altered her will in his favour; she subsequently made several other alterations, and by the last, the greater portion of the property she had power to dispose of was given to J L L and his two brothers. These alterations were made by her own solicitor. After the last of these alterations, she executed a *post obit* bond for 15,000l. in favour of J L L and his two brothers. This was done by a solicitor unknown to her, who was employed at her request by J L L. Differences afterwards arose between L F and her nephew J L L, who left her house. L F then sent for her own solicitor, and without taking any notice of the bond altered her will, and disposed of the whole of her property among other persons, and died leaving insufficient to pay the bond. Her solicitor, who was one of her executors, upon communicating the decease of the testatrix to J L L, was, for the first time, informed of her having executed the bond; and upon a bill by the executors to set it aside,—Held, that the bond was obtained by undue influence and upon a suppression of facts, and was void, and that it must be delivered up to be cancelled, with costs to be paid by J L L. *Cooke v. Lamotte; Lamotte v. Cooke*, 21 Law J. Rep. (N.S.) Chanc. 371; 15 Beav. 234.

A surgeon obtained from a poor patient, on a change of circumstances, his promissory note for an amount beyond what was due for medical attendance. The Court, in the absence of evidence to prove that the patient intended to pay more than what was justly due, ordered the note to be impounded, and directed an issue at law to try the amount actually due. *Billing v. Souther*, 21 Law J. Rep. (N.S.) Chanc. 472; 9 Hare, 534.

The Court of Chancery has jurisdiction over transactions between persons in the relation of *quasi* guardian and ward. Thus, where a young lady, who had been living for thirteen years previously with her mother and step-father, within twelve months after she became of age joined with the latter, at his request and under his influence, in a promissory note for which she received no consideration, and on which the payee had several years afterwards obtained a verdict against her at law, the Court on motion restrained the payee from issuing execution, and without requiring the amount to be paid into court. *Espey v. Lake*, 22 Law J. Rep. (N.S.) Chanc. 336; 10 Hare, 260.

An assurance company, through B, the medical attendant of a married woman, who was also the

trustee of the deed made upon her separation from her husband, purchased of her, with a knowledge of these facts, four annuities: each of these was secured by B's warrant of attorney, and also by her conveying to trustees for the company the rents of certain real estates settled to her separate use. B received, if not the whole, certainly very large benefits from the transactions:—Held, that the purchases were valid; that she had competent advice; that the transaction was fully explained to her; that she knew it was a purchase for value, and that the rents of her estate were made liable for the payment, and that she was not subject to coercion or undue influence, and that the rents of the settled estates were applicable to the payment of the annuities. *Blaikie v. Clark; Cock v. Clark*, 22 Law J. Rep. (n.s.) Chanc. 377; 15 Beav. 595.

Held, also, that the Court in its discretion, under the 53 Geo. 3. c. 141. s. 6, could direct allowance to be made to her in account for sums deducted from the purchase-money for the last two annuities for insuring the life of B the medical attendant, and for compound interest upon the arrears of the previous annuities, and that such deduction did not invalidate either of the last two transactions. *Ibid.*

Where a man obtains, without consideration, a security from a lady to whom he is engaged to be married, the Court requires him to shew the bona fides of the transaction. *Cobbett v. Brock*, 20 Beav. 524.

A debtor induced a lady to whom he was engaged to become security for a debt. After the marriage she insisted that she had been imposed upon:—Held, that the only duty of the creditor (who was aware of the relation between the parties) towards the lady was to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction of which the creditor had no notice, did not affect his security. *Ibid.*

A son entitled in remainder to real estate expectant on the lives of his mother and father, by whom he was maintained, a few days after he attained twenty-one, in order to relieve his parents, who had mortgaged their life interest as a security for monies borrowed and partly expended in improving the property, from keeping on foot certain life policies, executed a deed, charging the inheritance with the mortgage debt, but subsequently filed a bill claiming to have the deeds cancelled on the ground of fraud, which was disproved, and of undue influence. Bill dismissed with costs. *Baker v. Bradley*, 2 Sm. & G. 531.

The reported decision in *Field v. Evans*, 15 Sim. 375, ascertained to be erroneous. *Ibid.*

UNIVERSITY.

The Regius Professorships of Divinity, Greek and Hebrew, were founded and endowed in the University of Cambridge by King Henry the 8th, antecedently to the foundation of Trinity College, and the lands on which the endowment was charged were afterwards granted to the college, which thenceforward became bound to pay the stipends of the three professors. By the 41st of the Statutes granted by Elizabeth to the college, it was provided that any fellow of Trinity College on being elected

to any one of the professorships "*Socii nomen solum teneat*." By letters patent of Charles 2nd, this disabling provision was annulled, so far at least as related to the Greek and Hebrew Professorships. By the act, 3 & 4 Vict. c. 113, the canonry of Ely was annexed to the Regius Professorship of Greek, and in 1844, Her Majesty, by letters patent, and at the instance of Trinity College, granted a new code of statutes to the college, which, after reciting the statutes given to the college by Elizabeth, but not adverting by name to the letters patent of Charles 2nd, revoked "all statutes, ordinances and decrees made and given for the government of the college," and among the new statutes the 41st of Elizabeth was re-enacted in the same terms. In 1853 one of the junior fellows of the college accepted the office of Regius Professor of Greek, and was subsequently elected a senior fellow:—Held, that, by the acceptance of the office of Regius Professor, he ceased to be a fellow except in name only, and that his election as senior fellow was void. *In re Trinity College, Cambridge, ex parte Edleston*, 3 De Gex, M. & G. 742.

USE AND OCCUPATION.

Although a corporation may be liable in an action for use and occupation of premises, it can only be so for the period of actual occupation, and a continuous occupation for several years will not render the corporation tenants from year to year. *Fintlay v. the Bristol and Exeter Rail. Co.*, 21 Law J. Rep. (n.s.) Exch. 117; 7 Exch. Rep. 409.

A railway company, through their solicitor, hired rooms from the 16th of December 1846 for one year, but occupied them until the 16th of December 1848, previously to which time they removed their furniture and effects, left the keys in the doors, and paid the rent up to that day, but gave no notice to quit:—Held, that the defendants were not liable in use and occupation for rent subsequently to December 16, 1848. *Ibid.*

In an action for the use of a house, there was no evidence that the defendant had entered or occupied. The under-sheriff told the jury that a constructive occupation was sufficient, without explaining to them what that meant:—Held, a misdirection. *Towne v. D'Heinrich*, 22 Law J. Rep. (n.s.) C.P. 219; 13 Com. B. Rep. 892.

The defendant agreed to rent the house, and the plaintiff to put it in repair before the occupation should commence, and he sent in workmen for that purpose. The defendant having gone on to the premises and given them directions:—Held, no evidence of such an entry as would support the action. *Ibid.*

USURY.

Debt by the public officer of a banking co-partnership for work and labour, commission, money lent, interest, and on an account stated. Fourth plea, as to 390*l.* 13*s.*, parcel, &c. that it was corruptly agreed between the defendant and the banking co-partnership, that they should lend to him from time to time such sums as he should require,

by paying certain cheques of the defendant, upon the terms that while the said co-partnership should forbear to demand payment of the sums so lent, they should charge the defendant partly for interest and partly under the shift and chevisance of commission for their work and labour, more than 5*l.* per cent., to wit, 10*l.* per cent., and that in pursuance of such agreement, the company did lend to the defendant divers sums, and did charge a large sum, partly by way of interest and partly by way of shift and chevisance of commission, and exceeding the rate of 5*l.* per cent. The plea then identified the sum of 390*l.* 13*s.*, parcel, &c. The fifth plea was similar, but addressed only to the commission and interest:—Held, upon special demurrer, that the usurious agreement was pleaded with sufficient certainty, and that it was sufficient to state enough to make the agreement illegal within the 12 Ann. st. 2. c. 16, without averring that the contract was prior to the 2 & 3 Vict. c. 37, or that it was within the exception of that act as relating to land. *Derry v. Toll*, 20 Law J. Rep. (N.S.) Exch. 33; 5 Exch. Rep. 741.

Sir J. O. being much indebted, conveyed by indenture to trustees all his life interest in an estate, in trust, without the necessity of his consent, to convey the same to certain creditors. By another indenture of the 1st of July 1823, between the trustees, Sir J. O. and the creditors, it was agreed that the trustees should hold the rents to pay annuities, and to divide the rents into two shares proportionate to the amount of the debts specified in two schedules to the deed, the portion appropriated to the first schedule to be paid to the creditors specified in that schedule equally in discharge of their debts, and after satisfying the debts and interest as to the shares appropriated to such creditors, to apply a competent sum in effecting and keeping on foot policies on the life of Sir J. O.: provided that any addition by way of bonus to the sums assured should belong to the creditors in the second schedule in addition to their debts, and be divided in proportion to their debts, notwithstanding that the principal and interest thereon might be discharged; and in consideration thereof, all the creditors gave to Sir J. O. leave to live anywhere without molestation to his person or goods by them; provided that if any creditor should molest him, his debt should be considered as released, and that Sir J. O. might plead such release in bar to any action. The trustees accordingly effected assurances, and after the death of Sir J. O. received the sum assured and also a bonus, the whole of which was claimed by Lady O. the widow, on the ground of the transaction having been usurious as to the creditors in the second schedule:—Held, first, that the indenture of the 1st of July was not void for usury as to the provision for the creditors in the first schedule. *O'Brien v. Kenyon*, 20 Law J. Rep. (N.S.) Exch. 203; 6 Exch. Rep. 382.

Seemle—that the licence to Sir J. O. was not a forbearing of the debt within the meaning of the 12 Ann. st. 2. c. 16, but was a relinquishment of his personal liability; and held, secondly, that the indenture was not void for usury as to the provision for creditors in the second schedule, nor was it in any respect void for usury. Held, also, that no action at law would lie at the suit of Lady O. against the trustees to recover either the balance unapplied or the sums received from the insurance

office; nor would such action lie even if the transaction were usurious as to the creditors in the second schedule. *Ibid.*

The statute 3 & 4 Will. 4. c. 98. s. 7, which exempted from the provisions of the Usury Act (12 Ann. st. 2. c. 16. s. 1.) bills of exchange not having more than three months to run, is not repealed by the statute 2 & 3 Vict. c. 37. s. 1, which, and the statutes continuing it, exempt from the operation of the usury laws all bills not having more than twelve months to run and all contracts above 10*l.*, provided there be no security upon land. Therefore, bills not having more than three months to run, though for more than 5*l.* per cent. interest, and though there be further security on land, are not void. *Clack v. Sainsbury*, 21 Law J. Rep. (N.S.) C.P. 41; 11 Com. B. Rep. 695.

A bill of exchange at three months, made to secure the repayment of money lent by the plaintiff at interest exceeding 5*l.* per cent., is not invalidated by reason of the plaintiff holding the security of land also for the repayment, within the 3 & 4 Will. 4. c. 98. s. 7. and the 2 & 3 Vict. c. 37. s. 1. *Nixon v. Phillips*, 21 Law J. Rep. (N.S.) Exch. 88; 7 Exch. Rep. 188.

The plaintiff covenanted (before the statute 17 & 18 Vict. c. 90, repealing the usury laws) to lend the defendant 15,000*l.* at certain periods, the whole to be advanced in a year from the date of the agreement, if required by the defendant, and to be secured by mortgage of real estates; and the defendant covenanted to pay the plaintiff, by way of premium, 1*l.* per cent. per annum upon the whole 15,000*l.* for three years from the date of the agreement, whatever might be the sum of money advanced, and also interest at 4*l.* per cent. on all sums advanced:—Held (*Platt, B. dissentiente*), that the contract was not on the face of it usurious within the statute 12 Ann. stat. 2. c. 16, as the 1*l.* per cent. premium must be considered as a compensation for the liability of the plaintiff to be called on by the defendant from time to time to make the advances. *Fussell v. Daniel*, 24 Law J. Rep. (N.S.) Exch. 130; 10 Exch. Rep. 581.

It is not usury to reserve interest on a mortgage debt secured on real estates at 5*l.* per cent. per annum from a day anterior to the day of actual payment of the principal, if from delay not occasioned by the mortgagee the payment of the principal is postponed, and if it was the *bonâ fide* intention of the parties to have paid and received the principal on the day from which the interest is reserved; and, *à fortiori*, if, under the circumstances, less than the legal amount of interest has been paid. *Long v. Storie*, 21 Law J. Rep. (N.S.) Chanc. 521; 9 Hare, 542.

Thus where a proposed mortgagee agreed to advance a certain sum to pay off two existing incumbrances, upon having, amongst other securities, a transfer of those incumbrances, and accordingly duly paid off the second incumbrancer and took a transfer from him, but from delay in the execution of the transfer from the prior incumbrancers he did not pay off their incumbrance until six weeks after the day of payment to the second incumbrancer, as and from which day it was agreed between the mortgagor and proposed mortgagee the deed of transfer from the prior incumbrancers should be dated and interest

calculated, it being the *bond fide* intention of all parties that both the incumbrances should have been then paid off, and the proposed mortgagee, under an agreement in the mortgage deed to accept interest at the rate of 4l. per cent. on punctual payment, having received less for the first half-year's interest than the amount would have been at the rate of 5l. per cent. per annum from the day on which the prior incumbrancers received their principal,—it was held, that the transaction was not usurious within the statute of 12 Ann. c. 16. *Ibid.*

A creditor who had lent a trader money took promissory notes for the amount, with interest, at 6l. per cent. per annum, and obtained a mortgage for securing the same amount of principal money, and for the same rate of interest on leasehold estates. Some of the notes were at, and some under, three months' date, and others at dates exceeding three but not exceeding twelve months. The trader became bankrupt, and the creditor tendered a proof for the amount of the notes and interest at 6l. per cent., but the Commissioner rejected the proof on the ground of usury, the money being, in his opinion, contracted to be lent on the security of the mortgage, the notes forming only a collateral security. The creditor appealed:—Held, that the statute 3 & 4 Will. 4. c. 98. having wholly exempted bills and notes not having more than three months to run from the usury laws, whether the money for which the same be given is or is not also secured on land, those notes were proveable. *Ex parte Warrington, in re Leake*, 22 Law J. Rep. (n.s.) Bankr. 33; 3 De Gex, M. & G. 159.

Held, further, that, whether or not such three months' notes were protected by the statute, they, as well as the notes for longer periods, not exceeding twelve months, similarly secured on land, were protected by the statute 2 & 3 Vict. c. 37, and proveable against the bankrupt's estate, the creditor giving up all the alleged securities but the notes. *Ibid.*

Held, also, that the concluding proviso of the latter statute does not impeach the validity of any bill or note payable at or within twelve months after date, given *bond fide* and not colourably, although interest, at however higher rate than 5l. per cent., be formally expressed as well as substantially contracted for, and landed security, by writing or deposit, or both, for payment of such bill or note was contemporaneously, either effectually or ineffectually, given. *Ibid.*

Where a person, at the same time that he gave a promissory note for money borrowed at 6l. per cent. interest, deposited title deeds of land as a further security, and upon a further advance entered into a parol agreement with the lender to execute a mortgage of the same lands as a security for the whole amount at 5l. per cent.—Held, that although (as already decided by one of the Vice Chancellors) the original deposit was not valid as being obnoxious to the usury law (12 Ann. stat. 2. c. 16), yet that the parol agreement created a good equitable mortgage notwithstanding that the deeds were not at that time and on that occasion delivered by the borrower to the lender, but had remained in the lender's possession from the time of the former transaction. *James v. Rice*, 23 Law J. Rep. (n.s.) Chanc. 819; 5 De Gex, M. & G. 461; 23 Law J. Rep. (n.s.) Chanc. 243; Kay, 231.

By a deed dated in 1819, A, in consideration of 500l. paid to him by B, conveyed a reversion of real estate, expectant on the death of C, to a trustee, upon trust, if C should die within five years, to raise and pay to B the sum of 1,000l.; and, if C should live beyond five years, to raise and to pay to B the sum of 1,500l. At the date of the deed C was sixty-one years of age. C died in 1844:—Held, that the deed of 1819 was void for usury. *Earl of Mansfield v. Ogle*, 24 Law J. Rep. (n.s.) Chanc. 450.

A foreclosure bill was filed, by a mortgagee of real estate, against A and other incumbrancers, stating that the defendants claimed an interest in the property, with the usual prayer. A put in an answer to the bill, and therein stated the deed under which he claimed, which was impeachable on the ground of usury. No objection was taken to this deed on the pleadings. By a decree made at the hearing of the cause, it was referred to the Master to take an account of the incumbrances:—Held, that in the proceedings before the Master, the plaintiff and the co-defendants of A were at liberty to object to A's deed on the ground of usury. *Ibid.*

In 1816 A transferred 10,000l. 3l. per cent. to B, which he sold, and after retaining 6,000l. repaid the surplus to A. Concurrently B gave to A a bond conditioned for the repayment of 6,000l. and 5l. per cent. interest, and he wrote to A engaging to replace the 6,000l. in the 3l. per cents. In 1822 B admitted his obligation to restore to A the stock sold out. The Court, in 1852, considering that the contract was for restoring the stock, and that A had not the option of taking stock or money, held that the contract was not usurious. *Goddard v. Lethbridge*, 16 Beav. 529.

There had been a loan of money on the security of bills, which bills being unpaid, others for a larger amount (including the interest due on the first set) were taken in their stead and were discounted, and discounted at usurious interest; and on this second occasion a warrant of attorney was taken, on which judgment was instantly entered up and registered so as to become a charge on land under the 1 & 2 Vict. c. 110:—Held, that the lender of the money was entitled to enforce his security against the land, as the circumstances under which it was given did not render it void under the 2 & 3 Vict. c. 37. s. 1. *Lane v. Horlock*, 25 Law J. Rep. (n.s.) Chanc. 253; 5 H.L. Cas. 580: reversing 22 Law J. Rep. (n.s.) Chanc. 985; 1 Drew. 587.

VENDOR AND PURCHASER.

- (A) CONTRACTS AND CONDITIONS OF SALE.
- (B) TITLE.
- (C) WARRANTY.
- (D) LIEN OF VENDOR.
- (E) PURCHASER.
 - (a) *Rights and Protection of.*
 - (b) *Liabilities and Duties.*
 - (c) *Conveyance to.*
- (F) INTEREST ON PURCHASE-MONEY.
- (G) COSTS.

(A) CONTRACTS AND CONDITIONS OF SALE.

One of the conditions of sale, subject to which certain copyhold estates were purchased, stipulated that

the vendors should not be required to produce any deeds, instruments or documents of title not in their possession, and all deeds of covenant for production, and attested, official or other copies, or extracts of or from any deed, will, &c. whether recited or referred to in the abstract or not, which the purchaser should, subject to this condition, require for verifying the abstract, or for any other purpose, and all certificates, &c. required to prove any descent, fact, matter or thing whatsoever, also all searches and inquiries for the purpose of ascertaining where such instruments or evidence were to be found, and all costs and expenses incidental thereto, should be respectively paid, made, searched for and obtained by and at the expense of the purchaser requiring the same, and all expenses of examination and comparison of the abstract with the deeds, and of procuring the production of such deeds as the purchaser under this condition should have a right to require, should be exclusively borne and paid by the purchaser:—Held, in an action to recover back the deposit paid upon the sale, that under the above condition, the vendors were not bound to procure a covenant for the production of two deeds not in the possession of the vendor, but which were set out in the abstract of title delivered to the purchaser, and to which the vendors had procured access for the purpose of verifying the abstract. *Gabriel v. Smith*, 20 Law J. Rep. (n.s.) Q.B. 386; 16 Q.B. Rep. 847.

Real property settled upon A for life, with remainder to trustees upon trust for sale, and to stand possessed of the proceeds for all the children of A equally, to be paid on their attaining twenty-one, was contracted to be sold by the trustees in the lifetime of A. A's children had attained twenty-one, and had conveyed their interests to trustees for the benefit of their children, who were minors, without any power of sale being given to such trustees. One of the conditions of sale was as follows:—"The purchaser shall not object to the vendors' title on the ground that the sale is taking place in the lifetime of A. The children of A, or the assigns and trustees of such of them as have aliened or settled their estates and interests, shall, if required, join in the conveyance to the purchasers":—Held, that this amounted to a warranty that the children, or those representing them, were in a condition to join in an effectual conveyance to the purchaser, and that the purchaser was not precluded from relying upon this defect of title. *Mosley v. Hide*, 20 Law J. Rep. (n.s.) Q.B. 539; 17 Q.B. Rep. 91.

All objections not taken by a certain day were to be considered as waived. Before the day, the purchaser's solicitor wrote to the vendors' solicitor, objecting to the title solely on the ground of the sale taking place in A's lifetime, but the letter inclosed an opinion upon the title, which expressly pointed out that the trustees of the children's shares had no power to join in the conveyance:—Held, that the letter and opinion must be read together, and sufficiently stated the latter ground of objection. *Ibid.*

A contract of sale described the property purchased as "The cottage and paddock comprising 1 a. 2 r. 8 p. situate at, &c. described in the particulars as Lot 1." The description of Lot 1. in the particulars was, "The property comprises 1 a. 2 r. 8 p. situate, &c. consisting of a cottage and paddock in the occupation of Mr. P." By the contract of sale,

the title and conveyance were to be completed according to the conditions of sale. One of these was, "The property comprised in the particulars is presumed to be correctly described, and the quantity of the land shall be taken as stated whether more or less (although the title-deeds state such quantity to be less) without any compensation on either side. And no other evidence of identity shall be required than that furnished by the title-deeds, and the statements therein shall be deemed conclusive evidence of the identity of the property." On default of completion the deposit-money was to be forfeited. The vendor delivered an abstract of title to 3 r. 22 p. only:—Held, that the mere fact of a title to land described as consisting of 3 r. 22 p. being made by the vendor, did not, under the circumstances, authorize the purchaser to contend that the title had not been made according to the conditions of sale, and that he was bound to complete. *Nicholl v. Chambers*, 21 Law J. Rep. (n.s.) C.P. 54; 11 Com. B. Rep. 996.

A & Co., merchants at Londonderry, had instructed their correspondent, S A, a merchant in London, to purchase corn on their account. S A purchased a cargo of Indian corn, and sent a contract note to the vendors, R & Co., which stated that the cargo was "sold by order and for account of R & Co. to our principals, shipped per *Cleopatra*, at the price of 24s. 6d. per quarter." The entry of the sale in the books of R & Co. made S A "debtor to the cargo of Indian corn;" and they sent to S A the charter-party, the bill of lading duly indorsed, an invoice, and an order directing the captain to act upon the instructions of S A. In the invoice S A was made the purchaser of the cargo. On the day of the purchase S A wrote to A & Co., advising them of "having purchased for your account the cargo at 24s. 9d.," and inclosing the bill of lading and other documents received from R & Co., as also S A's draft for 1,525l. 16s. 3d. at three months, and an invoice signed by S A, and stating that the cargo was "bought by order and for account and risk of A & Co.," at 24s. 9d. per quarter. S A afterwards wrote requesting the draft to be made payable at a banker's, as it "facilitates our discounting the bill." The draft was returned to S A accepted. S A, before the bill was due, became bankrupt, and R & Co. thereupon stopped the cargo *in transitu*, not having received payment for it "on account (as they stated) of the bankruptcy of the cargo buyer." A & Co. then wrote to R & Co., stating that S A, "from whom we bought the cargo," had informed them of its being stopped, and stating that they would then take up their acceptance upon the cargo being allowed to proceed. A & Co. afterwards paid to R & Co. the amount of the cargo (1,472l. 3s.) as invoiced by R & Co. to S A, upon being indemnified by R & Co., and the cargo was allowed to proceed as ordered by A & Co.:—Held, in an action by the assignees of S A to recover the amount of A & Co.'s acceptance, that the documents in this case shewed that S A was the purchaser of the corn from R & Co. and the seller of it to A & Co., and not merely an agent; that, therefore R & Co. had not at the time the right of stoppage *in transitu*; and that the assignees were entitled to recover in the action. *Pennell v. Alexander*, 23 Law J. Rep. (n.s.) Q.B. 171; 3 E. & B. 283.

A surplus of about 19 acres in one lot of land purchased under conditions of sale, and stated in the particulars taken from a former erroneous survey to contain 70 a. 24 p. more or less, and a deficiency of about 10½ a. in three several lots, stated in the same particular to contain together 32½ a. 2 r. 30 p. more or less, one of the conditions providing for compensation for any error in the particulars, and there being no intention of the vendors to sell the property in the lump:—Held, on special case, to be respectively subjects of mutual compensation by the vendors and purchaser. *Leslie v. Thompson*, 20 Law J. Rep. (n.s.) Chanc. 561; 9 Hare, 268.

Leasehold property put up for sale with the condition that the lessor's title would not be shewn and should not be inquired into. In the inquiry as to the title in a reference to the Master, the purchaser shewed that the lessors were a canal company, and that the company had, under their act, the power of selling the property, but not the power of leasing it:—Held, that the purchaser was precluded by the conditions of sale from taking that objection to the title. *Hume v. Bentley*, 21 Law J. Rep. (n.s.) Chanc. 760; 5 De Gex & S. 520.

A signed the usual agreement for purchase at an auction, and also a memorandum that he had purchased as trustee for B, who was present and paid the deposit. The abstract of title was sent to a solicitor, but whether he acted for A or B, or both, was disputed, and was afterwards sent by the vendors to B's solicitor. On bill filed by the vendors against A and B for specific performance, A stated as above, but B stated that he had bought the property as sub-purchaser from B:—Held, that the contract having been entered into by the vendors with A, the bill must be dismissed as against B, but that A was not bound by any communications or proceeding which had taken place as to title or otherwise between the vendors and B. *Chadwick v. Muden*, 21 Law J. Rep. (n.s.) Chanc. 876; 9 Hare, 188.

Where there is one entire contract for the sale of intermixed freehold and copyhold lands, and of the timber on both lands, and the vendor stipulates against distinguishing the freeholds from the copyholds, the title to the timber follows the land, and the purchaser cannot insist upon having the timber growing on the copyholds distinguished from that growing on the freeholds, although the price for the timber is in addition to that for the land. *Crosse v. Lawrence*, 21 Law J. Rep. (n.s.) Chanc. 889; 9 Hare, 462.

Under a contract to sell a copyhold estate and the timber upon it, at a certain price for the estate, and an additional price for the timber, according to the amount at which the timber had been previously valued for the purpose of the sale, the vendor is not bound to shew any licence, custom, or grant to sell or cut the timber. *Crosse v. Keene*, 21 Law J. Rep. (n.s.) Chanc. 892; 9 Hare, 469.

A purchaser cannot refuse to perform a contract to purchase leaseholds, because the lessee or covenantee is unknown, if the tenants regularly pay the rent according to the lease. *Flint v. Woodin*, 22 Law J. Rep. (n.s.) Chanc. 92; 9 Hare, 618.

A vendor may be his own auctioneer, and may, unknown to the bidders, employ a person to bid progressively up to a reserved price. *Ibid*.

Every objection to title or contract must be immediately notified by the purchaser on becoming acquainted with it, otherwise it will be deemed to have been waived. *Ibid*.

An agreement to purchase an estate stipulated that the purchase should be completed on the 25th of October. A difficulty occurred in making out the title, and the purchaser's solicitor, before the time of completion, acceded to its extension, but said that he should treat the contract as at an end if the title was not complete on or before the 5th of November following; and the title not being then complete, the purchaser brought an action for the deposit:—Held, upon a bill for specific performance by the vendor, that the contract was not determined, and a decree was made for specific performance, with costs. *Parkin v. Thorold*, 22 Law J. Rep. (n.s.) Chanc. 170; 16 Beav. 59.

Where the owner of a reversionary life interest in leasehold estates sold the same by private contract, and the purchaser obtained only the opinion of an actuary on its value, without taking any steps to obtain a knowledge of its market value with reference to its local circumstances, and the vendor instituted a suit to rescind the sale on the ground of inadequacy of price, the Court, considering upon the evidence that the defendant had not shewn that he gave the fair market value, set the same aside. *Edwards v. Burt*, 22 Law J. Rep. (n.s.) Chanc. 215; 2 De Gex, M. & G. 55.

If, before a sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill, and who have a knowledge of the property and of all the circumstances likely to influence its value, and also a well-considered estimate of what the property would be likely to fetch on a sale, and act on that opinion:—*Semble*, that the Court would not set aside the sale merely because surveyors should differ from the conclusion on which the parties acted. *Ibid*.

Semble—That a sale by auction is not necessary to sustain a purchase of a reversion if impeached. *Ibid*.

An estate was put up to sale by auction on the 22nd of July. By the conditions of sale an abstract of title was to be furnished within seven days from the day of sale on the application of the purchaser for the same; all objections were to be taken within eight days of such delivery, or to be considered as waived; the purchase to be completed on the 8th of August. The purchaser's solicitor called for the abstract on the 24th of July, two days after the sale. The estate was in mortgage, and the mortgagee being abroad, the abstract could not be made in time, but the same was delivered on the 3rd of August. The purchaser thereupon claimed to rescind the contract, and brought an action for the deposit. The vendor filed a bill for specific performance, to which the purchaser put in a demurrer:—Held, affirming a decree at the Rolls, overruling the demurrer, that time in the delivery of the abstract was not of the essence of the contract. *Roberts v. Berry*, 22 Law J. Rep. (n.s.) Chanc. 398; 3 De Gex, M. & G. 284: affirming 16 Beav. 31.

An offer by letter to purchase a house at a given sum, which is accepted unconditionally, will not constructively incorporate particulars and conditions of sale into the contract merely because the pur-

chaser and his agent had attended the auction, and had the particulars, &c. given to them. *Cowley v. Watts*, 22 Law J. Rep. (n.s.) Chanc. 591.

C put up a leasehold house for sale by auction, at which W and his agent attended: the house was not sold, but W through his agent offered to the auctioneer 3,200l. for the premises, which was unconditionally accepted. Upon a bill for a specific performance,—Held, that the offer and acceptance formed a contract to purchase the premises; but that the attendance at the previous auction and the knowledge of the conditions of sale did not make them a part of the agreement. *Ibid*.

Customary leasehold property held for a term of twenty-one years was described as customary renewable leasehold, and sold subject to the usual condition as to compensation in case of misdescription, error or mistake in the particulars:—Held, on claim by the purchaser, that the error was one of description, and not a defect of title, and that the plaintiff was entitled under the condition to a decree for specific performance; and an inquiry was directed in respect of the compensation for the difference in value between the actual and the stated tenure of the property. *Newby v. Paynter*, 22 Law J. Rep. (n.s.) Chanc. 871.

Property sold under an order of Court was described as being in the possession of A B at a yearly rent of 42l. It appeared, however, that the property was, at the time of sale, in the possession of a hostile claimant; and the Court, on the application of the purchaser, discharged him from his purchase, refusing to give the vendor time to recover possession by an ejectment. *Lachlan v. Reynolds*, 23 Law J. Rep. (n.s.) Chanc. 8; Kay, 52.

Leasehold hereditaments were agreed to be sold, and the vendor stipulated that he would produce a good and marketable title, commencing from the freeholder, but that no title should be called for prior to the lease granted by D S to the vendor. The lease having been granted pursuant to a prior contract, which contract had been mortgaged, the purchaser refused to complete, and the vendor filed a claim for specific performance:—Held, that the words of the contract were ambiguous, and that the purchaser was entitled to construe them most favourably to himself; and, therefore, that if the vendor insisted on specific performance, the disputed stipulation must be construed as if the words "but no title shall be called for prior to the lease granted by D S to the vendor" were omitted. *Rhodes v. Ibbetson*, 23 Law J. Rep. (n.s.) Chanc. 459; 4 De Gex, M. & G. 787.

An annuity was granted for the lives of four persons, and the lives and life of the survivors and survivor of them, secured by a term in a reversion of a freehold estate, and the reversion was offered for sale. One of the conditions of sale was, that certain evidence that "a life annuity granted to" A B had not been paid or claimed for twenty years, should be conclusive evidence that the annuity and term had determined:—Held, affirming a decision of one of the Vice Chancellors, that the condition was not binding, as the condition was one so worded as to lead a purchaser to a definite conclusion contrary to the real facts of the case. *Drysdale v. Mace*, 23 Law J. Rep. (n.s.) Chanc. 518; 5 De Gex, M. & G. 103; 2 Sm. & G. 225.

Where there is a condition of sale that "if from any cause whatever" the purchase shall not be completed by a certain day, the purchaser shall pay interest, and delay take place which is occasioned by the state of the title, and is not wilful, the purchaser is not discharged from the payment of interest; but where the first abstract was not a complete abstract, the Court gave interest only from the same period after the complete abstract was delivered as was equal in duration to the time which, by the contract, was allowed to elapse between the delivery of the abstract and the day wherefrom interest was to be paid. *Sherwin v. Shakespeare*, 23 Law J. Rep. (n.s.) Chanc. 898; 5 De Gex, M. & G. 517; 23 Law J. Rep. (n.s.) Chanc. 177; 17 Beav. 267.

On a sale of land by auction, one of the conditions provided that the purchaser of the largest lot should be entitled to the possession of the title-deeds:—Held, that the purchaser of the lot largest in extent, and not largest in value, was entitled to the deeds. *Griffiths v. Hatchard*, 23 Law J. Rep. (n.s.) Chanc. 957; 1 Kay & J. 17.

Upon the sale of certain property, comprising houses, lands and coal mines, lot 6. in the particulars of sale was described as "eighty cottages built of stone and eight cottages partly of timber, all in the occupation of the S colliery or their under-tenants or workmen." The purchaser discovered that the cottages were built by the owners of the colliery under lot 6, but had been transferred to the S colliery, and that they were let to workmen belonging to that colliery, who paid no rent for them. A claim was made by the vendor to the free occupation of the cottages, under a lease dated in 1771. The purchaser claimed compensation in respect of the rent:—Held, that the facts regarding the rent ought to have been stated in the particulars, and that the purchaser was entitled to compensation; but inquiries were directed as to the title of the vendor to the free occupation. *Brandling v. Plummer*, 23 Law J. Rep. (n.s.) Chanc. 960; 2 Drew. 427.

The sale of a manor with all the lord's rights indefinitely stated will not be held to include valuable rights, which, at the time of the sale, the vendor had no contemplation of selling, and which were discovered only in consequence of the inquiries made by the purchaser in investigating the title of the vendor. *Baxendale v. Seale*, 24 Law J. Rep. (n.s.) Chanc. 385; 19 Beav. 601.

On a sale by a trustee he stipulated that his receipt should be deemed an effectual and conclusive discharge, and that the purchaser should not require the concurrence of the heir or *cestuis que trust*. A decree was made for specific performance and reference as to title. The Master found in favour of the trustee, and upon exceptions the purchaser contended that the rule as to the concurrence of the *cestuis que trust* being one for their protection, it was a breach of trust to stipulate that they should not concur; but the Court held the point concluded by the decree. *Wilkinson v. Hartley*, 15 Beav. 183.

The rule that the costs of a suit for specific performance depend upon when the title was first shewn is to be strictly adhered to. *Ibid*.

A tenant was to have a purchasing clause at any time within nine years by giving three months' notice. He gave the notice at the end of four years, and delays occurring the three months elapsed. Afterwards

the landlord threatened hostile measures to compel a completion, but subsequently gave notice that unless the purchase should be completed within six weeks he should treat the notice as void, and the right of purchasing as forfeited. The purchase was not completed within six weeks:—Held, first, that though a conditional right to purchase must be strictly complied with, yet time was not in this case of the essence of the contract; secondly, that if it had been it was waived by the landlord's insisting on the contract after the expiration of the three months; thirdly, that time was not made of the essence of the contract by the notice; and, fourthly, that six weeks was not under the circumstances a reasonable time. *Pegg v. Wisden*, 16 Beav. 239.

Unless a valid acceptance be given within a reasonable time to a written offer to sell an estate it will be treated as abandoned. *Williams v. Williams*, 17 Beav. 213.

In 1827 A wrote to B that he had credited B's account with 220*l.* in consideration of an agreement by B to convey two houses. The abstract was delivered, but there was no acceptance in writing on the part of B. Five years afterwards B filed a bill against A for specific performance. A swore, and it was not denied, that in 1827 he abandoned the contract, and that in 1829 it was considered broken off by both parties. It appeared, however, that B had in the mean time the benefit of the credit for 220*l.* The Court dismissed the bill on the ground of the delay. *Ibid.*

Leaseholds were sold under the Court described as "a bonded sugar refinery," and the lease was referred to, which contained no such restriction. The abstract shewed a prior agreement for the lease of the premises to be used "for refining sugar in bond." The purchaser accepted the title, paid the purchase-money into court, and was let into possession. The lessors afterwards instituted a suit to rectify the lease by introducing the restriction. The Court refused to compel the final completion of the purchase, or part with the purchase-money until the result of the suit was known. *Bentley v. Craven*, 17 Beav. 204.

When an offer in writing is made by the owner to sell an estate on specified terms, and this is unconditionally accepted, there is a binding contract which neither party can vary, but the owner is entitled, at any time before his offer has been definitively accepted, to add any new terms to his proposal. If these be refused, the treaty is at an end. *Honeyman v. Marryat*, 21 Beav. 14.

The time for paying the deposit may be made an essential term for entering into a contract for sale of an estate. *Ibid.*

The plaintiff's solicitor wrote to the defendant's agent that he was instructed to make him an offer of 25,000*l.* for the purchase of his estate. The defendant's agent wrote in answer that he was authorized to accept the offer "subject to the terms of a contract being arranged" between the two solicitors:—Held, that this was not a concluded contract. *Ibid.*

In the above case, the owner's solicitor sent the draft of an agreement for the perusal of the purchaser's solicitor, which, amongst other stipulations, required a deposit of 1,500*l.* to be paid down. This term was objected to, and after some delay, and before the plaintiff had acceded to it, the defendant required it to be paid and the agreement signed before

a given day or the treaty to be at an end. This was not complied with, but an offer was subsequently made to sign the agreement and pay the deposit required, which was refused:—Held, that there was no contract that this Court could enforce. *Ibid.*

Land was advertised to be sold in lots as freehold subject to conditions, one of which was, that objections to the title not made within a prescribed time should be considered as waived, and another of which provided that any misstatement of the quality, tenure, outgoings or other particulars should be the subject of compensation. An objection to the title of one lot was taken, after the prescribed time, that it was of copyhold tenure. It, however, appeared that under a composition with the lord, the rights of the copyholder were such as to render the tenure hardly different from that of freehold:—Held, that the misdescription did not form a ground for resisting a specific performance, although the decision might have been otherwise had the misdescription been wilful. *Price v. Macaulay*, 2 De Gex, M. & G. 339.

Another lot was described in the advertisements as being sold with a certain reservoir and waterworks, yielding a yearly rental of 60*l.* exclusively of the land and buildings. An objection was taken after the prescribed time, and was supported by the fact that this rent arose from supplying with water certain houses, separated from the reservoir by the property of strangers, over which the vendor had no right to carry it beyond a licence from year to year by payment of a rent:—Held, that the description contained such a misrepresentation as to preclude the vendor from enforcing a specific performance, and that the objection was not one as to title, and therefore was not obviated by the stipulations as to time. *Ibid.*

A mortgagee, with power of sale, obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee with power of sale, she would only enter into the usual covenant that she had not encumbered. The purchaser objected to the validity of the foreclosure decree, and insisted upon having the conveyance under the power of sale, and, on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence shewing that the above-mentioned clause was inserted by inadvertence, and that she never intended to incur the risk of opening the foreclosure, by conveying under the power:—Held, that the misapprehension was a sufficient defence to the enforcement of a conveyance under the power. *Watson v. Marston*, 4 De Gex, M. & G. 230.

A B became the purchaser of a mansion-house and park, under conditions of sale, which stated that the whole property was freehold except eight acres which were copyhold, but undistinguished except as to not including any of the buildings. The abstract of title having been delivered and discussions thereon having taken place which raised difficulties in the way of completing the purchase, a supplemental agreement was entered into, detailing what requisitions as to title, &c. should be complied with. Among these requisitions was one in the following words, "Declaration of identity of lands mentioned in deeds to those now sold":—Held, on a bill filed by the vendor for specific performance, that the sup-

plemental agreement was a substitution for the original contract, and that A B was not entitled to demand that the vendor should distinguish the freehold from the copyhold parts of the premises, so as to shew that the latter did not include any of the buildings. *Dawson v. Brickman*, 3 Mac. & G. 53.

Upon a sale by auction of a large parcel of land in sixty lots, the particulars and conditions of sale referred to a plan on which several roads were marked out so as to provide frontages for all the lots, but there was no intention that any lot was to have rights of way beyond the road adjoining it, and directly leading into the public highway. In a suit by a purchaser of two lots for a specific performance, the question arose as to what rights of way he was entitled to have conveyed to him:—Held, that the Court could only act on the footing of the contract, and that the purchaser could only claim a right of way over the road adjoining the lots, and directly thence into the public highway. *Randall v. Hall*, 4 De Gex & S. 343.

An hotel-keeper, who was also the owner, agreed, on the 24th of March 1851, to sell his hotel, and to assist in carrying on the business for two years, receiving half the profits. The purchaser's wife (who was the hotel-keeper's daughter) went on the premises, and assisted in managing the concern. From the purchaser's letters it appeared that he was not able to supply the funds necessary to carry on the business, and, in a letter of the 24th of May 1851, he wrote thus to the hotel-keeper, "You must mortgage or sell the premises." He subsequently asked the hotel-keeper to give him a mortgage on the hotel for sums which he claimed to be due to him, and brought an action against the hotel-keeper for, among other things, a remuneration in respect of the services of his (the purchaser's) wife above mentioned. The hotel-keeper became bankrupt. Upon a claim filed by the purchaser against the assignees, claiming that they should elect specifically to perform the agreement, or that it should be declared that the purchaser was entitled to a lien for the sums he had advanced under the contract,—Held, that although the purchaser would have been entitled to a lien if the contract had failed through the vendor's fault, yet that as the purchaser had himself abandoned the contract, the purchaser was not entitled to any lien, and his claim was dismissed. *Dinn v. Grant*, 5 De Gex & S. 451.

A landowner agreed to sell land to a railway company, and the company, requiring immediate possession of it, offered to deposit the purchase-money in a certain bank, in the joint names of the vendor and the chairman of the company, pending the investigation of the title. The vendor assented to the deposit being made, but in a different bank, and stipulated also that he should be paid 5l. per cent. interest from the time possession was given. The deposit was accordingly made, and possession taken by the company. Before the conveyance was completed, the bankers with whom the money stood became bankrupt, and most of it was lost:—Held, that the loss must be borne by the vendor, the deposit having been made and accepted as payment, and not merely as security. *St. Paul v. the Birmingham, Wolverhampton and Stour Valley Rail. Co.*, 11 Hare, 305.

The particulars of sale erroneously (but without any fraud) described a part of the property as cus-

tomary leasehold, holden of a certain manor, and renewable every twenty-one years, at a customary fine (an annual rent of 10s.). This property proved to be holden only for the residue of a lease for twenty-one years, at a rent of 10s. without any customary right of renewal. One of the conditions of sale fixed the time at which any objections to the title of the vendor should be taken, and enabled him at any time, after the delivery of such objections, to vacate the sale. Another condition provided that the purchaser should accept the existing lease and the assignment to the vendor as a sufficient title to the leasehold property, and a further condition stipulated that if, through any mistake, the estate should be improperly described, or any error or misstatement be inserted in the particulars, such error or misstatement should not vitiate the sale, but the vendor or purchaser should allow or pay compensation. Upon a bill by the purchaser against the vendor:—Held, that the purchaser was entitled to specific performance of the contract, with compensation for the absence of any customary right of renewal, the same being a misstatement or misdescription within the last-mentioned condition. *Painter v. Newby*, 11 Hare, 26.

That the power reserved to the vendor of vacating the sale, must be construed to apply only to a case of dispute arising upon an objection of title. *Ibid.*

That the claim of the purchaser for compensation in respect of the absence of any customary right to renew the lease, was not an objection to the title within the meaning of the particulars and conditions of sale. *Ibid.*

It is a misdescription in particulars of sale to describe a house as No. 58, Pall Mall, opposite Marlborough House, when the house was, in fact, not in Pall Mall, but was situate behind No. 57, Pall Mall, having an entrance with a door which, for many years, bore the designation of No. 58, and a separate passage, about 60 feet long and 3 feet 8 inches wide, across the ground-floor of No. 57, between the basement and upper stories of No. 57:—Held, that the particulars having indicated no peculiarity in the access to the house, and the objection on this point having been taken as soon as it was known, the purchaser was entitled to have the contract rescinded. *Stanton v. Tattersall*, 1 Sm. & G. 529.

Land was sold by the mortgagees of B, consisting of a certain plot, surrounded by a ring called the Park Drive. It was stipulated that if used for building, villas of a certain size were to be built. That the ground between the villas and the park drive should be laid out in lawn or pleasure grounds down to the park drive. That a footpath of the width of fifteen feet should be laid out round the whole of the northern, southern and eastern boundaries of the said land. The park drive, round the circular piece belonging to B, the part outside, had originally been his, but, with a small exception, had been sold by him:—Held, that the condition about the footpath was too vague to be enforced, and that the purchaser was not bound to make it, and could not be restrained from using the land in any way inconsistent with making it. *Taylor v. Gilbertson*, 2 Drew. 391.

Where, by the conditions of sale, it is agreed that the vendor shall retain the title-deeds, "and that a covenant will be entered into for the production of such of

them as are not enrolled, and for giving attested or other copies thereof to the respective purchasers at their expense," a purchaser has not, on completion, a right to attested copies at the expense of the vendor. *Cotton v. Scudamore*, 1 Kay & J. 321.

(B) TITLE.

Where a deed acknowledged by a married woman, under the 3 & 4 Will. 4. c. 74, forms an essential part of a title, a good title is not made out to a purchaser by the mere production of the deed, with an indorsement thereon of an acknowledgment before a Judge; proof must also be given of a certificate of such acknowledgment filed of record in the Common Pleas, pursuant to the 85th section. *Jolly v. Hancock*, 22 Law J. Rep. (n.s.) Exch. 38; 7 Exch. Rep. 820.

A lease with a proviso of forfeiture for breach of covenants contained a covenant by the lessee to insure and keep insured the demised premises during the term. The lessee had insured, but did not pay the last premium of insurance until one month after it was due:—Held, that he had thereby incurred a forfeiture, which the lessor could enforce notwithstanding such payment of the premium; and that although the lessor had taken no step to enforce the forfeiture, a purchaser, with whom the lessee had contracted to sell his term, might refuse to complete his contract, and might reclaim his deposit; and, therefore, that the lessee could not recover from the purchaser, as money due upon an account stated, the amount of the deposit for which the latter had given his I O U, and that the defendant had a good defence under the general issue. *Wilson v. Wilson*, 23 Law J. Rep. (n.s.) C.P. 137; 14 Com. B. Rep. 616.

A purchaser must take a title, though depending on the invalidity of a voluntary conveyance as against a purchaser for valuable consideration with notice. *Butterfield v. Heath*, 22 Law J. Rep. (n.s.) Chanc. 270; 15 Beav. 408.

The Court will not, in a suit for specific performance, force on a purchaser a title which depends on the question whether the vendor had or had not, at the time of his purchase, notice of a prior incumbrance. *Freer v. Hesse*, 22 Law J. Rep. (n.s.) Chanc. 597; 4 De Gex, M. & G. 495.

In 1843, a judgment was registered against A. In 1844, A mortgaged real estate to B, with a power of sale, and B at the same time procured an assignment to be made to a trustee for him of the residue of a satisfied term. It was not proved or alleged that B had any notice of the judgment at the time of his conveyance. In 1846 B contracted to sell to C. In a suit for specific performance, by B against C, the Court refused to compel C to complete, except on the terms of the judgment creditor joining in the conveyance. *Ibid.*

In 1843, a judgment was registered against A. In 1844, A mortgaged real estate to B, with a power of sale. In 1846, B contracted to sell the estate to C. In 1848, the five years from the time of the registration of the judgment expired. The judgment was afterwards re-registered in 1850, but before the completion of the contract. Whether the judgment so re-registered would prevail either against B or C, *quære*. *Ibid.*

In 1843, a judgment was registered against A. In

1844, A mortgaged real estate to B, with a power of sale. B, at the same time, procured the assignment to a trustee for him of the residue of a satisfied term. B, at the date of his conveyance, had no notice of the judgment. In 1846, B contracted to sell the estate to C. Whether in the event of a conveyance by B to C, the term would, under the Satisfied Terms Act, protect C from the judgment, *quære*. *Ibid.*

Conditions of sale, which state certain facts, and represent that certain acts were done in error, and that the vendors could sell an absolute interest, will not preclude a purchaser from requiring proof of the title. *Johnson v. Smiley*, 22 Law J. Rep. (n.s.) Chanc. 826; 17 Beav. 223.

A bankrupt was seized of copyhold premises for an estate tail in remainder expectant upon the decease of a tenant for life. His assignees, in 1832, sold only the interest to which the bankrupt was entitled for life after the death of the then tenant for life. This was purchased by the bankrupt himself, who had obtained his certificate. In 1846 the tenant for life in possession died, the bankrupt entered into possession and surrendered the estate, and was readmitted in fee. In 1851 the assignees, considering they were entitled to the bankrupt's interest as tenant in tail, again put up the estate to auction, subject to the life interest purchased by the bankrupt; but upon a bill against the purchaser for the specific performance of the contract,—Held, that an interest for the life of the bankrupt alone vested in the assignees, and that, as the estate tail could not have been barred before the bankrupt obtained his certificate, it was, upon the death of the tenant for life, a new right, and that no estate or interest accrued to the assignees in respect thereof; and the bill was dismissed, with costs. *Ibid.*

Upon the sale of an advowson by a devisee, the abstract disclosed a title in the heir-at-law of the testator, the advowson having been purchased after the date of his will, which was made prior to the 7 Will. 4. & 1 Vict. c. 26. Upon the objection being made known, an instrument of republication was produced, and a statutory declaration under the 5 & 6 Will. 4. c. 62, was made by the attesting witnesses of its due execution. The purchaser refused to complete his purchase; and upon a bill filed by the vendor,—Held, that the purchaser could only be compelled to complete the purchase upon the validity of the document being proved by evidence, which would enable the Court to establish it against an heir-at-law, and that the codicil ought to be proved in the ecclesiastical court; that the purchaser was not liable to pay interest upon the purchase-money, as the title was not complete until after the suit was instituted; but as the defendant's denial of the validity of the codicil had increased the expenses of the suit, the decree for specific performance was made without costs. *Weddall v. Nixon*, 22 Law J. Rep. (n.s.) Chanc. 939; 17 Beav. 160.

A agreed to sell an estate to B, subject to a mortgage. The contract, which was dated in August 1849, contained the stipulations that B should indemnify A from the mortgage debt, that B should be entitled to immediate possession, and that an abstract of title should be delivered to B, at the expense of A, within a month. By another agreement B agreed to pay for his abstract "when required"

by him. In April 1850 B took possession of the property. No abstract of title was required or delivered. B suffered the interest on the mortgage debt to fall into arrear, and the mortgagees, in consequence, recovered some interest from A, and took possession of the mortgaged property. In a suit for specific performance, instituted in January 1853 by A against B,—Held, that B was to be taken as having accepted the title, and was not entitled to have it investigated. *Sibbald v. Lowrie*, 23 Law J. Rep. (N.S.) Chanc. 593.

In the abstract of title delivered to a purchaser of an estate put up for sale under a decree of the Court of Chancery, a will was incorrectly abstracted; but the same abstract set out a recital in another document, which gave the correct words of the will. The purchaser's counsel called attention to the abstract of the will, and desired that it should be examined with the original. This the solicitor neglected to do, and the purchaser paid his purchase-money into court. Subsequently the error was discovered, and the purchaser presented a petition to have the contract rescinded, and the purchase-money repaid:—Held, that, the money being still within the controul of the Court, the application was not too late, and that the purchaser's counsel having been evidently misled by the abstract, the purchaser was entitled to rescind the contract; but that, as the matter had gone so far owing to his own negligence in not examining the will, he must pay all the costs of the application, except those of the vendor. *McCulloch v. Gregory*, 24 Law J. Rep. (N.S.) Chanc. 246; 1 Kay & J. 286.

By agreement, dated the 12th of November, 1853, A agreed to take underleases of two houses from B, the fixtures to be taken at a valuation. One of the terms of the agreement was, that A should have possession of the property on the 21st of November; but the agreement was silent as to the title or the delivery of an abstract. A entered into possession on the 12th of November, and on the 2nd of December he concurred in the nomination of an agent to value the fixtures, having previously, by letter to B, desired the preparation of the leases to be deferred for a short time. On the 8th of December A advertised for sale his interest in the premises, and on the 5th of March 1854 he, for the first time, required an abstract of title. In a suit for specific performance by B against A,—Held, affirming the decree below, that A had by his conduct waived his right to call for the lessor's title. *Simpson v. Sudd*, 24 Law J. Rep. (N.S.) Chanc. 562; 4 De Gex, M. & G. 665; affirming 23 Law J. Rep. (N.S.) Chanc. 373; 2 Sm. & G. 469.

The defendant sold and conveyed some undivided shares in various properties. Disputes afterwards arose as to what shares had been purchased. They agreed to settle all these disputes and signed a written agreement that the plaintiff should pay the defendant 9,500*l.*, and that the defendants should execute such deeds as the plaintiff should require for the conveyance of the estate. Upon a bill for specific performance,—Held, that the defendant was not bound to deduce any title to the property. *Godson v. Turner*, 15 Beav. 46.

A residence with four acres was sold. It turned out that there was no title to a slip of ground of about a quarter of an acre between the house and

the high road:—Held, that it was not a proper subject for compensation, and that a good title could not be made. *Perkins v. Ede*, 16 Beav. 193.

A purchaser having retained the abstract for five months, made no objections to the title, but simply required the vendor to verify the abstract with the title-deeds:—Held, that he must be deemed to have accepted the title. *Pegg v. Wisden*, 16 Beav. 239.

The purchaser of property has notice of the interests of a tenant in possession, and the purchaser of leaseholds notice of what it is he purports to buy, and that he must be bound by all the covenants of the lease; but one who contracts for a lease from a party, with knowledge that he holds under a leasehold title, has notice of ordinary, but not of unusual covenants in the original lease. *Wilbraham v. Livesey*, 18 Beav. 206.

Covenants in restraint of trade, in a trading liability are not considered usual covenants. *Ibid.*

The defendant agreed with the plaintiff to take a house in the Strand, to be used for the business of printing. Nothing was said as to covenants. The plaintiff was a lessee under a lease containing covenants against "obnoxious trades," and the defendant was told that the premises were leasehold. A reference as to title was directed, having regard to the covenants in the lease and the purposes for which the premises were taken. *Ibid.*

A testatrix gave the residue of her real and personal estate, subject to the payment of her debts and legacies, to or in trust for D absolutely, and she appointed D and R executors of her will. D died, and R by deed reciting that the debts and legacies had been paid out of the personal estate, conveyed the real estate to D's devisees:—Held, that the devisees could make a good title without proof of the fact of payment of debts and legacies as stated in the recital, and that a purchaser from them was not bound to inquire as to such payment. *Storrey v. Walsh*, 18 Beav. 559.

On a sale by the above purchaser, subject to a condition that "if from any cause whatever the purchase-money was not paid on a given day, interest would be payable,"—Held, that delay caused by requiring proof of the fact of payment of the before-mentioned debts and legacies did not prevent the operation of the condition. *Ibid.*

When a vendor can make a title to three-fourths only of the property sold, the purchaser is not entitled to take the three-fourths with an abatement, but he may take the three-fourths at the price agreed on for the whole. *Man v. Topham*, 19 Beav. 576.

On a sale of real estate by a trustee, under a will open to suspicion as having been obtained by undue influence, the title was approved, but before the actual completion of the contract the heir-at-law gave notice that he intended to dispute the will, and brought an action against the tenant for rent. The purchaser thereupon refused to complete, and a bill for specific performance was filed; but before it came to a hearing, the action brought by the heir was tried and a verdict given against the heir. A reference as to title was then directed; and the Master having reported in favour of the title, a decree was made for specific performance. On appeal, however, by the purchaser, the Lord Chancellor (Lord Cottenham) ordered the case to stand over generally, with

liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The Lord Chancellor (Lord Truro) thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed, and also to pay the costs of the suit subsequently to the hearing when the reference as to title was directed. His Lordship held, that at the time there had been such reasonable inquiry into the title as ought to have satisfied the purchaser, and that, therefore, the consequences of the further proceedings by which the will was established, both in reference to the costs of the suit for specific performance and the payment of interest, must fall on the purchaser. *Grove v. Bastard*, 1 De Gex, M. & G. 69.

The judgment of Lord Cottenham in this case, 2 Phil. 619, observed upon. *Ibid*.

A testator devised land, subject to payment of his debts, to A and B, their heirs and assigns, and he authorized his executors thereafter mentioned, with the approbation of his trustees for the time being, to sell any part of his estates:—Held, that the surviving executor, with the assent of trustees appointed by the Court of Chancery (in whom the devised lands were vested by a vesting order) could make a good title. *Brassy v. Chalmers*, 4 De Gex, M. & G. 528.

A lessor being in possession of a lease of certain messuages, granted an underlease of one (No. 7) to A, who subsequently assigned it to B. The lessor by his will devised the leaseholds to trustees, who, under an order of the Court, sold *inter alia* No. 7 to a purchaser, in the particulars of sale No. 7 being described as leased to A. On investigating the title, it appeared that the parcels set out in the underlease to A were, by clerical mistake, the parcels of No. 6. The trustees after the sale obtained an order of the Court to correct this mistake by authorizing an assignment to the tenant of No. 6, and a new underlease with proper parcels to the tenant of No. 7, and the Court overruled an objection to the title by the purchaser of No. 7, and compelled him to complete his purchase. *Grissell v. Peto*, 2 Sm. & G. 39.

A purchase was to be completed on the 25th of October. Before that day arrived, the purchaser, at the vendor's request, extended the time to the 5th of November. The title, however, was not completed on that day:—Held, that the purchaser was at liberty to abandon the contract. *Parkin v. Thorold*, 2 Sim. N.S. 1.

The presumption is that a surrender will bar an estate tail in copyholds until a contrary custom is shewn. *Goold v. White*, Kay, 683.

Copyholds having been sold subject to a condition that all statements and recitals in any of the title deeds or muniments of title should be considered as satisfactory evidence of the facts stated or recited, and in case any purchaser should not, within fourteen days from the delivery of the abstract, declare his dissatisfaction with the title, and point out some valid objection thereto, the same should be considered as accepted. The purchaser objected that the first surrender on the abstract was by A and I, his wife, which said I, it was therein stated, "had then lately

been admitted there tenant in tail according to the custom of that manor," and that there was nothing to shew how the estate tail had been barred. Afterwards the purchaser required evidence that the custom of the manor warranted estates tail. The first surrender was dated in 1801, and was conditionally only. In 1815 the same parties made an absolute surrender in fee, under which the possession had been enjoyed ever since:—Held, that the recital was conclusive evidence under the conditions of sale of the fact that I, had been admitted tenant in tail, but not that this was according to the custom of the manor, for this was not a single fact, but a deduction from a series of facts; but held, that this recital, coupled with the conditional surrender of 1801, the absolute surrender of 1815, and the subsequent possession consistently with that title, was sufficient evidence that the custom of the manor did warrant estates tail. *Ibid*.

(C) WARRANTY.

The defendant, whose horse was at an auction stable for sale, seeing the plaintiff on the day before the sale examining the horse, told him *bonâ fide* that the horse was "sound in every respect." Next day the horse was put up for sale by auction without a warranty, and the plaintiff, induced by what the defendant had told him, became the purchaser:—Held, in an action for a breach of warranty, that there was no evidence to go to the jury that the horse was sold with a warranty; the representation by the defendant not forming part of the contract of sale. *Hopkins v. Tanqueray*, 23 Law J. Rep. (N.S.) C.P. 162; 15 Com. B. Rep. 130.

Quære—as to the validity of a secret warranty if given by the defendant to the plaintiff, the sale being by public auction without warranty. *Ibid*.

(D) LIEN OF VENDOR.

A special contract for the payment of purchase-money must be explicit to deprive a vendor of his lien upon the estate sold; and though a contract is stated in the conveyance of the estate, evidence may be given to shew the real nature of the transaction, and a subsequent purchaser is bound to inquire whether it was accepted in substitution of the lien. *Frail v. Ellis*, 22 Law J. Rep. (N.S.) Chanc. 467; 16 Beav. 350.

Where an estate was expressed to have been conveyed in consideration of 150*l.* down and a bill of exchange for 300*l.* payable in three months,—Held, that the vendor might give evidence of the real nature of the transaction, and that his lien was not discharged; and a mortgagee having notice through the solicitor who had been employed in all the transactions, was bound to see that the vendor's claim for his purchase-money was satisfied. *Ibid*.

A contract for the sale of an estate made in March 1811, stipulated that the purchase-money should be paid on the 13th of May following. The purchase-money was not paid, but the purchaser entered into possession, and he and persons claiming under him continued in such possession. In 1834 their agent signed a written acknowledgment of the vendor's title sufficient to take his lien for the principal of the purchase-money out of the Statute of Limitations, 3 & 4 Will. 4. c. 27. s. 40. In 1840 the assignees of the vendor filed a bill seeking to enforce the

vendor's lien on the estate for the purchase-money :—Held, that the 42nd section of the statute did not apply to the arrears of interest, but that the whole was recoverable from the 13th of May 1811. *Tuft v. Stevenson*, 5 De Gex, M. & G. 735.

(E) PURCHASER.

(a) *Rights and Protection of.*

In the year 1641 a rent-charge of 3*l.* was granted to trustees, and made payable out of two pieces of marsh land; the trusts declared were for charitable purposes. The last trustee died in 1764; no new trustees had been appointed, and it was not known in whom the rent-charge was legally vested; it was, however, paid to the minister and churchwardens of the parish by the successive owners of the lands until the year 1832, when the trustees of the will of the last owner sold the land to the defendant, who never had any notice of the rent-charge, and never made any payment in respect of it. Upon an information and bill on behalf of the charity,—Held, that the defence of a purchase for value without notice was good; the principle of the Court is, neither to afford assistance nor prejudice the rights of the purchaser for value, but to leave the parties to their remedy at law; and the parish having neglected to obtain new trustees of the rent-charge, this bill was dismissed, but without costs. *Attorney General v. Wilkins*, 22 Law J. Rep. (n.s.) Chanc. 830; 17 Beav. 285.

(b) *Liabilities and Duties.*

A purchaser cannot throw upon a vendor the risk of investing the purchase-money pending the completion of the contract; but if invested with the consent of the vendor it becomes his property, and he is entitled to any increase in the value of the investment. *Burroughes v. Brown*, 22 Law J. Rep. (n.s.) Chanc. 148; 9 Hare, 609.

A purchaser will not be bound to see to the application of the purchase-money of an estate charged by will with a mortgage in exoneration of other estates, where the testator mentions the mortgage debt, and without giving it any priority, charges the estate with the payment of that and all his other debts. *Robinson v. Lowater*, 23 Law J. Rep. (n.s.) Chanc. 641; 5 De Gex, M. & G. 272; 17 Beav. 592.

Where a purchaser of shares in a mine had not relied upon the representations of the vendor as to the value of the mine, but had himself inspected the mine, the Master of the Rolls refused to relieve him from his contract :—Held, on appeal, that as, upon the evidence, there was no proof that the representations made by the defendants were untrue assertions which, if taken as true, would have added to the value, nor that these representations were merely conjectural, the plaintiff was not entitled to relief in equity, but that his bill must be dismissed without prejudice to any action he might be advised to bring. *Jennings v. Broughton*, 23 Law J. Rep. (n.s.) Chanc. 999; 5 De Gex, M. & G. 126; 22 Law J. Rep. (n.s.) Chanc. 585; 17 Beav. 234.

In 1835 A contracted to purchase an estate described as "redeemed from land-tax." The only evidence on the abstract in support of this allegation was a certificate, dated in 1799, by which certain commissioners, acting under the 36 Geo. 3. c. 60, contracted with W and M, as guardians of P, an

infant, for the redemption of the land-tax charged on this estate. A made no inquiry as to the circumstances attending the redemption, took a conveyance, and enjoyed the property, free from all claims in respect of land-tax, until 1850, when the administrator of P filed a bill claiming a lien upon the estate in respect of land-tax redeemed. It appeared that at the time of the redemption, P was tenant in tail of the estates under a will, and he afterwards died an infant, and the said W and M, who were trustees under the will, but not guardians of P, had applied the accumulated rents of the infant for this purpose; and, by a decree, made in 1803, it was declared that the representatives of P had a lien upon the estate for an annuity equal in amount to the land-tax redeemed. In 1831 a subsequent tenant in tail suffered a recovery and sold the estate to A free of land-tax :—Held, reversing the decision below, that A was not affected with constructive notice that the money by which the land-tax had been redeemed was taken from a fund not applicable to this purpose, particularly as the testator had given W and M his residuary personal estate, in trust to invest it in the purchase of lands to be settled to the like uses as the devised estates. *Ware v. Lord Egmont*, 24 Law J. Rep. (n.s.) Chanc. 361; 4 De Gex, M. & G. 460; reversing 23 Law J. Rep. (n.s.) Chanc. 499.

Where a purchaser is sought to be affected with constructive notice, the question is not whether by a cautious prudence he might not have acquired knowledge, but whether his not obtaining it was an act of gross and culpable negligence. *Ibid.*

Although a purchaser obtained an estate from a lunatic through undue influence and for an inadequate consideration, a Court of equity, upon the sale to a subsequent purchaser for value, without notice, would not, in the absence of proof of notice, look at any evidence to vitiate the sale. *Greenlade v. Dare*, 24 Law J. Rep. (n.s.) Chanc. 490; 20 Beav. 284.

A purchaser must not disregard plain marks and symbols of fraud. The facts, therefore, of each case must be considered with a view to uphold purchasers for value without notice, and at the same time to suppress fraud. *Ibid.*

In the absence of traces to excite suspicion of fraud lapse of time will exonerate a purchaser from making inquiries into circumstances connected with a previous transaction, although they were alleged to have been based in fraud. *Ibid.*

Upon the purchase of an advowson from an alleged lunatic, the absence of a receipt for the purchase-money on the deed of conveyance, the non-residence of the rector, the vendor, and an apparent inadequacy of price were considered insufficient to put a purchaser thrice removed upon such inquiries as would affect him with notice. *Ibid.*

The Court, although it may disregard a single fact, will give effect to it when combined with other circumstances which tend to shew that a purchaser had notice. *Ibid.*

A purchaser under an order in lunacy paid his purchase-money in the manner directed by the Lords Commissioners in Lunacy, disregarding a charge of the plaintiff and a suit to enforce it, of which he had notice. The amount was principally applied in payment of the costs of the receiver in

lunacy, relating to the sale, &c. Upon a bill by the plaintiff to make the purchaser liable for not seeing to the due application of the purchase-money, the Master of the Rolls, considering himself bound by the order in lunacy, and as having no jurisdiction to alter it, retained the bill, with liberty to the plaintiff to apply in lunacy for the discharge or variation of the order. *Norris v. Lord Dudley Stuart*, 16 Beav. 359.

A testator ordered his debts to be paid by his executors, and after giving legacies he gave the residue of his real and personal estate, subject as aforesaid, to A, and he appointed A and B executors:—Held, that if the legacies were charged on the real estate, the debts must also be charged thereon; and that, therefore, A was able to give valid receipts for the purchase-money of the real estates, which relieved a purchaser from the necessity of seeing to its application. *Dowling v. Hudson*, 17 Beav. 248.

An estate was mortgaged to A, and afterwards to the defendant. The plaintiff subsequently obtained a registered judgment against the mortgagor. The defendant then purchased the equity of redemption without searching for judgments. On a bill to charge the equity of redemption with the judgment, the Court held, that the defence of "purchase for valuable consideration without notice" was available in this case; secondly, that on the evidence no notice was proved; thirdly, that it was incumbent on a purchaser to search for judgments. *Lane v. Jackson*, 20 Beav. 535.

A purchaser having notice that another person or his under-tenant is in possession of the property, is not justified in presuming the possession of that person to be the possession of the vendor, but is bound to make inquiries of the person who, by himself or his under-tenant, is so in possession, or he will be deemed to have notice of the title of such person. *Bailey v. Richardson*, 9 Hare, 734.

An agreement on the sale of an estate that the title-deeds should be delivered to the purchaser on the completion of the contract, but as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper or sufficient covenant or covenants with the vendors, for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator, for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainders over in strict settlement. The estates were conveyed by the vendors to the purchasers to the uses declared by the will of their testator:—Held, that the agreement to enter into a proper and sufficient covenant, for the production of the deeds, did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the word "sufficient" was connected with the word "proper"; that the extent and sufficiency of the covenant must, in a great degree, depend on the mode in which the conveyance was taken; that releasees to uses do not stand in a worse position than trustees who, according to the ordinary rule of the Court, are required to covenant for their own acts only; and that the Court would not compel the purchasers, who were

only releasees to uses—especially after the uses were executed by statute—to enter into such covenants. *Onslow v. Lord Lonsborough*, 10 Hare, 67.

Testatrix by her will declared that every person thereby made tenant for life, should have such and the like powers of leasing, selling and exchanging any part of the devised estate as were by her father's will given to the tenants for life and in tail mentioned in his will, or to the trustees thereof. It appeared that the father's will did not give a tenant for life or in tail any power of leasing, selling or exchanging, but gave trustees full power to sell and exchange the hereditaments therein comprised and to give receipts for the purchase-money:—Held, that tenant for life in possession of the estate devised by the testatrix had the same powers of selling and exchanging that estate as were, by the father's will, given to the trustees, but that such powers did not extend to giving receipts. *Cox v. Cox*, 1 Kay & J. 251.

Semble—that the difficulties which might be met with in exercising such power of sale in the absence of a power to give receipts, might be removed by paying the money into court under the Trustees' Relief Act, stat. 10 & 11 Vict. c. 96, and that upon such payment the purchaser might safely complete. *Ibid.*

(c) Conveyance to.

A purchaser of property included in one contract may divide the property purchased and apportion the purchase-money, and he may direct its conveyance to be made by the vendors in such manner as he may deem most expedient, and by one or more deeds; but in this case the objections on both sides being frivolous, the decree was made without costs. *Clark v. May*, 22 Law J. Rep. (n.s.) Chanc. 302; 16 Beav. 273.

(F) INTEREST ON PURCHASE-MONEY.

Real estate, including property in possession and in reversion, was put up for sale by auction in lots, under a condition that the vendors should confirm the Master's report of purchases on or before the 25th of December 1849, and that, on or before that day, each purchaser should pay his purchase-money into court, and be entitled to the rents of his lot from that day, and that if, from any cause whatever, the purchase-money should not be so paid, he should pay interest on it at 5l. per cent. from that day. A purchased a reversion in fee, being one of the lots. Through the default of the vendors, the Master's report was not confirmed until August 1851. Motion that A should pay his purchase-money into court with interest from the 25th of December 1849:—Held, that interest was payable from that day at 4l. per cent. *Wallis v. Sarel*, 21 Law J. Rep. (n.s.) Chanc. 717; 5 De Gex & S. 429.

By a contract for purchase, interest was to be paid on the purchase-money from the 26th of December 1852, if the purchase was not then completed. Certain objections and requisitions were made with regard to the title. The purchaser declining to complete until these were satisfactorily answered, the vendor filed a claim for specific performance on the 2nd of May 1853, and in the following month sent copies of certain deeds, upon receiving which the purchaser, in November,

accepted the title. The claim came on to be heard, when the Court, considering that these deeds were not essential to the title, decreed specific performance, with costs, and interest to be paid by the purchaser from the 26th of December 1852. *Litchfield v. Brown*, 23 Law J. Rep. (N.S.) Chanc. 176.

Upon the sale of a reversion interest is payable upon the purchase-money from the date of the contract. *Bailey v. Collett*, 23 Law J. Rep. (N.S.) Chanc. 230; 18 Beav. 179.

It is a general rule of equity that if a purchaser is in possession of an estate, receiving the rents, he is liable to pay the purchase-money, and that the purchase-money being retained by him will carry interest to be paid by him to the seller. An agreement which appears to prevent the application of this rule, will be examined in a court of equity by its aid, and will, or will not, be enforced, according to the circumstances. *Birch v. Joy*, 3 H.L. Cas. 565.

B, in March 1812, contracted for the purchase of an estate from C for 90,000*l*. The estate was very much encumbered, and C was to make a title free from all incumbrances, except one mortgage of 12,000*l*. B, on being put into possession of part of the estates, was to pay 16,000*l*. on the 24th of June 1812, "and a further sum of 4,000*l*. at Michaelmas next, on C putting B into the actual possession of the remainder, free from all incumbrances except the mortgage for 12,000*l*.; the further sum of 25,000*l*. in March 1813; 16,500*l*. in March 1816, and 16,500*l*. in March 1816." B was to grant C a mortgage of all the estates for securing these three sums at the respective times aforesaid, "with legal interest from Michaelmas next." The 20,000*l*. thus agreed to be paid in two sums within the first year not having been paid by B, nor any of the incumbrances cleared off by C, a new agreement was entered into in October 1812. B was forthwith to advance 10,000*l*. to pay off certain incumbrances. He was to be let into immediate possession, to be entitled to the rents and profits "from Michaelmas last," and to be at liberty to cut timber, &c. The conveyances were to be executed as soon as existing difficulties could be removed, and every possible exertion was to be made to that end. It was further agreed, that "the interest of the remainder of the purchase-money shall not commence till Lady-day next, in case the title shall be perfected, and the conveyances and other assurances executed at that time, and if not, then to commence on the execution of such assurances." B was let into possession, but the business was not completed. In a suit by B for specific performance, an account was directed; and, held, first, that, under the clause in the second agreement exempting "the remainder of the purchase-money" from the payment of interest, the sum remaining unpaid of the 20,000*l*., and the three sums constituting the 58,000*l*., must be taken to come under that description; secondly, that the exemption of a purchaser in possession of the estate from liability to interest on the purchase-money, though permissible if the agreement had been speedily executed, would not be enforced by any Court of equity where that state of things continued for many years; and thirdly, that the second contract must be taken to have failed by circumstances, and that the first contract must be decreed to be executed so far as it had remained unexecuted, and the House of Lords

ordered the accounts to be settled on these principles. No costs were given. *Ibid*.

A purchase was to be completed on a given day, when the purchaser was to have possession, and it was provided "that if from any cause whatever," the purchase-money should not be then paid, the purchaser should pay interest. A delay of six months accrued from the default of the vendor in not furnishing proper abstracts:—Held, that the purchaser must pay interest unless he gave up the rent during that period. *Crope v. Bakewell*, 13 Beav. 421.

In the absence of any express stipulation, the expenses and outgoings of property sold must be borne by the vendors down to the time when the purchaser could prudently take possession, *i.e.* down to the time when a good title was shewn. *Carrodus v. Sharp*, 20 Beav. 56.

The validity of a leasehold title depended on the lessors' assent to the assignment. The assent was not given until after suit by vendor:—Held, that the vendor must bear the rent, rates, taxes and outgoings down to the date of the assent, and on the other hand, the purchaser must pay interest from that time. *Ibid*.

An estate was mortgaged in 1841 for 2,000*l*., with interest at 5*l*. per cent. In 1842 the mortgagor died, and in the same year the devisees of the equity of redemption sold by auction the mortgaged premises, together with other lands of the mortgagor, for 2,700*l*., to the mortgagee. The usual deposit was paid at the time of the sale; and by the conditions of sale 4*l*. per cent. was payable on the balance of the purchase-money. The mortgagee entered into possession in 1842, and remained in such possession until her death, in 1847, when her devisees entered into possession. Upon a claim filed by the devisees of the mortgagor against the devisees and executors of the mortgagee for specific performance of the contract to purchase eleven years after the sale, no demand having been made during that period, either for the payment of the residue of the purchase-money into court, or for interest on the mortgage, —Held, under the circumstances, that a set-off *pro tanto* was to be inferred at the date when possession was taken by the mortgagee, and that from that period interest at 4*l*. per cent. only was payable upon the balance of the purchase-money. *Wallis v. Bastard*, 4 De Gex, M. & G. 251.

The rule that where a vendor fails to complete at the time agreed upon, the purchaser by providing himself with the money, and giving notice that it is lying idle, may free himself from payment of subsequent interest, is settled by well-established authorities, and could not have been intended to be rendered doubtful by the dicta in *De Visme v. De Visme*, 1 M. & G. 352. *Dyson v. Hornby*, 4 De Gex & S. 481.

A purchaser liable to pay interest on his purchase-money may deduct income tax from such interest. It was the practice to deduct the tax from the interest on debts upon promissory notes and the like in the offices of the Masters in Chancery. *Bebb v. Bunney*, 1 Kay & J. 216.

The tax is not deducted on payment of purchase-money into court; but the purchaser, it seems, may apply to have it deducted when the purchase-money is paid out of court. The words "yearly interest" in section 40. of 16 & 17 Vict. c. 34. mean not only

interest accruing *de anno in annum*, but any interest at a fixed rate per cent. per annum, though accruing *de die in diem*. *Ibid*.

(G) COSTS.

A entered into a written contract for the sale of an estate to B. B declined to perform the contract on the ground of inadequacy of value. In a suit by A against B for a specific performance, by a decree, dated in April 1851, it was declared that A was entitled to a specific performance of the agreement, and a reference was made to the Master to inquire whether A could make a good title, and, if so, to state when such good title was first shewn; and costs were reserved. The Master found that a good title was made, and that it was first shewn in April 1852:—Held, that A was entitled to the costs of the reference to the Master. *Abbott v. Sworder*, 22 Law J. Rep. (N.S.) Chanc. 235; 4 De Gex & S. 448.

Where a purchaser objects to specific performance of contract for sale upon other grounds than those of title, and fails, and the vendor does not make out his title until after decree, the purchaser is liable to the costs of the vendor's suit for specific performance, except the costs of making out the vendor's title. *Abbott v. Calton*, 22 Law J. Rep. (N.S.) Chanc. 336.

Where the Court has declared, in a suit for specific performance by a vendor, that the concurrence of judgment creditors was necessary, that being the substantial ground of the litigation, although a question of conveyance and not of title, the vendor plaintiff failing must pay the costs of the suit. *Freer v. Hesse*, 23 Law J. Rep. (N.S.) Chanc. 338; 4 De Gex, M. & G. 495.

It is the duty of a vendor plaintiff who has a defective title, when the objection is removed, to offer to the purchaser the costs up to that time and to give him a conveyance. *Ibid*.

A copyhold estate of the testator in a cause sold to A under a decree of the Court of Chancery. The legal estate was vested in B, as a trustee, he being the tenant on the court rolls of the manor. After the sale, but before a surrender to A, B died intestate. No improper delay was to be attributed either to A or B as to the surrender:—Held, that the fine and fees payable on the admission of B's heir, ought to fall, not on A, the purchaser, but on the testator's estate. *Paramore v. Greenslade*, 23 Law J. Rep. (N.S.) Chanc. 34; 1 Sm. & G. 541.

A reversion expectant on the decease of a person aged fifty-six, without issue, was sold for 20*l*. On a reference the Master found that it was worth 350*l*. The sale was set aside, but the purchaser had his costs of suit, except those of the inquiry before the Master to ascertain the value. *Boothby v. Boothby*, 15 Beav. 212.

Costs to which a purchaser under the Court is entitled on its being found that a good title cannot be made. *Perkins v. Ede*, 16 Beav. 268.

A vendor agreed to surrender or procure some person to surrender, and the costs of the surrender were to be paid by the purchaser. It was found necessary to procure a surrender under the Trustee Act:—Held, that the costs of the proceedings ought to be paid by the vendor. *Bradley v. Munton*, 16 Beav. 294.

When a vendor succeeds in a suit for specific performance, he is entitled to costs, notwithstanding the

title was first shewn in the Master's office, if the suit was occasioned solely by the conduct of the defendant. *Peers v. Sneyd*, 17 Beav. 151.

A purchaser who had altogether denied the vendor's right to a specific performance, ordered to pay the costs of suit instituted by the vendor for that purpose down to the hearing, although the title was not finally completed until after the decree. *Carrodus v. Sharp*, 20 Beav. 56.

A vendor after the contract and before the conveyance to the purchaser died, without having devised the legal estate in the premises in trust to complete the purchase, and a suit for specific performance of the contract against the trustees and the infant devisees of interests in his estate having become necessary, the Court made the decree without costs, there having been no default on either side. *Hinder v. Streeten*, 10 Hare, 18.

VENUE.

The following practice is to be observed under the Reg. Gen. Hil. term, 16 Vict. rule 13, which directs that "no venue shall be changed without a special order of the Court or a Judge, unless by consent of the parties":—First, it is more convenient as a general rule that the application to change the venue by rule or summons may be made before issue joined; but this shall not prejudice either party from applying after issue is joined to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county. Secondly, a defendant in his affidavit to obtain the rule *nisi* to change the venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but he may, if he pleases, rely only on the fact that the cause of action arose in the county to which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shews that the case may be more conveniently tried in the county in which it was originally laid or other good reason why the venue should not be changed. *De Rothschild v. Shilston*, 22 Law J. Rep. (N.S.) Exch. 279; 8 Exch. Rep. 503.

One of two defendants may, under ordinary circumstances, change the venue without the consent of the other. *Job v. Butterfield*, 20 Law J. Rep. (N.S.) Exch. 8; 5 Exch. Rep. 827.

A rule to discharge a rule for changing the venue need not be drawn up on reading the affidavits on which the original rule was obtained. *Ibid*.

Since Reg. Gen. Hilary term, 1853, r. 18, the venue cannot be changed till after issue joined; and the order must be a special one, founded on a special affidavit of the circumstances. *Skipp v. Ramsden*, 22 Law J. Rep. (N.S.) C.P. 186.

Where a Judge at chambers made an order to change the venue on the common affidavit, and before issue joined, and the plaintiff afterwards applied to have the venue changed again to another Judge, who refused to interfere,—Held, that the plaintiff had not so acquiesced in the order of the former Judge as to be precluded from obtaining a rule to set aside that order. *Ibid*.

Since the Common Law Procedure Act (15 & 16

Vict. c. 76.) and Reg. Gen. Hil. term, 1853, r. 18, a defendant who has got an order for time to plead on the terms of taking short notice of trial, is not entitled to have the venue changed, either before or after issue joined, on the common affidavit that the cause of action arose in the county into which he seeks to change the venue, and not elsewhere. *Clullee v. Bradley*, 23 Law J. Rep. (N.S.) C.P. 38.

Seem—that an affidavit to that effect, which stated, in addition, that the witnesses on both sides resided in the county to which it was sought to change the venue, amounts to no more than the common affidavit. *Ibid*.

VESTRY.

A burial board appointed under the 15 & 16 Vict. c. 85, laid before the vestry of the parish a proposal that the board should be authorized to borrow any sums of money not exceeding 20,000*l*. for their purposes. This proposal was not put to the vote by a show of hands, but was met by an amendment that the matter should be referred back to the board to be reconsidered, and a show of hands being taken upon this amendment, it was carried by a majority. A division was then demanded, whereupon the chairman said that there should be a poll upon the original proposal and the amendment together, and that the votes must be affirmatively for one or the other, and not negatively as to either, and that no further amendment could afterwards be received. A majority of affirmative votes were given for the original resolution:—Held, that the proceeding was too informal to authorize the burial board to borrow the money, for that no show of hands having been taken upon the original resolution, it could not properly be put to the poll, having regard to the provisions of the special act regulating the proceedings of this particular vestry. *Elt v. the Burial Board of St. Mary's, Islington*, Kay, 449.

Held, also, that the manner of putting the resolution and amendment to the poll, and requiring only affirmative votes on each, was informal, because the majority of votes being given for the original proposition did not prove that it was preferred to any other, but merely to that particular proposition which had been put as an amendment, and which was not a direct negative of it. *Ibid*.

A "division" of a vestry "to be taken in the manner prescribed by the 58 Geo. 3. c. 69," may be taken by a poll of all the ratepayers, such poll being an adjournment of the vestry. *Ibid*.

At such poll the original proposition and an amendment inconsistent with it being the only one proposed, may be put to the vote, and affirmative and negative votes may be taken upon each, and in that way the sense of the voters may be ascertained. *Ibid*.

Observations upon the best mode of taking the opinion of a meeting upon a resolution and amendment. *Ibid*.

VOLUNTARY CONVEYANCE AND SETTLEMENT.

G P executed a document, which was attested by two witnesses, giving and granting to E P his wife a freehold house in which they resided. G P after-

wards died, without having made any will, and his heiress-at-law brought an action of ejectment to recover the possession of the house and premises from E P, and obtained a verdict; upon which E P filed this bill. Upon a motion to dissolve an injunction which had been obtained,—Held, that the gift was incomplete; that the relationship of trustee and *cestui que trust* was not created; that this Court would not assist either party, but leave them as it found them; and that the injunction must be dissolved. *Price v. Price*, 2*l* Law J. Rep. (N.S.) Chanc. 53; 14 Beav. 598; 1 De Gex, M. & G. 308.

A charge created by C S upon his estates to secure the payment of a sum of money borrowed for S H S is a good consideration, not only for a collateral charge upon the estates of S H S to indemnify C S and his estate from the payment of the money borrowed, but also for a settlement of the S estates upon his family. *Ford v. Stuart*, 21 Law J. Rep. (N.S.) Chanc. 514; 15 Beav. 493.

A H, being a trustee for the younger children of S H S, advanced a sum of 5,185*l*. 3*s*. 4*d*. upon the security of certain estates in Berkshire, which C S on the 20th of January 1832 demised to A H for 300 years, to secure the repayment. The money was borrowed for S H S, who was tenant in tail of the S estates in remainder expectant on the death of his mother, the tenant for life; and on the 21st of January 1832, S H S demised the S estates to C S for 2,000 years, to indemnify him and the Berkshire estates from the 5,185*l*. 3*s*. 4*d*. and interest; secured to A H; and by deeds dated the 23rd and 24th of January 1832, in further compliance with an agreement recited in this deed, he settled the S estates upon various uses, for the benefit of his family. On the death of the tenant for life, S H S, being greatly indebted to G S F, executed a disentailing deed, and conveyed the S estates to G S F, giving him a power of sale over the estates as a security for the money due: this was subsequently confirmed by another deed; and in a suit instituted by G S F, insisting that the settlement of the 23rd and 24th of January 1832 was voluntary and void against the subsequent alienation for value made to G S F, who had notice of the settlement,—Held, that the agreement made by S H S with C S to indemnify him against the 5,185*l*. 3*s*. 4*d*. and to settle the S estates, was such as this Court would specifically perform, and that it was a consideration sufficient to support the settlement; that the recital in the deed of the 24th of January 1832 of the agreement between S H S and C S was sufficient evidence of the contract, and that it was doubtful if evidence to disprove it could have been entertained; that S H S and C S were, by executing the deed, estopped from alleging that the recital was false; that the plaintiff G S F was in the same position as S H S; that the deeds of the 23rd and 24th of January 1832 were valid, and not voluntary and void against a subsequent purchaser for value; and the bill was dismissed with costs against the children of S H S and the defendants resisting the plaintiff's demand, but without costs as against S H S and the defendants supporting the plaintiff. *Ibid*.

Stock was standing in the names of A and B, mother and daughter, as trustees for A for life, remainder for B absolutely. B, in contemplation of

marriage, assigned her interest, subject to A's life interest, to trustees, upon trust for the benefit of herself and her intended husband, for life, and then upon trusts for the issue of the marriage, and for C, a niece of B, and her issue, as B should appoint, and in default of appointment, among them equally. And it was provided that, if there should be no issue of the marriage, or none who should attain a vested interest, then as to 5,000*l.*, part of the fund, and 600*l.* long annuities, subject to a life estate, the same should be in trust for C absolutely, to be vested at twenty-one. A had notice of the settlement, but was not a party to it. No transfer of the fund was made. The marriage was solemnized, but no issue was born, and the husband died. B contracted a second marriage, and in contemplation of it she assigned her interest, subject to A's life interest, to trustees upon trusts for her benefit for life, and then upon trusts for C (the niece) and the issue of the second marriage, as she (B) should appoint by will, and in default of appointment among the issue of the marriage equally, and in default of issue, as to 5,000*l.*, part of the fund, for C absolutely. No transfer of the fund was made. The marriage was solemnized, and one child was born, and then the second husband died. A, the mother, the original tenant for life, then died, and the fund was still standing in the names of A and B. C, the niece, married, and a suit was instituted by the trustees of the first settlement, and by C, and her husband, against B, the trustee of the second settlement, and the child of the second marriage, praying a transfer of 5,000*l.* to the trustees of the first settlement, and an injunction to restrain the transfer of the fund by B to the trustees of the second settlement. The bill was dismissed in the court below; but on appeal,—Held, that, whether or not the first settlement was voluntary (which the Court did not decide) as to the trusts in favour of C, the niece, still it was a complete alienation of the fund by B, and the decree below was reversed, a transfer being directed as prayed. *Kekewich v. Manning*, 21 Law J. Rep. (N.S.) Chanc. 577; 1 De Gex, M. & G. 176.

The assignee of a debt under a voluntary assignment, filed a claim against the representatives of the deceased debtor and the assignor for payment of the debt or administration of the debtor's estate:—Held, that the plaintiff had no equity, and the claim was dismissed. *Sewell v. Mossy*, 21 Law J. Rep. (N.S.) Chanc. 824; 2 Sim. N.S. 189.

J L B, being entitled under the will of his uncle to real and personal estate, a portion of which consisted of shares in the General Mining Association, Regent's Canal shares, Columbian bonds, consols and cash at the bankers, executed a voluntary settlement for the benefit of himself for life, with remainder for his children. Upon a suit by him asking that the deed might be declared void,—Held, that no legal estate passed to the trustees of the settlement, and that it did not create any declaration of trust, as the trustees of the will were not parties to the deed; but as the shares in the General Mining Association and the Regent's Canal shares had been transferred to the trustees of the settlement, the transfer was complete, and the bill was dismissed as to these, but that the deed did not affect the real estate: and as no complete transfer of the Columbian bonds, and 12,694*l.* consols, and 475*l.* 10*s.* 10*d.* cash, which was standing

in the names of the trustees of the will, had been made, they were unaffected by the deed, and the trustees of the will were directed to transfer them to the plaintiff; but the costs of all parties to the suit were to be paid by the plaintiff. *Bridge v. Bridge*, 22 Law J. Rep. (N.S.) Chanc. 189; 16 Beav. 315.

A feme covert, being seized of an estate in fee, joined with her husband in conveying to trustees for the benefit of her husband, herself, and children, of whom there were several. The husband and wife subsequently joined in mortgaging the estate to secure 2,500*l.*, and after that, they joined in conveying the estate to trustees, upon trust to sell, and divide the proceeds among the creditors of the husband. All the deeds were acknowledged by the wife; but the last two were executed without the intervention of the trustees of the settlement. The trustees of the last deed sold the estate for the benefit of the creditors, but the purchaser objected to the title; and upon a claim for specific performance:—Held, that the settlement was voluntary under the 27 Eliz. c. 4, and void against a purchaser for valuable consideration. *Butterfield v. Heath*, 22 Law J. Rep. (N.S.) Chanc. 270; 15 Beav. 408.

Where a voluntary settlement made in consideration of natural love and affection also purports to have been made for divers other good and valuable considerations, the party claiming under the settlement against a subsequent mortgagee or purchaser must shew that a valuable consideration had been given for the settlement. *Kelson v. Kelson*, 22 Law J. Rep. (N.S.) Chanc. 745; 10 Hare, 385.

Semble—*scus*, if *prima facie* it appears from the deed that a valuable consideration was given, in which case the onus of disproving the consideration will lie upon the party disputing the deed. *Ibid.*

A creditor, by memorandum in writing, without power of revocation, directed her debtor to pay part of his debt by instalments to herself, and to invest part of the residue, by like instalments, for the benefit of certain volunteers, payable to them after her decease. By a second memorandum the creditor directed her debtor to continue the payment of the debt, by similar instalments, to herself, and not to accumulate any portion of it for the *cestuis que trust*. Both memorandums were written by the debtor, and signed by the creditor, without notice to the *cestuis que trust*, and part of the residue settled by the first memorandum was paid to the creditor by the debtor according to the directions in the second memorandum:—Held, that the first memorandum constituted a complete declaration of trust in favour of the *cestuis que trust*, and was irrevocable by the settlor. *Pater-son v. Murphy*, 22 Law J. Rep. (N.S.) Chanc. 882; 11 Hare, 88.

A voluntary settlement by debtor, which *per se* might be void as against his creditors, may be valid against them if it forms part of the consideration for contemporaneous dealings with the debtor's property. *Harman v. Richards*, 22 Law J. Rep. (N.S.) Chanc. 1066; 10 Hare, 81.

A, being entitled to a reversionary interest in a sum of stock standing in the names of trustees, expectant on the death of B, made a voluntary assignment of this interest to C by deed, and gave notice of the assignment to the trustees:—Held, that the assignment was valid. *Voyle v. Hughes*, 23 Law J. Rep. (N.S.) Chanc. 238; 2 Sm. & G. 18.

A defendant executing a voluntary assignment of a reversionary interest in a sum of stock, without making any transfer of the fund, will not be compelled either to transfer the fund, or to do any act to render the assignment available. *Beech v. Keep*, 23 Law J. Rep. (N.S.) Chanc. 539; 18 Beav. 285.

A B, by a voluntary deed, assigned to C D, his interest in a sum of stock standing in the names of trustees upon trust for him. No notice of the assignment was given to the trustees in A B's lifetime:—Held, that, as between C D and the representatives of A B, the assignment was complete; but that if the trustees had transferred the stock before receiving notice of the deed, C D would have had no remedy against them. *Donaldson v. Donaldson*, 23 Law J. Rep. (N.S.) Chanc. 788; Kay, 711.

The execution of two deeds at several times, the one granting annuities to seven parties, and the other granting different annuities to five of the same parties, affords no presumption that the one is substituted for the other. *Benham v. Newell*, 24 Law J. Rep. (N.S.) Chanc. 424; 20 Beav. 32, *nom.* *Palmer v. Newell*.

The presumption arising from a donor placing himself *in loco parentis* will not be allowed to confine double to single gifts, when they are made to a mother and children, towards whom the donor cannot at the same time be considered as standing *in loco parentis*. *Ibid.*

Evidence to explain the intention of the donor is inadmissible against the evidence appearing in the deeds. *Ibid.*

A solicitor and money-scrivener being in insolvent circumstances, upon his marriage with a woman with whom he had for seven years previously cohabited, by a deed of settlement and articles of agreement executed prior to the marriage, conveyed and assigned the whole of his real and personal estate to trustees upon certain trusts for his wife, with a joint power of appointment among the children of the marriage (including an illegitimate daughter), but reserving no interest to himself. Immediately after the marriage the power was exercised in favour of the illegitimate daughter. The property remained under the controul of the husband. Within two months after the marriage a fiat in bankruptcy was issued against him. On a bill filed by the wife to establish the settlement,—Held, that the settlement was itself an act of bankruptcy, and void as against the assignees. *Colombine v. Penhall*, 1 Sm. & G. 228.

In the same case it being objected that the fiat was no proof of bankruptcy as against the wife,—Held, that the fiat being the adjudication of a Court of competent jurisdiction is until set aside proof of the bankruptcy against all parties. *Ibid.*

In a settlement, executed by a person in embarrassed circumstances, being in part merely meritorious, but untrue recited as valuable, where the operation of the deed was to withdraw property from the creditors of the settlor, the Court declared the deed invalid as against creditors, and set it aside. *Penhall v. Elwin*, 1 Sm. & G. 258.

Semble—advances made by a parent to a child, which formed a debt, but had ceased by lapse of time to be a legal obligation, are yet a sufficient consideration to support a deed by way of family arrangement, but not against creditors. *Ibid.*

The Court in order to give effect to voluntary set-

tlements requires, where the settlor is the legal owner, everything to have been done which is requisite to transfer the legal ownership, and where he is the equitable owner, clear and distinct evidence of a declaration of trust in favour of the donee. *Bentley v. Mackay*, 15 Beav. 12.

A father being entitled during the life of his son to the dividends on funds standing in the names of himself and three other trustees, directed two of the trustees to pay over the dividends for the future to his son. They acted on the direction, and the testator afterwards recognized the gift:—Held, that there was a valid and effectual voluntary settlement which this Court would give effect to. *Ibid.*

This Court will not assist a volunteer by making effectual an incomplete gift. *Weale v. Olive*, 17 Beav. 252.

A B directed the certificates of some United States Bank shares standing in his name to be delivered to his nephew, and in a letter to him stated that "he made a free gift of them" to him. A B also executed a power for transferring the shares, but which was not acted on in A B's life. The shares being found in A B's name at his death were held to form part of his personal estate. *Ibid.*

WARRANT AND ORDER.

The prisoner forged and delivered as genuine to B, who owed money to A, a letter purporting to be written by A, and addressed to B, in which, after setting out the amount due from B, A was made to say, "Sir,—I hope you will excuse my sending for such a trifle," &c., "but I am obliged to hunt after every shilling":—Held, that the document was a forged "warrant" for the payment of money within the meaning of the statute 11 Geo. 4. & 1 Will. 4. c. 66. s. 3. *Semble*—that it was also a forged "order" for the payment of money. *Regina v. Dawson*, 20 Law J. Rep. (N.S.) M.C. 102; 2 Den. C.C. 75.

WARRANT OF ATTORNEY.

It is a good preliminary objection on shewing cause against a rule to rescind a Judge's order, that the affidavits on which the order was made have not been brought before the Court. *Pocock v. Pickering*, 21 Law J. Rep. (N.S.) Q.B. 365.

After a rule has been discharged upon such an objection, a second application may be made. *Ibid.*

A warrant of attorney was attested as follows:—"Signed, sealed and delivered in the presence of me, Henry Clarke, who at the request and in the presence of the said Joseph Heathcote Brooks, James Cogan and James Henry Pickering, have set and subscribed my name as the attorney on their behalf, attesting the execution hereof, having first read over and explained to them and each of them the nature and contents thereof":—Held, (*Erle, J.* dissenting) that the attestation was invalid, on the ground that the witness did not by necessary implication declare himself to be attorney for the persons executing the warrant of attorney as required by the 1 & 2 Vict. c. 110. s. 9. *Ibid.*

A warrant of attorney, prepared by the defendant, was addressed to H, an attorney, by name. The

plaintiff introduced H to the defendant, who adopted him as his attorney to attest the execution of the warrant of attorney, and H accordingly attested it. H afterwards, at the request of the plaintiff, signed judgment and issued execution on the warrant as attorney for the plaintiff. The Court refused to set aside the warrant on the objection that the attestation by H was insufficient. *Levinson v. Syer*, 21 Law J. Rep. (N.S.) Q.B. 16; 2 L. M. & P. P.C. 557.

The Court, setting aside a warrant of attorney, the judgment signed thereon, and subsequent proceedings, on the ground that one attorney had attested the execution of the warrant for both plaintiff and defendant, refused to deprive the defendant of the costs of the rule, unless he would undertake not to bring an action. *Cooper v. Grant*, 21 Law J. Rep. (N.S.) C.P. 197; 12 Com. B. Rep. 154.

WARRANTY.

The defendant, being the owner of a ship, inserted the following advertisement in the *Shipping Gazette*:—"The fine teak-built barque *Intrepid*, A 1, 286½ tons register, built under particular inspection at Coringa, in 1842, of the best materials, shifts without ballast, carries a good cargo, has a poop and excellent height between decks, and is well adapted for a passenger ship; length 91½ feet, breadth 22 feet 8 inches, depth 16 feet 8 inches; now lying at the St. Katherine Docks. For inventories and further particulars apply to J. H. Arnold, 3, Clement's Lane, Lombard Street." The plaintiff, having seen the ship, entered into a written agreement to buy her, "as she now lies in the St. Katherine Docks, agreeable to the inventory annexed." This document commenced thus:—"For sale by private contract the fine teak-built barque *Intrepid*," &c., pursuing the terms of the advertisement down to the words "St. Katherine Docks." Then followed this statement: "Hull, masts, standing and running rigging, with all faults as they now lie." Under this was the word "Inventory," which was followed by a list of the ship's stores and tackle; and the document concluded with these words: "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, height, quantity, quality, or any defect or error whatever. For inventories and further particulars apply to J. H. Arnold, 3, Clement's Lane, Lombard Street, London." The defendant signed his name to this inventory, opposite to the list of the ship's stores. The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger ship.—Held, first, that the contract of sale incorporated the whole of the above document, and not merely the list of stores headed "Inventory." Secondly, that the defendant was not guilty of a breach of warranty. *Taylor v. Bullen*, 20 Law J. Rep. (N.S.) Exch. 21; 5 Exch. Rep. 779.

A tradesman who sells an article which he, at the time, believes to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a third person, not a party to the contract of sale, in consequence of such unsoundness. *Longmeid v. Holliday*, 20 Law J. Rep. (N.S.) Exch. 430; 6 Exch. Rep. 761.

A declaration in case by a husband and wife stated that the defendant, who was the maker and seller of

certain lamps called Holliday's lamps, sold to the husband one of these lamps, to be used by his wife and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that in consequence of the insufficient materials with which it was constructed it exploded and burnt her. At the trial, the jury found that the accident had been caused by the defective nature of the lamp; but that the defendant was ignorant of this unsoundness, and had sold the article in good faith.—Held, that the fraud on the part of the defendant having been negatived, the action was not maintainable by the wife, who was not a party to the contract. *Ibid.*

WASTE.

A testator devised to A for life, a house and other real estate, "he committing no manner of waste, and keeping the premises in good and tenantable repair." In July 1837, A entered into possession, and in November 1844 the house was totally destroyed by an accidental fire. In 1845, A was found lunatic by inquisition, and the lunacy was dated from the 1st of October 1843. Upon petition in lunacy of the remainder-men, who were also committees of the person and estate,—Held, that the lunatic's estate was liable under the terms of the condition to reinstate the house; and a reference was directed as to what amount ought to be expended in rebuilding, and out of what fund the expense should be paid; with liberty to the next-of-kin to take a case to law upon the construction of the condition. *In re Skingley, a lunatic*, 20 Law J. Rep. (N.S.) Chanc. 142; 3 Mac. & G. 221.

Several persons were entitled successively to life estates in real property limited in strict settlement: they became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon a bill filed on behalf of H L, the then first tenant in tail in existence, who was an infant, the assignees were ordered to bring the money into court; this, with the accumulations, amounted to 26,133*l.* 2*s.* 10*d.* Two of the tenants for life died without issue; H L attained twenty-one, and being still the first tenant in tail, and entitled to the first estate of inheritance, he presented a petition for payment to him of the fund and the accumulations: which were ordered to be transferred to him. *Lushington v. Boldero*, 21 Law J. Rep. (N.S.) Chanc. 49; 15 Beav. 1.

A rector is justified in cutting timber growing on the glebe, provided that he specifically applies it to the repairs of the rectory-house and the buildings on the glebe; but he is not justified in cutting such timber and selling it. *The Duke of Marlborough v. St. John*, 21 Law J. Rep. (N.S.) Chanc. 381; 5 De Gex & S. 174.

The circumstance that the rector had applied a much larger sum in the repairs of the rectory-house than the proceeds of the sale of timber cut by him, was held not to be an answer to a case made against him of cutting and selling timber, in a suit instituted by the patron. *Ibid.*

A Court of equity will not interfere to make a tenant for life liable in respect of permissive waste. *Powys v. Blagrave*, 24 Law J. Rep. (N.S.) Chanc. 142; 4 De Gex, M. & G. 448; Kay, 495.

WATCHING AND LIGHTING.

[See title RATE.]

In the parish of K a district for ecclesiastical purposes had been assigned under the 1 & 2 Will. 4. c. 38. to the chapel of B, for which chapelwardens were appointed, but they had authority only in ecclesiastical matters, all parochial business of the district being always transacted by the churchwardens of K at large. A notice, convening a meeting for the purpose of considering whether the 3 & 4 Will. 4. c. 90. (the Watching and Lighting Act) should be adopted in the B. district, was upon a requisition of the rate-payers of the district issued by the district chapelwardens. The meeting was held, and the act adopted in the district; and inspectors were appointed, who made orders on the overseers of K to levy certain sums of money for the purposes of the act. The overseers having neglected to obey these orders, an application was, more than two years after the adoption of the act, made to Justices for a distress warrant against the overseers, but they refused to issue it:—Held, that the act had never been legally adopted in the district, as the notice for convening the meeting could only be properly given under the act by the churchwardens of the parish at large, who were the persons usually calling meetings on parochial business, and that consequently the Justices were not bound to issue their distress warrant. Held, also, that the whole of the proceedings being void, the objection was open notwithstanding the time which had elapsed. *Regina v. the Overseers of Kingswinford*, 23 Law J. Rep. (N.S.) Q.B. 337; 3 E. & B. 686.

WATER AND WATERCOURSE.

To an action by plaintiffs, as the occupiers of a water grist-mill, against the defendant, as owner of land on one side of the stream, for diverting part of the water, for the irrigation of his tenant's meadows, the defendant pleaded—first, not guilty; fourthly, that his tenant was possessed of four closes on the bank of the stream above the mill; that the defendant, as servant of his tenant, diverted small and reasonable quantities of water for irrigating the closes, which, excepting such a small quantity as was absorbed and used in irrigation, were returned to the stream above the mill; that the diversion was not continuous, but only intermittent; that the quantity of water absorbed and lost was very small, and “inappreciable;” and that the diversion caused no damage to plaintiffs’ mill. It was proved that the diversion was not continuous; that it took place when the stream was full; and that it caused no diminution of the water cognizable by the senses. The Judge, in directing the jury, suggested that the word “inappreciable” might mean so inconsiderable as to be incapable of value or price. *Quære*—whether this was a misdirection? *Embrey v. Owen*, 20 Law J. Rep. (N.S.) Exch. 212; 6 Exch. Rep. 353.

Semble—that, assuming the word “inappreciable” to mean something incapable of being estimated or valued, the plea was not proved; and that rejecting that word, the verdict on that issue ought to have been found for the plaintiffs.

Water is *publici juris* in this sense only, that all

may reasonably use it who have the right of access to it. No man can have any property in the water itself, except in that particular portion which he may choose to abstract from the stream, and take into his own possession, and that during the time of his possession only. *Ibid*.

The proprietor of the adjacent land has the right to the usufruct of the streams that flow through it, not as an absolute and exclusive right to the flow of all the water in its natural state, but subject to the similar rights of all the proprietors of the banks on each side, with a reasonable enjoyment thereof. *Ibid*.

An action will lie for the unreasonable and unauthorized use of the water, although there may be no actual damage. *Ibid*.

The same law applies to the corresponding rights of air and light. *Ibid*.

Held, therefore, in the present case, that as the irrigation took place not continuously but only at intermediate periods, when the stream was full, and no damage was done to the working of the plaintiffs’ mill, and the diminution of water was not perceptible to the eye, the use of the water by the defendant was reasonable, and was not prohibited by law. *Ibid*.

The plaintiffs were the occupiers of paper-mills, and had for twenty years last past, and previously to the 11th of September 1817, enjoyed the waters of the rivers B and G for the use of their mills. The act of parliament which incorporated the Grand Junction Canal Company provided that before any of the brooks, streams, &c. supplying the rivers B and G should be used for the canal, and the B and G should be diminished, a reservoir should be made for collecting water to supply such rivers and the mills with a quantity equal to what should be taken for the supply of the canal, and that when there should be a want of water in the rivers for the supply of any mill, water should be let off from the reservoirs to such rivers. Actions having been brought by the plaintiffs against the company for not making the reservoir, an agreement was ultimately made between them and the company that the latter would apply for an act of parliament, and that they should not make any alteration in the state of the B and G, or any diversion of their waters. An act of parliament was afterwards passed, which enacted that it should not be lawful for the company to divert any of the waters of the B and G. In 1849 the defendants sank a large well to the depth of seventy-two feet, close to the summit level of the canal, and by means of pumps and a steam-engine pumped into the summit level of the canal a quantity of underground water, which would otherwise have flowed underground into the river B, and also other underground water, which would otherwise have percolated through the intervening chalk underground into the B, and would have flowed to the plaintiffs’ mills. A portion also of the water of the B, which would have flowed to the plaintiffs’ mills, was, by means of such pumping, drawn off through the intervening chalk, out of the river into the well, so that the plaintiffs in each of the above cases were prevented from working their mills as beneficially as they would have done:—Held, first, that as to the water which had been taken from the river, not by the reasonable use of it by another riparian proprietor, but by the digging of a well, which was clearly a diversion, an action would

lie at common law against the company for the injury done to the plaintiffs. *Dickinson v. the Grand Junction Canal Co.*, 21 Law J. Rep. (N.S.) Exch. 241; 7 Exch. Rep. 282.

Quere—whether the action would have been maintainable if it had appeared that the defendants were ignorant, and could not by any degree of care have ascertained before making the well, that it would have the effect of abstracting the water, and when they discovered that it did have that effect, could not have repaired the injury. *Ibid*.

Secondly, that an action would lie at common law for the abstraction of the water, which never formed part of the river, but was prevented from doing so by the excavation of the well, whether the water was part of an underground watercourse, or percolated through the chalk. *Ibid*.

Thirdly, that the taking away, by means of the well, of the water of the rivers or the supply of the rivers from springs and percolation, was a breach of the agreement and also of the act of parliament; the meaning of which was, that the defendants should not take water from the waters or springs which in their natural course would form part of the rivers in their then existing state. *Ibid*.

Lastly, that proof of actual loss of profit by the plaintiffs, by their being unable to work the mills as before, was not necessary to enable them to recover; nor was it necessary at common law, if the defendants were not authorized to make the well. *Ibid*.

A special verdict found that a pit in the plaintiff's close, adjoining a close of the defendant, in and since 1796 had been principally supplied with water coming from the defendant's close through an agricultural tile drain for the better cultivation of the land, and which water flowed thence into a ditch and then into the pit. That the drain came from a hill-side through the defendant's close, through a wet, boggy soil, and not from any ascertained source, and that it aided in effecting the general surface drainage of the defendant's close. That the defendant, for the purpose of more effectually draining and cultivating his close, deepened the course of an old drain, and by making a communication between it and the drain which fed the plaintiff's pit, drew the water from the pit. The immediate object was to get a better fall of water from the defendant's close which previously had been so wet and boggy as to be comparatively unproductive:—Held, that under the above circumstances no grant of the flow of the water to the plaintiff was to be presumed, and that the plaintiff had no right of action against the defendant for the diversion of the water. *Greatrex v. Haywood*, 22 Law J. Rep. (N.S.) Exch. 137; 8 Exch. Rep. 291.

Permission was obtained from E and other landowners, on behalf of a body of subscribers, to make a watercourse through their respective lands to supply the town of G with water. It was alleged that the subscribers agreed to pay to E 2s. 6d. a-year, but this was denied. E subsequently diverted the watercourse into the old channel; and upon a bill filed by several of the subscribers,—Held, upon its being amended, and made on behalf of the plaintiffs, and others whose names and residences were unknown, being subscribers to the fund, that the plaintiffs were entitled to the use of the watercourse passing under the lands of E; and an injunction was granted to restrain the defendant from preventing, obstructing, or

interfering with the flow of water, or with the plaintiffs' use of the watercourse. *The Duke of Devonshire v. Elgin*, 20 Law J. Rep. (N.S.) Chanc. 495; 14 Beav. 530.

WATERMEN.

The 37th section of the Watermen's Act (7 & 8 Geo. 4. c. lxxv.) imposes a penalty on any person (other than a freeman of the Watermen's Company or an apprentice to a freeman or widow of a freeman) who shall work or navigate "any wherry, lighter, or other craft" from or to any place or places or ship or vessel within the limits of the act:—Held, that this does not extend to a person who works a steam-tug for the purpose of towing vessels on the river. *Reed v. Ingham*, 23 Law J. Rep. (N.S.) M.C. 156; 3 E. & B. 889.

The appellant, who was not a freeman of the Company of Watermen and Lightermen of the River Thames, or an apprentice to a freeman, was convicted of an offence under the 37th section of the 7 & 8 Geo. 4. c. lxxv., which inflicts a penalty on any person not a freeman or an apprentice, &c. who, except as thereafter mentioned, "shall at any time act as a waterman or lighterman, or ply, or work, or navigate, &c. any wherry, lighter, or other craft upon the said river from or to any place, &c. within the limits of this act for hire or gain." By the 101st section of the act it was enacted that this section should not extend to any western barges, and that all flat-bottomed boats and barges navigated from the town of Kingston, or any place beyond the said town, should be deemed western barges, and might be navigated on the river as far as London Bridge. The appellant was employed by the Great Western Railway Company at a weekly salary in navigating the company's barges upon the river Thames, and at the time of the alleged offence the appellant had the command of one of the company's barges, laden with goods in the possession and care of the company as common carriers, and which were in the course of being forwarded for delivery to the owners and consignees. The goods had been laden on board the barge at a private basin of the Grand Junction Canal, adjoining one of the company's stations and without the limits of the act. The barge was towed along the canal to the river, and steered by the appellant upon the river and within the limits of the act, to a private wharf of the company west of London Bridge. The barge was flat-bottomed and of the same build as certain barges known as "western barges," and before it was purchased by the company it was known as a western barge, and was worked and navigated upon the river from Reading and places west of Reading, to the same wharf:—Held, that the barge was not, at the time of the offence, a western barge within the meaning of the 101st section, and that the appellant had been properly convicted under the 37th section. *Tibble v. Beadon*, 24 Law J. Rep. (N.S.) M.C. 104.

By the 57th section of the Thames Watermen and Lightermen's Act, 7 & 8 Geo. 4. c. lxxv., power is given to the Court of Mayor and Aldermen of the city of London to make such rules and by-laws as they should think proper for the government and regulation of the freemen of the Company of

Watermen and Lightermen, and the boats, vessels and other craft rowed or worked within the limits of the act, and to annex reasonable penalties and forfeitures, not exceeding 5*l.*, "provided the same rules and by-laws be not inconsistent with any of the laws of this kingdom or the provisions and directions in this act contained, or any of them." Under this section a by-law was made, which imposed a penalty of 40*s.*, or not less than 10*s.*, upon any freeman of the said company who should "set at work to row, or permit or suffer to be set at work to row, or in any manner navigate any lighter, barge, &c., within the aforesaid limits, any other person not being a freeman of the said company," &c. The appellant, a freeman of the company, employed a non-freeman, and permitted him to be set at work to row and navigate a barge within the limits of the act, and was convicted of an offence against the by-law:—Held, that, although there were no sections in the act which went to the extent of the by-law in prohibiting the employment of non-freemen in rowing and navigating barges within the limits of the act, still the by-law was good under the power conferred by the 57th section, there being nothing in its prohibition inconsistent with law or the provisions and directions of the act: and that the conviction therefore was valid. *Edmonds v. the Company of Watermen and Lightermen*, 24 Law J. Rep. (n.s.) M.C. 124.

WAY.

To a declaration in trespass *quare clausum fregit*, the defendant pleaded that he was occupier of a close called Backside Mead, with certain lands thereunto adjoining, and of another close called Mead, and divers, to wit, two other closes next adjoining thereunto, and justified under a right of way from the said Backside Mead over the *locus in quo*, and thence into the said Mead for the better use, occupation, and enjoyment of the said Backside Mead, the said lands adjoining thereto, and the said Mead and the said adjoining closes respectively:—Held, on special demurrer, that the plea stated with sufficient certainty the closes in respect of which the said right of way was claimed. *Holt v. Daw*, 20 Law J. Rep. (n.s.) Q.B. 365; 16 Q.B. Rep. 990.

The plaintiff sold to the defendant two dwelling-houses, a coach-house and stables, and a field, together with all ways usually held, occupied, or enjoyed therewith, with free liberty of ingress, egress, and regress for the defendant, or for cattle and carriages, over the carriage road leading to the said dwelling-houses and stables. The defendant afterwards made a gate from the field which abutted upon the carriage road into the road at an intermediate part thereof, and drove horses and carriages along the road into the field, and back again:—Held, that he was liable in trespass, the right of way being a right of way to the dwelling-houses, coach-house, and stables only. *Henning v. Burnett*, 22 Law J. Rep. (n.s.) Exch. 79; 8 Exch. Rep. 187.

D was seised in fee of five closes; two of them, named the Rye Holme close and the Moat close, were separated by two of the others from the only available highway. From 1823 the road A B was used by the tenants of the Rye Holme close, it

being the most convenient road to the highway. In 1839 D sold the Rye Holme close to M, one of the other closes to N, and the remainder, over which the road A B passed, to E. The deeds of conveyance bore different dates, but were all executed on the same day, and the order of priority could not be ascertained. In none of them was there any special grant or reservation of any particular way, but the conveyance to M contained the usual words "together with all ways, roads, paths, passages, rights, easements, advantages, and appurtenances whatsoever, to the said close belonging or appertaining." The occupier of Rye Holme close used the road for several years subsequent to the conveyance. In 1842, E conveyed to the defendant part of the land, over which the road A B passed, at which time the plaintiff was tenant of the Rye Holme close under M. In an action to try the right of the plaintiff to use the road,—Held, that the plaintiff was entitled to the way by implied grant, if the conveyance to M was first executed; or, if the conveyance to E was first executed, that the right of way was reserved to D, and subsequently passed to M, as appurtenant to Rye Holme. *Pinnington v. Galland*, 22 Law J. Rep. (n.s.) Exch. 348; 9 Exch. Rep. 1.

By the Regent's Canal Act for enabling the Canal Company to purchase lands, and which incorporated the Lands Clauses Act, 1845, the company were authorized to take a field called "Clayfield," held by one W under a lease from the Warden and Fellows of All Souls, Oxford. Notice to take this field having been given under the act, and the parties being unable to agree as to the terms, an arbitrator was appointed under the act to settle the question of disputed compensation. The company had taken a portion of Clayfield, but had left the rest in the possession of W, without, however, giving him any approach or access to it whatever; but they had delivered to the Warden and Fellows a grant of a right of road to that portion which it was stipulated was to enure for the benefit of W and his tenants, the way so granted being more commodious than before. The arbitrator awarded to W a pecuniary compensation and the lands taken by them. An application to set aside the award having been made on the grounds that the arbitrator had omitted to adjudicate on the right of way to Clayfield, and that he had not apportioned the rent of the leasehold land, or determined in what proportion the rent should remain chargeable,—Held, that the arbitrator had acted rightly under the Lands Clauses Act in awarding a money compensation only, and that he would have exceeded his powers if he had adjudicated either on the question of the right of way, or of the apportionment of the rent. *Ware v. the Regent's Canal Co.*, 23 Law J. Rep. (n.s.) Exch. 145; 9 Exch. Rep. 395.

A plea under the statute 2 & 3 Will. 4. c. 71. of a user of a way as of right for twenty years over a close, is not supported by proof of a user of the way for part of the twenty years while M was the landlord and owner as well of the messuage in respect of which the right was claimed as of the close over which it was exercised, and for the rest of the period when the defendant had acquired the freehold of the messuage. *Winship v. Hudspeth*, 23 Law J. Rep. (n.s.) Exch. 268; 10 Exch. Rep. 5.

A right of way of necessity can only arise by grant, express or implied. *Proctor v. Hodgson*, 24 Law J. Rep. (n.s.) Exch. 195; 10 Exch. Rep. 824.

Where, therefore, to an action of trespass *qu. cl. fr.* the defendant pleaded that one N S until and at the time of his death was seised as well of the said close in which, &c. holden by him of the manor of H, as also of another adjoining close, called Y, holden of the manor of T, and that the said N S had no way to close Y except over the said close in which, &c., and that on his death the said closes respectively escheated to the lords of the manors of H and T, and that the lord of T, by virtue of the premises, from and after the death of the said N S until and at the time when, &c., necessarily had and still of right ought to have a certain necessary way on foot, &c., over the said close, &c., to and from the said close called Y, at all times of the year, for the necessary use and occupation of the said close called Y, the same being such way as had been and was used in the lifetime and until and at the time of the death of the said N S, and the most convenient way over the said close in which, &c., to the said other close; and the plea then justified the trespasses as the servant of the lord of the manor of T:—Held, after verdict for the defendant on an issue on this plea, that the plaintiff was entitled to judgment *non obstante veredicto*. Held, also, that, even assuming escheat were equivalent to grant, the plea would have been bad for the want of an averment that the lord of the manor of T had no other way at the time of the trespass. *Ibid.*

Commissioners having, before the passing of the Municipal Corporation Act (5 & 6 Will. 4. c. 76), been empowered by a local act of parliament to levy rates not exceeding 2s. in the pound in any one year for paving, lighting, watching and improving the streets of a town, were, by the Municipal Corporation Act, relieved of the duty of watching, and were, by the effect of the same act, prevented from levying rates of more than 1s. 3d. in the pound in any year:—Held, that although, if the powers of the Commissioners had been sought to be affected by a private act, they might have applied funds raised by them under their act in opposing such intended private act, yet they could not apply any such funds in soliciting a new act to obviate the consequences of the public general act, or to extend the powers originally given to them by their local act. *Attorney General v. Eastlake*, 11 Hare, 205.

WEIGHTS AND MEASURES.

Under the 28th section of the 5 & 6 Will. 4. c. 63, an inspector of weights and measures is not authorized to seize and take away as forfeited, a weighing machine found to be incorrect and unjust. *Thomas v. Stephenson*, 22 Law J. Rep. (n.s.) Q.B. 258; 2 E. & B. 108.

Section 39. of the same act provides, that in all actions for anything done in pursuance of the act, or in the execution of the powers or authorities thereof, the defendant may plead the general issue and give this act and the special matter in evidence, and that the acts were done in pursuance or by the authority of the act; and if they shall appear to

have been so done, the jury shall find for the defendant, upon which verdict, &c., the defendant shall have his costs, &c. Section 40. further provides that no plaintiff shall recover for any irregularity, trespass, or other wrongful proceeding made or committed in execution of the act, if tender of sufficient amends shall have been made before action brought, and in case of no such tender made that the defendant shall be at liberty, by leave of the Court, before issue joined, to pay money into court, as in other actions:—Held, that an inspector, who had illegally seized a weighing machine, under a *bond fide* belief that he was acting at the time under the authority of the act, was entitled to the protection afforded by the 39th section; but that, considered with the 40th section, such protection did not extend to entitle the inspector to a verdict in an action against him for the illegal seizure. *Ibid.*

To an action for goods bargained and sold, the defendant pleaded that the contract for the sale and the sale by the plaintiff were made by a measure other than those authorized by the 5 & 6 Will. 4. c. 63, to wit, by the old gallon measure. Replication that the contracts were for the sale of palm oil, at a certain price per gallon old measure, the said oil to be procured by the plaintiff's testator in Africa, and to be shipped there on board the defendant's vessel sent there for the purpose, the quality of the oil to be approved of before it should leave the shore; and that the contracts as to the measurement, delivery and receipt of the oil were wholly to be performed in parts beyond the seas. Rejoinder, that the contracts were made in England; and that the palm oil was to be paid for by the defendant in England:—Held, on demurrer, that this contract was not in violation of the Weights and Measures Act, 5 & 6 Will. 4. c. 63, as that act was intended to apply to bargains and sales in England, which were to be performed by measuring the articles in this country. *Rosseter v. Cahlman*, 22 Law J. Rep. (n.s.) Exch. 128; 8 Exch. Rep. 361.

A sale of wheat took place at a price per "hobbit." It appeared that the "hobbit" was a term used in Wales to express a quantity consisting of four pecks, each peck weighing forty-two pounds; and that the wheat in question had been delivered to the purchaser in sacks containing six pecks or 252 pounds, and the custom was so to deliver it, the sacks on such occasions being weighed, and the quantity in each sack increased or reduced to 252 pounds: Held, that this was to be considered a sale by weight and not by measure, and, therefore, not contrary to the provisions of 5 Geo. 4. c. 74. s. 15. and 5 & 6 Will. 4. c. 63. s. 6. *Hughes v. Humphreys*, 23 Law J. Rep. (n.s.) Q.B. 356; 3 E. & B. 954.

A contract for the sale of goods by "the ton long weight" is legal and valid, as "the ton long weight," though it consists of 240,000 pounds avoirdupois, and is more than twenty hundredweight statutory measure, is yet a multiple of the standard pound. *Giles v. Jones* (in error), 24 Law J. Rep. (n.s.) Exch. 259; 11 Exch. Rep. 393: affirming *s. c. Jones v. Giles*, 23 Law J. Rep. (n.s.) Exch. 292; 10 Exch. Rep. 119.

WESLEYAN TRUSTS.

A Methodist chapel was conveyed to trustees upon trust to mortgage and pay money already advanced and for repairs, and subject thereto to permit the chapel to be used exclusively by Methodist preachers duly appointed by the Conference, and with power to sell in case a new chapel should be required. The chapel was mortgaged, and ultimately the defendant Hardy became mortgagee; a new chapel was then built, which was conveyed to trustees, one of whom was Hardy, upon trusts similar to those of the old chapel. It was then mortgaged, and Hardy became subsequently mortgagee of this chapel also. Hardy applied for his mortgage-money lent upon both chapels, and not being able to obtain payment, the old chapel was sold by the trustees to Turner, who was a trustee of the new chapel, and Hardy transferred his mortgage on the new chapel to Hill, who brought an action of ejectment to recover possession. The bill was filed by two preachers appointed by the Conference against all the trustees, alleging that a scheme had been formed by certain Wesleyan reformers to take all the chapels in their power out of the hands of the Conference, and to allow the reforming preachers to use them; that the trustees took part with the reformers, and had allowed preachers not appointed by the Conference to use the old chapel contrary to their trusts. The bill prayed that the trusts of the original deeds might be carried into effect; that the trustees might be restrained from preventing the plaintiffs from using the chapels for divine service; that they might be restrained from any longer acting in the trusts of those deeds, and that the action by Hill might be restrained:—Held, upon motion for an injunction, that the title of the mortgagees was paramount to the trusts of the original deeds, and the plaintiffs could have no relief except upon payment of the mortgage-money. Injunction refused. *Attorney General v. Hardy*, 20 Law J. Rep. (N.S.) Chanc. 450; 1 Sim. N.S. 338.

In 1750 land at B was purchased by subscription, and a chapel was erected thereon. By a deed, dated in 1751, this land and chapel, described as in the occupation of J N (who was an assistant preacher associated with John Wesley), was conveyed to trustees, upon trust to permit John Wesley or such other persons as he should appoint, from time to time during his life, to have and enjoy the free use and benefit of the said premises, to preach and expound God's Holy Word, with similar trusts for C W and W G and their respective appointees, successively, during their respective lives; and, after the decease of the survivor, the trustees were to appoint preachers monthly or oftener to preach in the same manner as near as might be as God's Holy Word was then preached or expounded there. In 1749 John Wesley, assisted by the Conference, had issued certain regulations for the settling of chapels, by which, among other things, it was provided that after the death of the survivor of J W, C W and W G, the trustees should permit such persons as should be appointed at the yearly Conference of the people called "Methodists" to use the chapels for the purposes aforesaid. By a deed of 1782, reciting that in 1751 certain pious persons called "Methodists" had purchased the said land at B, and had erected a chapel thereon, and that the members of

the said society had agreed to enlarge the chapel, the trusts thereof were declared corresponding with those of the deed of 1751, except that after the death of the survivor of J W, C W and W G, certain other persons were associated with the trustees in the appointment of a preacher. By a deed-poll of 1784, executed by John Wesley, the appointment of preachers was vested in the Conference. An information was filed by some of the members of the Wesleyan body at B, praying relief on the ground that the provisions of the deed did not carry out the paramount object of the founders, and that the appointment of preachers by the trustees was contrary to the constitution of Methodism:—Held, upon appeal, varying the decree below, that the deed of 1751 being plain and unambiguous in its terms, parol evidence was inadmissible to shew a paramount intention, or that such appointment by the trustees would clash with the general system of Methodism; and the information was dismissed. *Attorney General v. Olapham*, 24 Law J. Rep. (N.S.) Chanc. 177; 4 De Gex, M. & G. 591; reversing 23 Law J. Rep. (N.S.) Chanc. 70; 10 Hare, 540.

Trustees of a Wesleyan Methodist chapel ceasing to be members of the Methodist body, held not to be a ground for their removal from the trusteeship, where the trust deed contained no provision on the subject; the dictum in *Attorney General v. Hardy* notwithstanding. *Ibid*.

WILL.

[See DEVISE—LEGACY—SETTLEMENT.]

- (A) CONSTRUCTION OF WILLS.
 - (a) *General Points.*
 - (b) *Power to appoint Trustees.*
 - (c) *Conversion of Perishable Property.*
 - (d) *Misdescription and Ambiguity, Evidence to explain.*
- (B) VALIDITY.
 - (a) *Attestation.*
 - (b) *Alteration and Interlineation.*
- (C) ESTABLISHING.
- (D) PUBLICATION AND REPUBLICATION.
- (E) REVOCATION AND CANCELLATION.
- (F) SPOILIATION.
- (G) CODICIL.
- (H) ELECTION UNDER.

(A) CONSTRUCTION OF WILLS.

(a) *General Points.*

A testator devised and bequeathed all his real and personal estate to trustees upon trust (after certain life estates) for the heir-at-law of his family then living, whosoever the same might be:—Held, that the next-of-kin of the testator according to the Statutes of Distribution had no interest under the above gift. *Tellow v. Ashton*, 20 Law J. Rep. (N.S.) Chanc. 53.

A, the father of C, by his will, gave the income of his residuary estate (after the death of B the mother of C) to trustees, upon trust, to apply it as they should think proper for the benefit of C; and died in 1815. B, by her will, gave the income of her residuary estate to trustees, upon trust to apply a sufficient

part of the income for the maintenance of C during his life, and declared that, in case there should be a surplus of income, such surplus should be considered as principal, and invested accordingly, and gave such principal on the trusts therein mentioned, and died in 1832. C was found a lunatic in 1818. The annual sums allowed for the maintenance of C were less than the annual income of both the estates of A and B:—Held, that the income of B's estate was to be first applied for the maintenance of C, in exoneration of the income of A's estate. *Methold v. Turner*, 20 Law J. Rep. (N.S.) Chanc. 201; 4 De Gex & S. 249.

The will of a testator contained the clauses following:—"Let my debts be paid. Let all my goods and chattels be sold, and the fund accumulated, except so far as is needed for the comfortable settlement of the family, except 200*l.* a year to be laid by as a marriage portion for my daughter A A C. My son E C C is heir to the whole real estate":—Held, that the above directions were void for uncertainty, and that the testator was to be taken to have died intestate, both as to his real and personal estate. *Jackson v. Craig*, 20 Law J. Rep. (N.S.) Chanc. 204.

A testator, by his will, gave certain shares of his residuary personal estate to certain legatees. He then directed that "the whole of the legatees should have the benefit of survivorship between them, in the event of any one or more of them dying without leaving issue":—Held, that "the dying without leaving issue" did not refer to death in the lifetime of the testator. *Smith v. Stewart*, 20 Law J. Rep. (N.S.) Chanc. 205; 4 De Gex & S. 253.

G T was entitled to a life interest in freehold and copyhold estates, and also in three sums of stock; the legal estate in the freeholds was vested in trustees, but the copyholds had never been surrendered to them, and many of the freehold and copyhold lands were let together; the three sums of stock were standing in the names of the trustees in the Bank of England. G T was also absolutely entitled in remainder to a moiety of the freehold and copyhold estates, and in the stock. G T upon his second marriage, by a covenant and his bond, secured an annuity of 200*l.* a year to his wife for life, and by his will he confirmed the settlement, and said, "I charge all and every my freehold hereditaments and estate and monies standing in my name in the public funds with the payment of the annuity to my wife; and subject to the said annuity, I devise and bequeath the same freehold hereditaments and estate and monies in the funds to my niece and godchild, S Q, her heirs, executors, administrators and assigns, with remainder to her two sisters, &c. All the rest and residue of my real and personal estate, subject as to my personal estate to the payment of my just debts, &c. and legacies, I devise and bequeath unto my wife, her heirs, executors, administrators and assigns." The testator had no monies standing in his name, and upon a suit by the devisee,—Held, that the testator meant his interest in the stock standing in the name of the trustees, to which he was entitled in remainder. *Quennell v. Turner*, 20 Law J. Rep. (N.S.) Chanc. 237; 13 Beav. 240.

Held, also, that the personal estate, as the primary fund for payment of the annuity, was not exonerated by the charge made upon the freeholds and the monies in the funds. *Ibid.*

Held, also, in the absence of any intention apparent on the will, that the word "estate" did not include the copyholds, and that they did not pass. *Ibid.*

A gift to all the grandchildren of the testatrix, except —, is not void for uncertainty, but takes effect in favour of all the grandchildren as a class. *Illingworth v. Cooke*, 20 Law J. Rep. (N.S.) Chanc. 512; 9 Hare, 37.

A testatrix directed her executors to pay the debt which she owed to two persons named, and for the security of the payment of which she had given her promissory note. The promissory note was voluntary:—Held, that whether this was a good debt or whether it was a legacy was a question for a court of law, and that it was not a case in which the Court could call in the assistance of a common law Judge under the statute 14 & 15 Vict. c. 83. s. 8. *Longstaff v. Rennison*, 21 Law J. Rep. (N.S.) Chanc. 622; 1 Drew. 28.

Under a bequest for all and every the "issue" of E living at the decease of her and her husband, but if any of the issue of E should die in the lifetime of the survivor of E and her husband leaving issue, the issue of such issue so dying should take the share his parent would have been entitled to:—Held, that the word "issue" meant children, and that if the testator had intended to express descendants, the words "issue of issue" would not have had any meaning. *Pope v. Pope*, 21 Law J. Rep. (N.S.) Chanc. 276; 14 Beav. 591.

A testator bequeathed all the rents and arrears of rent, with timber felled, and other annual profits due to him at the time of his decease, from his Berwick Hill estate, unto the person or persons who should be entitled to the freehold "and" inheritance of the same estate in possession at his decease. On the death of the testator, his brother became tenant for life of this estate:—Held, that the words "freehold and inheritance" must be read "freehold or inheritance," and that the tenant for life was entitled to the rents, &c., specified in the above clause. *Stapleton v. Stapleton*, 21 Law J. Rep. (N.S.) Chanc. 434; 2 Sim. N.S. 212.

Held, also, that the tenant for life was entitled under this bequest to the rents payable from the last quarter day up to the day of the testator's death, and also to certain bricks, tiles, and brick-earth being upon the estate at the death of the testator. *Ibid.*

A testatrix gave her real and personal estate to trustees, in trust for her niece for life; after the decease of her niece without issue, (which happened,) and of her niece's mother, she directed the real estate to be converted; and as to one moiety of her residuary estate she gave it amongst the child and children of A A, and the issue then living of any child or children of A A dying in the lifetime of the niece, and to their respective executors, administrators and assigns; and in case all or any of the children of A A should die without issue in the life of the niece, the share of him, her, or them so dying was to go "amongst the child and children of M H living at the decease of the niece, and to their respective executors, administrators and assigns." The niece died in 1830 unmarried and without issue, having by will given her personal estate to her mother, who died in 1850. A A had seven children, but two alone, H C and M H, married and

had issue. H C was alive at the date of the will, but died in 1847, leaving J C her husband and J A C and R L her two only children. M H died in 1820 in the life of the testatrix and of both the niece and her mother. Seven of her children were still living, and this moiety of the residuary estate was claimed by J C as the husband and personal representative of H C, by J A C and R L as children of H C, by the children of M H and the personal representative of the niece:—Held, as to one-half of this moiety, that the children of M H were entitled, and as to the other half of the moiety that it was undisposed of, and passed to the next-of-kin of the testatrix. *Coulthurst v. Carter*, 21 Law J. Rep. (n.s.) Chanc. 555; 15 Beav. 421.

A testator, by his will, bequeathed all the residue of his real and personal estate to his executors, upon trust to pay his wife the income and profits thereof, so long as she should continue his widow. A part of the personal estate of the testator, at his death, consisted of a debt of 12,000*l.* payable by annual instalments of 1,500*l.*, with interest at 5*l.* per cent. from the death on the debt or such part as for the time being should remain unpaid:—Held, that the tenant for life was entitled to 4*l.* per cent. on the debt or such part as should remain unpaid, and that the other 1*l.* per cent. ought to be invested for the benefit of the tenant for life and those entitled in remainder. *Meyer v. Simonson*, 21 Law J. Rep. (n.s.) Chanc. 678; 5 De Gex & S. 723.

A testator gave his freehold estate and "property whether real or personal" to M S for life, and after her decease he gave all his said freehold estate and property to S H and his wife for their lives, and after their decease he gave all his said freehold property to their children for an estate of inheritance in fee simple; but in case none should attain twenty-one, he gave his freehold estate and property to W M, his heirs and assigns, in fee simple. He charged his personal estate with the payment of several legacies, and the residue of what he should die possessed of was to become the property of M S:—Held, that M S was entitled to the personal estate, and that S H, his wife and children, took no interest in the personal estate. *Hollingsworth v. Shakeshaft*, and *Andrews v. Shakeshaft*, 21 Law J. Rep. (n.s.) Chanc. 722; 14 Beav. 492.

A testator gave all his real and personal estate whatsoever to his wife and son, whom he appointed executrix and executor, upon trust, to permit his wife during her life to receive the clear rents, issues and profits, interest, dividends, and annual proceeds thereof, subject to all out-goings; and upon the death of his wife, then, as to all his said devised and bequeathed freehold and residuary real and personal estate, with their appurtenances, and of which his wife was to have the clear yearly income for her life, upon trust for his son absolutely:—Held, that certain leaseholds belonging to the testator were to be held by his widow in specie, no intention of conversion being expressed. *Harris v. Poyner*, 21 Law J. Rep. (n.s.) Chanc. 915; 1 Drew. 174.

Shortly after the testator's death his widow was called upon to make good the dilapidations to the leaseholds, under a covenant in the lease:—Held, that these expenses, which the widow had paid out of her income, were properly chargeable upon the *corpus* of the estate. *Ibid.*

W B, by a will, dated the 5th of October 1837, gave all his property, real and personal, to trustees, to be divided between C S and the three boys of W W. By another will, dated the 13th of April 1838, he gave his household goods to C S, and he gave all his real estates to her for life, with remainder to W W for life, and after the decease of both, to W and G, the sons of W W; and by another testamentary instrument, dated the same day, he appointed C S and W W his executors. By another instrument, without a date, the testator gave his real estate to trustees, to divide the rents into three portions, and pay one-third to C S for life, and as to the other two-thirds to all the children of W W, or to permit him to receive the rents for their maintenance, &c., until their arrival at twenty-one. The testator then directed his trustees, out of the rents to pay his debts, &c., and the costs of executing the trusts of his will:—Held, that revocation by inconsistency of disposition will only affect the prior will to the extent that such inconsistent disposition is operative; that the fourth will revoked the first altogether, and the second so far only as it related to real estate; that by the fourth will, two-thirds of the real estate were devised to the children of W W in fee simple; that the remaining third was given to C S for life, and that the reversion in fee in such third was undisposed of, and passed to the heir-at-law of the testator, but charged with debts, legacies, &c., in exoneration of the testator's personal estate. *Plenty v. West*, 22 Law J. Rep. (n.s.) Chanc. 185; 16 Beav. 173.

Bequest, by a will, dated in 1819, of a sum of stock to trustees, upon trust to pay the dividends to A, the wife of B, for life, and, after her death, if she should have no issue living at her death, to B for life; but, if she should leave issue, then to pay a moiety of the dividends to B for life, and the other moiety to be applied for the benefit of such issue, as the trustees should think fit; and as to a moiety of the capital, after the death of A, and after the death of the survivor of A and B as to the whole of the capital, to divide the same among the children of A; and if A should die in the lifetime of B, leaving issue, and such issue should die in the lifetime of B under age and unmarried, then to pay the whole of the income to B for his life; and, after the death of the survivor of A and B, and the failure of issue of A, to transfer the stock to C. A died without issue, leaving B surviving:—Held, that by the word "issue" was meant children, and that by the words at the end of the will, "failure of issue," was meant failure of children. *Bryan v. Manson*, 22 Law J. Rep. (n.s.) Chanc. 233; 5 De Gex & S. 737.

A testator gave the residue of his estate to trustees to pay the dividends of 1,500*l.* stock to A for life, and after to divide the dividends between E B and F R and the survivor of them. He gave the residue of his freehold, copyhold and leasehold estates, and all other his estate and effects upon trust to pay the dividends, interest, rents and annual produce to his wife, E B, for life, with remainder to F R for life, with remainders over. The testator had leasehold property, canal and insurance shares, and Dutch bonds. F R died:—Held, affirming a decree of the Court below, first, that E B was only entitled to a life estate in the dividends of the 1,500*l.* stock; and secondly, that she was not entitled to enjoy the

shares and Dutch bonds in specie, though she was as to the leaseholds. *Blann v. Bell*, 22 Law J. Rep. (N.S.) Chanc. 236; 2 De Gex, M. & G. 775; 21 Law J. Rep. (N.S.) Chanc. 811; 5 De Gex & S. 658.

The testator bequeathed certain shares of the residue of his estate to trustees, upon trust to accumulate for such of his issue as his widow should by deed or will appoint. The widow by her will, referring to the power, appointed certain definite sums to the issue, on the express supposition that the shares would realize a certain sum per share; but if not, then she directed that the legatees should receive in proportion to their respective bequests:—Held, that the appointment extended to the accumulations of the shares. *Thompson v. Teulon*, 22 Law J. Rep. (N.S.) Chanc. 243.

A testator, by his will, bequeathed his personal estate to trustees, upon trust to pay the income to his two sisters, A and B, for their lives, and to the survivor for her life; and then to pay the capital to their children; and in default of such children, to pay the income to C, his brother, for his life, and then to pay the capital to his children; and in default of such children, to the testator's next-of-kin. The testator, by a codicil, declared that he left his effects, failing his brothers and sisters and their heirs, to E. The testator had two sisters only, A and B, and two brothers only, C and D, who all died without children:—Held, that the bequest in favour of E took effect. *In re Pattison's Trusts*, 22 Law J. Rep. (N.S.) Chanc. 286; 5 De Gex & Sm. 591.

A testator directed his trustees to hold 20,000*l.* Bank annuities, and pay the dividends to his son for life, with restrictions on alienation; provided that if his son should marry with the consent of his trustees, a settlement might be made of the fund, subject to the life estate, for the benefit of the wife and issue; and subject to the trusts of such settlement, or "in case none shall be declared," he directed that the fund should go to such persons as his son should by will appoint; provided that, in case his son died unmarried, or having been married without leaving issue, and without having exercised the power of appointment, the trustees were to hold one moiety of the fund upon the trusts mentioned. The son died without having been married, having by his will appointed 10,000*l.*, part of the fund, to his two brothers:—Held, reversing the decision of the Court below, that the son, in the events which had happened, had a valid power of appointment over the fund. *Sheffield v. Coventry*, 22 Law J. Rep. (N.S.) Chanc. 498; 2 De Gex, M. & G. 551.

A testator devised real estate to his cousin S K for life, charged with annuities, and declared that "in case any of the annuitants should survive S K," he gave the same estate to the eldest surviving son of S K, "charged with the aforesaid annuities"; but "in default of issue male" he gave the same estate to T K, brother of S K, "charged in like manner with the aforesaid annuities, and unto his eldest surviving son on the same conditions." The will then proceeded, "but in default of issue male my will is, that the aforesaid demised premises do descend unto my heirs-at-law, charged, nevertheless, with the above-mentioned annuities or out-payments." All the annuitants died in the lifetime of S K; after the death of S K, his eldest surviving son, J K, held the

estate for his life; he died, leaving a widow and a daughter, his only child. S K, the younger, a brother of J K, and the next eldest son of S K, was then living, and claimed the estate under the limitations of the will:—Held, that the words "in default of issue male" meant "in default of issue male of S K"; and that the plaintiff was entitled to the estate as tenant in tail male, but subject to the dower of the widow of J K. *Key v. Key*, 22 Law J. Rep. (N.S.) Chanc. 641; 4 De Gex, M. & G. 73.

A testator, who had made equal allowances during his life to four sons for their maintenance, and had settled property of the same annual amount on each of his three daughters on their respective marriages, made his will, dividing his real estate into seven portions, and described it in seven schedules. The annual rental of each portion, excepting "four" and "five," was of nearly equal amount. The testator was indebted on mortgages of his real estates, and directed the trustees of his will, out of his personal estate, to pay to the son to whom he afterwards devised "four" an annual sum, while a piece of land which was comprised in "four" was unlet. He then directed the rents of "four" and "five," and equal portions (fifths) of the rents of the other five properties to be set apart to raise the annual sum, and to be accumulated till the mortgages could be paid off. He then directed that when the vacant piece of land should be let (which the testator himself estimated would make the rental of "four" about equal to each of the others except "five"), the annual sum for paying the mortgages should be raised by the whole rents of the lands comprised in the "fourth" schedule, and the remainder by equal sixth parts of the hereditaments comprised in the other schedules:—Held, overruling a decision of a Vice Chancellor, that the whole will shewed that the general intention of the testator was equality of division among the seven children, and that the word "fourth" in the place where it was used must be treated as there without design, without meaning, and *merum per errorem scribentis*; and further, that "fourth" was written for "fifth," and the will must be so construed. *Hart v. Tulk*; *Tulk v. Hart*, 22 Law J. Rep. (N.S.) Chanc. 649; 2 De Gex, M. & G. 300.

S S directed her personal estate to be invested, and after the death of a tenant for life she gave it to A S and H J or to their respective heirs, as they respectively might deem proper, they or their heirs first paying 20*l.* to other parties. H J died without disposing of his moiety:—Held, that it vested in his next-of-kin according to the Statute of Distributions. *Jacobs v. Jacobs*, 22 Law J. Rep. (N.S.) Chanc. 668; 16 Beav. 557.

A testator devised real estate to trustees upon trust to sell, and directed that the proceeds of the sale should sink into and be deemed part of his personal estate, and be applied accordingly; and he bequeathed all the residue of his personal estate (including the proceeds of the real estate) to the same trustees upon trust for his seven children, *nomina-tim*, share and share alike. One son died in the lifetime of the testator:—Held, that the lapsed share in the proceeds of the real estate went to the testator's heir-at-law. *Taylor v. Taylor*, 22 Law J. Rep. (N.S.) Chanc. 742; 3 De Gex, M. & G. 190.

When the real and personal estate of a testator are constituted into one mass, and subjected to cer-

tain charges, the charges are to be apportioned between the real and personal estate and borne by them *pro ratâ*, according to their relative values. *Robinson v. the Governors of the London Hospital*, 22 Law J. Rep. (N.S.) Chanc. 754; 10 Hare, 19.

A declaration in a will that the proceeds of the sale of the testator's real and personal estate shall be considered to all intents and purposes as part and parcel of his personal estate, will not prevent his heir from receiving the monies arising from the sale of the real estate, in exclusion of the testator's next-of-kin. *Ibid.*

A B, by his will, dated in 1849, devised all his freehold and copyhold hereditaments in the county of D, which had or might thereafter come into his possession by inheritance from his father, to trustees for a term of 500 years, upon trust to provide certain sums. The testator died possessed of the Castle Eden estate in the county of D, which was conveyed to him by his father, and into the possession of which he entered in his father's lifetime. He was also possessed of other estates in the same county, which were devised to him by his father's will, but which, being the heir-at-law, he took by descent. The descended estate was not sufficient to pay the sums for which the 500 years term was created:—Held, that the Castle Eden estate was not included in the term. *Wilkinson v. Bewicke*, 22 Law J. Rep. (N.S.) Chanc. 781; 3 De Gex, M. & G. 937.

A testator appointed his wife a trustee of his will jointly with W L, and he appointed her sole executrix; he subsequently, on account of the arduous duties, revoked her appointment as executrix, and appointed W L and two other persons executors in trust of his will:—Held, that this did not revoke the office of trustee, which had been given by the testator to his wife. *Graham v. Graham*, 22 Law J. Rep. (N.S.) Chanc. 937; 16 Beav. 550.

A testator gave and bequeathed all the rest and residue of his estate and effects to trustees, in trust to collect, get in, and receive the same, and to invest the same in the funds, and pay the interest thereof to a lady for life, and after her decease to pay and divide the said residuary estate equally amongst her eight children:—Held, that the real estate as well as the personalty belonging to the testator, passed under this clause. *D'Almaine v. Moseley*, 22 Law J. Rep. (N.S.) Chanc. 971; 1 Drew. 629.

Declaration in a will that it should not be lawful for the trustees to pay to the testator's sons the sums bequeathed to them, or to permit them to enter into possession of the real estates devised to them until they had executed a bond not to marry or cohabit with their cousins, will not, in a case of doubtful limitation over, be regarded by the Court, where the time of payment and vesting has arrived and the event intended to be guarded against has not happened. *Poole v. Bott*, 22 Law J. Rep. (N.S.) Chanc. 1042; 11 Hare, 33.

A testator bequeathed the residue of his personal estate to his two brothers and his niece, the daughter of his sister Sarah, who had died before the date of the will, leaving an only child, a son, and never having had any daughter:—Held, on petition of the son under the Trustees' Relief Act, that the son was entitled to the share expressed to have been bequeathed to the daughter of his mother. *In re Rickitt's Trust, ex parte Waud*, 22 Law J. Rep. (N.S.) Chanc. 1044; 11 Hare, 299.

A testator, by his will, directed the lease of his residence to be converted into money, and invested in stock for his wife to receive the interest for life, and that she should receive all interest on all sums of money that he might have on any note of hand, bill or bond, except as therein mentioned. The testator then directed a freehold estate to be sold, and the produce invested in stock, and that his wife should receive the interest of the same as well as of all stock standing in his name at his death. At the decease of his wife, the testator directed all interest and dividends to be invested half-yearly, and to be added to such stock which he bequeathed to his nephew, which stock and all accumulations by the addition of such interest, the testator declared should become the property of his nephew on attaining twenty-one. The will did not contain any residuary bequest:—Held, on petition under the Trustees' Relief Act, that the nephew was entitled to the stock in which the produce of the leaseholds had been invested, as well as the stock in which the produce of the testator's freehold estate had been invested. *In re the Trusts of Curteis' Will*, 22 Law J. Rep. (N.S.) Chanc. 1045.

A testatrix gave 1,000*l.* to the trustees to pay the interest to the petitioner for life, and afterwards the capital to be divided between his children. There was also a power to the trustees, if they should think fit, to advance all or any portion of the 1,000*l.* for the "preference, advancement, or establishment in the world" of the petitioner. A portion of the 1,000*l.* had been advanced under this power. The petitioner had had twelve children, five of whom were alive: and, being in embarrassed circumstances, now asked, with the consent of the children and of the trustees, that the remaining portion of the money might be paid over to him under the power in the will:—Held, that this was not such a case as was contemplated by the power. *Luard v. Pease*, 22 Law J. Rep. (N.S.) Chanc. 1069.

Testatrix gave all her property to her mother for life, and at her decease directed the residue of her estate to be divided equally between the surviving brothers and sisters of the testatrix. The mother and four of the residuary legatees who survived her, predeceased the testatrix:—Held, on demurrer, that such only of the legatees as survived the testatrix were entitled to her residuary estate. *Spurrell v. Spurrell*, 22 Law J. Rep. (N.S.) Chanc. 1076; 11 Hare, 54.

A, by his will, bequeathed leaseholds to his daughter M for her life, and after her decease to his lawful issue, and "in default of such issue" to his son G and his issue. A codicil, made by the testator, recited that he had bequeathed the leaseholds to G after the death of M, and "in default of her leaving lawful issue":—Held, that the will might be interpreted by the codicil, and that the gift over in the will "in default of issue," being therefore capable of importing a bequest over on failure of issue living at M's death, it ought to be taken in that sense; and that even if the limitation in the will gave an absolute interest to M, there was a good executory bequest over to G and his issue. *Darley v. Martin*, 20 Law J. Rep. (N.S.) C.P. 249; 13 Com. B. Rep. 683.

A testator by his will, made in 1815, gave "all the rest, residue, &c. of his personal estate, goods and chattels, &c." to M J D absolutely; and he

further devised "all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, &c. at or near W, in the county of D, and B, in the county of Y, and all other his real estates in the said counties and elsewhere, and all his estate and interest therein," to uses in strict settlement. In 1841 the testator made a codicil ratifying and confirming his will. At the time of his making his will and of his decease, the testator was possessed of freehold estates in the county of D, and of some church leases in the same county, which were usually renewable every seven years; in some instances the leaseholds were let and occupied, with the freeholds, at undivided yearly rents. Upon part of the leaseholds, nearest to the freehold mansion, ornamental cottages were built, as well as buildings occupied by persons employed about the mansion and freehold estate:—Held, that, under the 1 Vict. c. 26. s. 26, the leaseholds passed under this general devise, and that no contrary intention appeared upon the will so as to prevent the operation of that section. *Wilson v. Eden*, 21 Law J. Rep. (n.s.) Q.B. 385; 18 Q.B. Rep. 474.

A testator bequeathed the one-half of certain personal property to his son, to be under his own controul, and the other moiety in trust for the children of his daughter. The son was made residuary legatee. The testator drew his pen through the words describing the property, and the will was admitted to proof, with a blank as to the amount of property:—Held, that the Court not being able to regard anything but the probate, and the amount of property to be divided being omitted, the bequest was void, and the property went to the residuary legatee. *Taylor v. Richardson*, 23 Law J. Rep. (n.s.) Chanc. 9; 2 Drew. 16.

A testator devised Bradon Farm, a real estate, to trustees in fee simple, upon trust to raise "by sale or otherwise" out of such estate 2,000*l.* and invest the same, and upon trust to permit his son Philip to enjoy the same estate, "after raising as aforesaid," for his life, and then for his children; and if he should die without leaving issue the testator devised the estate to his sons Simeon and Thomas, in fee, as tenants in common. The trusts of the 2,000*l.* were declared, as to half, for the testator's daughter, Mary, for life, and after her death to be equally divided among her children; and as to the other 1,000*l.*, upon trust for his other daughter, Elizabeth Cooper, for life, and after her death to be equally divided among her children. The testator gave the residue of his real and personal estate equally between Simeon and Thomas, their heirs, executors, administrators and assigns, for ever. All the three sons survived the testator; Simeon and Thomas died intestate, and never having in any manner dealt with their interests in the Bradon Farm estate or in the 2,000*l.* Philip was the heir-at-law of each of them. The 2,000*l.* was not raised during Philip's life, but he paid the interest to his sisters. Philip devised Bradon Farm to trustees in trust for certain persons. After his death the 2,000*l.* was raised, but Elizabeth Cooper died without ever having had a child, so that 1,000*l.* was remaining, the trusts of the same having thus partially failed:—Held, affirming a decision of the Court below, that the 2,000*l.* was a charge upon the

Bradon Farm estate, and not an exception out of the devise. *In re Cooper's Trusts*, 23 Law J. Rep. (n.s.) Chanc. 25; 4 De Gex, M. & G. 757.

Held, also (also affirming, but Lord Justice Turner doubting), that the 1,000*l.*, the trusts of which had partially failed, sank into and became part of the Bradon Farm estate, and passed by the will of Philip to his devisees in trust, the same having descended upon him as real estate, as heir-at-law of his brothers Simeon and Thomas. *Ibid.*

A testator gave all his real and personal property to trustees, in trust for his eight nephews and nieces, naming them, in equal shares, as tenants in common, the shares of nephews absolutely, and the shares of nieces as they should by deed or will appoint, and in default of appointment for them absolutely, but for their separate use; and the testator also declared that in case any of his nephews and nieces should die in his lifetime, leaving children, or should survive him and die under twenty-one, leaving children, then their shares to be in trust for their children; and if any of the nephews and nieces should die in his lifetime, without children, or should survive him, and afterwards die under twenty-one, without leaving children, then the shares of each such nephews and nieces so dying should go to the survivors. By separate codicils the testator revoked the trusts in favour of two of his nephews. By another codicil he gave a legacy of 100*l.* to A W; by a subsequent codicil he appointed A W his executor, and gave him 500*l.* in lieu of the 100*l.*, provided he should act as his executor. By a further codicil he revoked the appointment of A W as executor, and also revoked the legacy of 500*l.*:—Held, that the shares of the two nephews that were revoked were undisposed of, and went to the heirs and next-of-kin of the testator; that the share of a niece who died during the testator's lifetime, without children, was also undisposed of; and that the revocation of the 500*l.* legacy to A W did not revive the 100*l.* legacy, but that also was completely revoked. *Boulcott v. Boulcott*, 23 Law J. Rep. (n.s.) Chanc. 57; 2 Drew. 25.

A testatrix bequeathed the residue of her estate to such of her nephews and nieces as should be in England at the time of her death, and the children of such of her nephews and nieces as should be then dead, living in England. Two of the nieces were domiciled abroad at the date of the will, and the time of the death. A, another niece, at the time of the death, was living with her husband, who was on duty with his regiment in Ireland; and B, another niece, was staying with A in Ireland, on a visit at the same time:—Held, that A and B, though not actually in England at the time of the death, were entitled to shares in the residue. *Woods v. Townley*, 23 Law J. Rep. (n.s.) Chanc. 281; 11 Hare, 314.

A testator gave all his real and personal estate upon trust for his brothers and sisters, A, B, C, D, and E, their heirs, executors, administrators and assigns. He then gave a power of sale to his trustees, and directed that the monies should be divided between his brothers and sisters. He then declared that if any of his brothers and sisters should die without leaving issue, his or her share should go to the survivors, and that if any of his brothers or sisters should have left issue, such issue should be entitled to their parent's shares:—Held, that the

brothers and sisters living at the testator's death were absolutely entitled to shares of his real and personal estate. *Woodburne v. Woodburne*, 22 Law J. Rep. (n.s.) Chanc. 336.

A testator gave "the interest of 2,000*l.* to G S and at his death to his children," and in a subsequent part of the will "the sum of 1,000*l.* to G S, in addition to the 1,000*l.* before mentioned"—Held, that the first legacy was not reduced by the erroneous allusion to its amount in the second legacy; and that the latter legacy of 1,000*l.* was an absolute gift to G S of that sum. *Mann v. Fuller*, 23 Law J. Rep. (n.s.) Chanc. 543; Kay, 624.

By the marriage settlement of Mrs. B, the manor of W, with the appurtenances, and other real estate, were conveyed to trustees, upon such trusts as Mrs. B should, by will, appoint, and in default upon the trusts therein mentioned. The trustees, under the powers of the deed, purchased lands, copyhold of the manor of W, which were surrendered to them accordingly; and these lands were, in the lifetime of Mrs. B, thrown into one farm with other lands, not part of the manor, and let together under one demise. Mrs. B died in 1813, having by her will appointed all her manor of W to R H for life, with remainder to his first and other sons in tail male, and having appointed the residue of her real estate to trustees upon trust to sell. In 1814, the trustees of the will, presuming the purchased copyholds to have passed under the devise of the residue, sold them to R B, who continued in possession until his death in 1835; and in 1837 R B's devisees sold them to the defendant S. R H, the tenant for life, died in 1828, leaving two infant sons, R H, who died in 1831, a minor, and W H H, the plaintiff. In October 1849, W H H attained his majority, and, in December 1850, filed his bill against S and others, claiming the purchased copyholds as being included in the devise of the manor of W.—Held, upon appeal, affirming the decision of the Court below, that there being nothing in the will absolutely inconsistent with such a construction, the word "manor" must have its legal effect, and S was decreed to re-convey to the plaintiff. *Hicks v. Sallitt*, 23 Law J. Rep. (n.s.) Chanc. 571; 3 De Gex, M. & G. 782.

Held, also, that the purchasers having notice of the will, could not be held to have had a *bonâ fide* adverse possession; and that the plaintiff being an infant at the time his title accrued, and having asserted his rights without laches, was entitled to an account of the rents and profits from the time his title accrued. *Ibid.*

For the purpose of construing a testamentary appointment, the Court is entitled to look at the instrument creating the power, the two constituting at law but one instrument. *Ibid.*

Under a gift "to W M and his wife J for their lives, with remainder to my grand-children"—Held, that the wife surviving was entitled for her life. *Moffat v. Burnie*, 23 Law J. Rep. (n.s.) Chanc. 591; 18 Beav. 211.

Held, also, that the grandchildren named in the will, and those born during the life of W M, were entitled in remainder after the death of his wife. *Ibid.*

A gift of the residue "of my property, whether freehold or personal, wheresoever situate," to a wife absolutely, "being fully satisfied that she will dis-

pose of the same by will or otherwise in a fair and equitable manner to our united relatives, bearing in mind that my relatives are generally in better worldly circumstances than hers"—Held, that the word "freehold" must be read as "real," and that it included a copyhold estate. *Reeves v. Baker*, 23 Law J. Rep. (n.s.) Chanc. 599; 18 Beav. 372.

Held, also, that the wife took an absolute estate both in the real and personal property, and that it was not affected by any implied trust. *Ibid.*

A direction in a devise of real estate "never to sell out of the family, but if sold, it must be to one of his brothers thereafter named,"—Held to be a restraint on alienation, and void. *Attwater v. Attwater*, 23 Law J. Rep. (n.s.) Chanc. 692; 18 Beav. 330.

The gift of a freehold house to J N A in reversion expectant on the death of two lives, "together with my copyhold and leasehold property at C, in the parish of N"—Held, there being property in C and N, to pass the property in C only, though C was a tything merely of the parish of N. *Ibid.*

Held, also, that a reversionary interest in the copyhold and leasehold estates expectant on the decease of two lives was alone given to J N A, and that the customary heir took the copyholds, and the next-of-kin the leaseholds, until the death of the survivor of the two lives. *Ibid.*

A testator, after devising specific real estate, devised all the residue of his estate to trustees for ninety-nine years, without impeachment of waste; and, subject thereto, to his son W for life, without impeachment of waste; remainder to his granddaughter C for life, without impeachment of waste; remainder to her issue in strict settlement. The trusts of the term were to raise money by mortgage or sale of the premises comprised therein. The will contained a proviso that no part of the timber upon the residue of his real estate should be cut until his granddaughter attained twenty-one, at which time his trustees were to cut such timber as they should think fit, and pay the proceeds to his granddaughter for her sole use. In 1835 W died, and in 1836 the granddaughter attained twenty-one, and died in 1842, leaving an only child and her husband surviving her, the trustees not having exercised the power of cutting timber. In 1843 the term was sold for the purposes of the trust.—Held, that the purchaser was entitled to the timber standing upon the estate at the time of the sale. *Watlington v. Waldron*, 23 Law J. Rep. (n.s.) Chanc. 713; 4 De Gex, M. & G. 259.

By his will, dated in 1843, a testator exonerated his sister, as follows, "from all claims in respect of money laid out by me in improvements of the estates in Scotland, and which money has, according to the laws of Scotland, been charged thereon." At the date of the will some monies had been laid out and duly charged on the estates, and other monies had been laid out, but were not charged on the estates until after the date of the will. Further sums were afterwards laid out by the testator and charged on the estates. Held, that the exoneration was applicable only to the monies laid out and charged at the date of the will. *Douglas v. Douglas*, 23 Law J. Rep. (n.s.) Chanc. 732; Kay, 400.

A, by his will, devised Whiteacre to B for life,

with remainder to C in fee, and died. A was the father of B, and B was the aunt of C. C, by his will, made after the death of A, but during the life of B, devised all his real estate, except the real estate which he might derive from his aunt B or any of her family, in manner therein mentioned:—Held, that Whiteacre was excepted by the above terms from the general devise of B's real estate. *James v. Lord Wynford*, 23 Law J. Rep. (N.S.) Chanc. 767; 2 Sm. & G. 350.

A testatrix, by her will, directed her real estate to be sold, and charged debts and legacies and a sum of 5,000*l.* upon the proceeds of the real estate and her personal estate as a mixed fund. The trust of the mixed fund was for A B for life, and after her decease, subject to the charge of 5,000*l.* in favour of the appointees of A B by will, for C D absolutely. By a codicil the testatrix gave to A B, in fee, the real estate, freed from any charges created by the will:—Held, that the personal estate was subject to the whole of the 5,000*l.* charge. *Tatlock v. Jenkins*, 23 Law J. Rep. (N.S.) Chanc. 767; Kay, 654.

A bequest of leaseholds to A for life, remainder to B, remainder to C:—Held, that B took a life interest only. *Earl of Lonsdale v. the Countess Berchtoldt*, 23 Law J. Rep. (N.S.) Chanc. 816; Kay, 646.

A testatrix devised all her freehold property to her son for life, with remainder to all or such one or more of his children as he should appoint; and in default of appointment, to his first and other sons in tail male; and upon failure of all such issue, to her own right heirs for ever:—Held, that in default of appointment by the son of the testatrix, and upon failure of the issue of his sons, the daughters would take no interest, but the estate would go to the testatrix's right heirs. *Hardingham v. Thomas*, 23 Law J. Rep. (N.S.) Chanc. 910; 2 Drew. 353.

Another testatrix gave the income of her real property to W T during his life, and also to any child or children he might have who should attain twenty-one years, in such manner as he should appoint, and to his and their heirs for ever; with a gift over in default of such issue:—Held, that this was a gift, after the death of W T, to all his children in fee, he having the power to appoint in what manner they should take; but in default of appointment the estate would not go over unless he died without children living at his death. *Ibid.*

A testator gave an annuity of 600*l.* "to A for her life, and the issue from her body lawfully begotten; on failure of which, to revert to my heirs; and I request B and C to act as my trustees for A, so that the said annuity may be secured for her separate use":—Held, that A was entitled for life only to the annuity, with remainder to her issue. *In re Wynck's Trust*, 23 Law J. Rep. (N.S.) Chanc. 930; 5 De Gex, M. & G. 188; 22 Law J. Rep. (N.S.) Chanc. 750; 1 Sm. & G. 427.

In a will, the word "issue" is not a technical expression implying, *prima facie*, words of limitation, but will yield to the intention of the testator to be collected from the words of the will. *Ibid.*

Assuming the word "issue" to have been a word of limitation, A's life estate would not have coalesced with the estate in remainder, as the one estate was equitable and the other legal. *Ibid.*

The decision in *Knight v. Ellis*, 2 Bro. C.C. 570, approved of. *Ibid.*

A testatrix gave all her leasehold and personal estate to trustees, upon trust to pay the rents and profits of two specified houses to A, and she gave the sum of 100*l.* Bank stock to B when he attained the age of twenty-one years, and in case of his death to C. At her death the testatrix had Bank annuities, but no Bank stock:—Held, that A took an absolute interest in the leaseholds; that the legacy of 100*l.* Bank stock was contingent upon B's attaining twenty-one; that if he died under twenty-one, then C took absolutely; and that 100*l.* Bank annuities would not satisfy the gift of Bank stock, but that the trustees must purchase 100*l.* Bank stock out of the funds of the testatrix. *Bignall v. Rose*, 24 Law J. Rep. (N.S.) Chanc. 27.

A testator gave his residuary real and personal estates to trustees, upon trust to pay the income of one-fifth to a daughter for life, with remainder to all and every the children she should leave at her death. The other four-fifths he gave to his four other children in a similar manner; but provided that if any child should die without leaving any child at his or her death such share was to go to the testator's other children for their lives and the issue of any then dead, as before directed; and after the death of his five children the rent and income were to be paid to all and every the children of his five children, share and share alike. The daughter died, leaving an only son, who afterwards died:—Held, that the parties claiming through the daughter's son had no interest in the rent and income during the lives of the surviving children of the testator; that cross-remainders between the testator's children could not be implied; and that the interest in the one-fifth share during the lives of the surviving children of the testator was undisposed of by the will. *Rabbeth v. Squire*, 24 Law J. Rep. (N.S.) Chanc. 203; 19 Beav. 77.

A testator being seised of estates at L, F, S and B, subject as to L and F to a mortgage of 1,200*l.*, devised L, subject to 200*l.*, part of the mortgage debt, to one in fee, and he devised to other devisees in fee, subject to 1,000*l.*, the remainder of the debt, his estate at F and also his estate at S, and died intestate as to the estate at B. The personal estate being insufficient to pay the debts:—Held, first, that the apportionment of the charge did not exempt the personal estate from being the primary fund for payment of the mortgage debt; and, secondly, that the will did not impose any charge or condition on the estate at S. *Goodwin v. Lee*, 24 Law J. Rep. (N.S.) Chanc. 306; 1 Kay & J. 377.

A testator gave 5,000*l.* to each of his four daughters for their separate use, and if they had any children the principal to be divided between them after her death, if they should attain twenty-one; if not, it was to be divided among her "surviving sisters." A B, one daughter, died leaving two children, both of whom died infants, but one of them left a child surviving. Another daughter died before her sister A B's children, leaving three children:—Held, that on the death of the surviving child of A B under twenty-one, the surviving sisters became entitled to the fund; which was affirmed on appeal. *Carver v. Burgess*, 24 Law J. Rep. (N.S.) Chanc. 401; 18 Beav. 541.

The testator had a fifth daughter for whom he had separately provided:—Held, that the separate provision was no reason for excluding her from taking under the words "her surviving sisters." *Ibid.*

Maintenance having been allowed, by an order of this Court, out of the income of the legacy, and the surplus having been invested, it was held, that such surplus passed to the legal personal representatives of the infants. *Ibid*.

A testator bequeathed the income arising from certain funds to A, a widow, for life or until her marriage; and after her death or marriage, which should first happen, he gave the principal amongst her children by two former husbands. A married again between the date of the will and the death of the testator, and he was aware of her marriage:—Held, overruling a decision of one of the Vice Chancellors, that A was not entitled to the income of the funds, but that the gift over upon her decease or marriage came at once into operation. *Bullock v. Bennett*, 24 Law J. Rep. (N.S.) Chanc. 512; overruling 24 Law J. Rep. (N.S.) Chanc. 397; 1 Kay & J. 315.

The 24th section of the Wills Act, 1 Vict. c. 26, which enacts that a will is to be construed to speak as if executed immediately before the death of the testator, does not apply to the objects of a testator's bounty who are to take the real and personal estate given by the will, but only to the real and personal estate comprised in the will. *Ibid*.

A testator, by his will, gave his widow an annuity for her life. He then disposed of the greater part of his property, but left a portion of his personal estate undisposed of, there being an intestacy on the face of the will. He then declared that the provision made for his widow was intended by him to be taken in discharge of all claims which she, at any time, might or could have, or which, without provision or declaration, she might have, at the time of his death, in any part of his real or personal estate in any manner whatsoever:—Held, that the widow was excluded from participating in the property of which the testator died intestate. *Lett v. Randall*, 24 Law J. Rep. (N.S.) Chanc. 708; 3 Sm. & G. 83.

A testator gave, devised and bequeathed all his residuary personal estate, and also all his freehold and copyhold estate, unto and to the use of trustees, to pay the rents, issues and profits to his niece and her assigns for life; and after her decease he gave, devised and bequeathed his said real and personal estates unto the heirs, executors, administrators and assigns of his niece, according to the several natures and qualities thereof:—Held, that as to the real estate the niece had a general power of appointment after her death, and in default of appointment her heir would take by purchase, and that the personal estate was given absolutely. *Quested v. Michell*, 24 Law J. Rep. (N.S.) Chanc. 722.

A testatrix, after directing her debts and legacies to be paid, and a fund to be set apart to answer the several annuities given by her will, left whatever money remained, or whatever money she might be entitled to, or might have left her, to her two great-nieces. She then gave various specific legacies, and concluded with these words:—"If I have omitted naming anything, I leave it to my two sisters":—Held, that these last words did not constitute a general residuary bequest; and that the fund set apart to answer the annuities came within the term "money," and passed, under the first clause, to the testatrix's great-nieces. *Barrett v. White*, 24 Law J. Rep. (N.S.) Chanc. 724.

W W, by his will, dated in 1799, appointed trus-

tees and executors, and devised to them all his estate in trust. He had freehold and copyhold estates (but both were mortgaged), and also personal property. He desired that his debts might be paid, and that the trustees should pay to each of his two grandsons, C W C and R C, an annuity of 100*l*. for their maintenance till twenty-three; that when C W C attained twenty-three, then, subject, &c. to the charges contained in the will, they should apply the rents and profits for the use and benefit of his grandson C W C (the elder of the two) for life, and after his decease he devised the said real estate, or the surplus thereof, to the eldest son of the said C W C, his heirs, &c. for ever, chargeable, however, with 1,000*l*. for the benefit of his other grandson, R C. There had not been any surrender of the copyhold property to the use of the will. The annuities, without fault on the part of the trustees, had not been paid:—Held, that the copyhold did not pass by the will; that the annuities were properly charged on the real estate devised by the will, and that interest was not payable on the arrears of those annuities. *Torre v. Brown*, 24 Law J. Rep. (N.S.) Chanc. 757; 5 H.L. Cas. 555.

Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate. *East v. Twyford*, 4 H.L. Cas. 517.

A testator by a will, written on the pages of a small note-book, divided his property into three classes, marked No. 1, No. 2, No. 3. He devised these classes to persons designated by letters. The order of "succession" was marked in one page (54) of his will. This page contained the words "The eldest and other sons to inherit before the next letter." The persons designated by letters were all named in a card, which was referred to in the will, and which card was, with the will, admitted to probate. K was the testator's wife, to whom was given an estate for life in all the classes of the property. The will required implicit obedience to certain orders of the testator on the part of "the individual first to inherit after K;" and if not, "the property aforesaid set down and particularized in No. 1, to go to M, if not to L, and afterwards to his eldest lawfully begotten son, &c." There were similar expressions with regard to N and O. The card shewed that these two letters were intended for the eldest sons of two nephews, but who were then unborn. The property, No. 1, consisted of very large sums in stock, which the executors of the will were to invest in the purchase of real estate; and in page 54, L was named as the person to take No. 1 after the life estate of K. A grandson was "to inherit before the next-named in the entail, or any one of his sons." Class No. 2, consisted of a small estate in land, and by page 54, O was, as to that, to succeed to K, and the estate there given to O was expressly a life estate, with remainder to his eldest and other sons in tail male; and it was there also said, "a grandson, legitimate, shall inherit before a younger son." Class No. 3, consisted of certain estates in Suffolk; the "succession" there was (page 54) "first to K, then to M," and the devise (page 47) was "first to K, then to M, and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. After

the decease of K, I repeat I bequeath all the property aforesaid to M and his heirs male, in the manner aforesaid as in the case of L, &c. at page 2, and I mean and order that this mode shall prevail throughout the whole entail under precisely the same injunctions":—Held, that, reading all the parts of the will together, L took only a life estate in No. 1, with remainder to his eldest and other sons in tail male. Held, also, that this was not an executory trust. *Ibid.*

The Court of Exchequer, on an information filed by the Attorney General for legacy duty, had held that L took an estate tail. On a bill to carry into effect the trusts of the will, the Vice Chancellor held that L took a life estate only. The Vice Chancellor's decision was affirmed; but as the testator had himself created the difficulty, the costs were ordered to come out of the estate. *Ibid.*

Meaning of the words "son," "grandson," and "inherit." *Ibid.*

A testator gave his real and personal estate to A, B and C as tenants in common. By a codicil he declared that if any of the devisees should die in his lifetime his estate and interest should "go to the survivors or survivor of them, and the heirs, executors, administrators and assigns of such survivor." A died in the testator's lifetime:—Held, that B and C took as joint tenants the share intended for A. *Leigh v. Mosley*, 14 Beav. 605.

A testator bequeathed his residue to his nieces A and B; he then confined the gift to A and B and their children, without comprehending their husbands, unless his nieces should die without issue:—Held, that A and B took for their separate use for life, with remainder to their children, and that in default the nieces took absolutely. *Dawson v. Bourne*, 16 Beav. 29.

Real and personal estate were given upon trust during the life of A, out of the income to pay A 200*l.* a year, and one-third of the residue to B; and on the death of A to sell and pay one-third to B; then a gift over on the death of B before his share should "become due and payable." B died in the life of A:—Held, that the gift over took effect. *Creswick v. Gaskell*, 16 Beav. 577.

Bequest to A during widowhood, and immediately after her death or second marriage, whichever event should first happen, to trustees to sell and divide between several persons named, or such of them as should be living at the death of A. A married again:—Held, that the property thereupon became immediately distributable. *Bainbridge v. Cream*, 16 Beav. 25.

The doctrine laid down in *Leake v. Robinson* as to remoteness applies to real as well as to personal estate. *Walker v. Mower*, 16 Beav. 365.

Devise and bequest of real and personal estate to trustees for A for life, and "afterwards to convey and assure" equally between all A's children on their respectively attaining twenty-one, with a gift over on A's death "without leaving any child." There was one child who survived A, and died an infant:—Held, that such child did not take a vested interest; and, secondly, that the gift over did not take effect. *Ibid.*

Bequest of leaseholds upon trust to assign unto all the children of A B on their respectively attaining twenty-one, and if one child, to assign to such

child (omitting "on attaining twenty-one"). An only child who died an infant was held to take a vested interest. *Ibid.*

A testator gave his real and personal estate to his sister for life, and if she should have any family living at her decease they should have "their due proportion of the property," and in case of the demise of his sister's children, his two nephews were to stand in the same situation as his sister's children would have stood had they been living:—Held, that such only of the nephews as survived the sister and the children took; and one of the nephews having died in her lifetime, that the other nephew was entitled to the whole residue. *Lewis v. Lewis*, 17 Beav. 221.

A testator devised and bequeathed all his lands and property whatsoever in Australia, together with the arrears of rents, to A and B, their heirs and assigns; and he gave the residue of his estate and effects to C:—Held, that his personality in Australia passed under the first gift. *Robinson v. Webb*, 17 Beav. 460.

A testatrix gave her real and personal estate to three trustees, upon trust as soon as they, in their discretion, should think most advantageous to sell and convert into money her real estate, and pay her debts and legacies. She gave the residue of her estate and effects to her son J B:—Held, that J B took the residue of the realty in the character of personality. *Griesbach v. Fremantle*, 17 Beav. 814.

J B, who was one of the trustees, paid the debts and legacies except one annuity, and remained in possession sixteen years, and died intestate:—Held, (having regard to his acts, and notwithstanding he was both co-trustee and owner,) that the property was re-converted into realty and passed to his heir. *Ibid.*

Observation that the interest of a witness is apt to mislead his recollection. *Ibid.*

A testator gave his freehold, copyhold and leasehold estates, and all his stocks, shares and personal estate to trustees, in trust to receive the rents, issues and profits, and thereout to keep the houses, &c. in good, substantial and tenantable repair, and renew his leaseholds, &c., and then to pay the net income arising from the residuary real and personal estate to his wife for life:—Held, first, that the wife was entitled to the enjoyment in specie; and, secondly, that all ordinary repairs were to be paid out of the income, but not such extraordinary repairs as would amount to rebuilding the houses. *Crowe v. Crisford*, 17 Beav. 507.

Part of the testator's property being at his death invested on insufficient securities, an inquiry was also directed, whether any and which of the outstanding debts due to the testator should be got in. *Ibid.*

A testator, by his will, gave real and personal property to his daughter A absolutely, but by a codicil made subsequent to her marriage, he directed that "it should be settled to the exclusion of her present or any future husband, that the same might belong to her during her life, and be secured for the benefit of her children equally after her death, so that the issue of any such child dying in her lifetime might take his or her parent's share"; and in default of such children or other issue, over:—Held, that the property must be settled in trust for A for life to her separate use, without power of anticipation, and after her decease upon trust for such of her children as should survive her, and for the issue living at her

death of such of her children as should not survive her equally as tenants in common, the issue to take *per stirpes*, but, *inter se*, equally as tenants in common. That there should be limitations in the nature of cross-remainders in favour of such of the children and issue as should survive A, in respect of the share of any child dying in her lifetime without leaving issue, and in respect of any share of any issue of any child similarly dying. That the realty should be settled as realty, and (as the testator by simply directing a settlement must have intended) with powers of leasing and sale and exchange, and with a receipt clause. That the settlement should contain provisions for maintenance, education and advancement, and a power to appoint new trustees. *Turner v. Sargent*, 17 Beav. 515.

A testatrix by her will appointed A and B executors and trustees thereof. By a codicil she revoked the appointment of A as executor, and appointed C executor, and gave to C "all the powers and authorities to enable him to carry out the trusts of her will as were given by her will to A." The testatrix thereby also declared her intention to be, that the codicil should only "affect the appointment of A as executor of her will":—Held, that B and C were executors, and A, B and C trustees of the will. *Worley v. Worley*, 18 Beav. 58.

A testator resided in Camperdown House, and had eleven houses in Camperdown Place, and three in the rear in Ship Row, all being leasehold. He bequeathed his leasehold estates, situate Camperdown House, Camperdown Place, to his wife for life. After her death he bequeathed another leasehold to A, and the other leaseholds, viz. fourteen houses, Camperdown, to B:—Held, that the fifteen houses passed to B. *Armstrong v. Buckland*, 18 Beav. 204.

Bequest of long annuities to A and B jointly for their natural lives. "In case of one or both of their deaths before mine," the interest to C for life, &c. &c. A and B survived the testator:—Held, by the Master of the Rolls, that the gift to C failed; but the Lords Justices were of a different opinion. *Boosey v. Gardner*, 18 Beav. 471.

A bequest in favour of the testator's two children then born (by name), and the child "of which his wife was then *enceinte*":—Held, on the context, to include besides the above three a fourth child, born three years after the date of the will. *Goodfellow v. Goodfellow*, 18 Beav. 356.

A testator in 1831 devised his copyhold messuages to trustees upon trust, to permit his wife to occupy one of them during the minority of his youngest child, and to apply the rents of the others to the maintenance, &c. of his children, Thomas and John, "and the children or child of which his wife was then *enceinte*" during minority, making thereout a provision for his wife. The testator then provided for the advancement of his "said children," the division of the messuages among them at twenty-one, and for benefit of survivorship among them. He also bequeathed his personal estate on the like trusts in favour of his "said children," and in all these cases he added the words "as well the children or child of which my wife is so *enceinte* as those already born;" but in several instances he simply used the words "said children," and in one instance omitted the word "said." In 1847 the testator made a codicil disposing of freeholds and copyholds acquired since

the date of the will on the same trusts, and confirming the will. The child of which the wife was *enceinte* was afterwards born, and subsequently in 1835 a fourth child was born:—Held, first, that the fourth child was entitled to a share, and, secondly, that the widow was put to her election. *Ibid*.

A testator gave his property to his wife for life, and "if he should survive her" (which did not happen) he ordered a sale, and gave the produce amongst his sisters:—Held, that the power of sale and the gift of the produce took effect on the death of the wife, although the testator did not survive her. *Tuer v. Turner*, 18 Beav. 185.

A domiciled Englishman made his will in a Spanish colony, in the Spanish language and form, and empowered K, whom he appointed his universal heir, to make his (the testator's) will, making therein the declaration, &c. and other matters, which had been and would be communicated to him. The will was admitted to probate:—Held, first, that the will was an English will, and that in construing it, the Spanish language was only to be looked to in order to ascertain the equivalent expression in English; and, secondly, that K being appointed universal heir, the beneficial interest, after performing the trusts, if any there were, belonged to K, and not to the testator's next-of-kin. *Reynolds v. Kortright*, 18 Beav. 417.

A testator gave his real and personal estate to trustees, upon trust to pay the income to four persons for life, as tenants in common, and after the death of the survivor to sell the real estate, and stand possessed of the proceeds, and of the stocks, funds and securities upon which his personal estate should then be invested, upon certain trusts for a class of children. By the death of one of the four his portion of the income became released, and was accumulated until the death of the survivor of the four:—Held, that the accumulation of the real estate was undisposed of and passed to the heir, but that the accumulation of the personalty passed as residue to the children. *In re Drakeley's Estate*, 19 Beav. 395.

The testator gave an annuity to A for life, and the income of the residue to B and C "during their lives as tenants in common." The gift over to their respective children was only after the deaths of A, B and C; and though there was a provision for intermediate maintenance, it was only on a contingent event which never happened. B died:—Held, that C was not by implication or otherwise entitled to more than half the income for life. *Ibid*.

Bequest of the interest of one property to two sisters, and of another property to a female cousin, and "in case of the death of the above three females," over:—Held, that the gift over took effect as each fund was liberated by the deaths of the tenants for life thereof respectively. *Swan v. Holmes*, 19 Beav. 471.

A testator having three species of property, viz. his own property, property derived from his wife, and a reversion in 10,000*l.* consols, bequeathed his own property to his two sisters, with benefit of survivorship; his wife's property to his cousin Margaret; and he proceeded thus—"in case of the death of the above three females, the interest to be divided amongst my cousins (naming four) for their lives," and the property, including the 10,000*l.* trust-money, "to devolve" to the children of three of those cousins

(naming them) in equal proportions:—Held, that Margaret was not, by implication or otherwise, entitled to more than the wife's property; secondly, that there was no intestacy between the death of the surviving sister and that of Margaret, but that the different portions of the property went over from time to time, as they were liberated by the respective deaths of the tenants for life thereof respectively; thirdly, that the four cousins took life-interests in the trust fund as tenants in common, and that on the deaths of each, their shares then set free went over to the three cousins *per capita*, and not *per stirpes*. *Ibid*.

A testator devised his real estate to trustees to sell whenever it may appear to them advantageous. He directed annuities to be paid to charities out of his personal estate until his real estate should be sold, when he gave the produce to charities. But if the charity bequests should be defeated, he gave the principal money to the plaintiffs. No sale of the realty took place, the infant plaintiffs having (under the chief clerk's certificate finding it for their benefit) elected to take the land in lieu of the produce:—Held, that the real estate must be considered as converted from the death of the testator, from which time the plaintiffs were entitled to the rents; and, secondly, that the charity annuities ceased to be charges on the personal estate from the date of the chief clerk's certificate. *Robinson v. Robinson*, 19 Beav. 494.

Bequest to a daughter's "younger children," held to mean the children other than the oldest of age, and therefore to exclude the eldest child, a daughter, and to include her younger brother, though under his parents' marriage settlement the family estates stood settled on him. *Lyddon v. Ellison*, 19 Beav. 565.

The testatrix directed her trustees to settle her property, but in such a way that some of the limitations would be void for remoteness:—Held, that in carrying the direction into effect, the Court would modify the limitations so as to make them consistent with the rules of law and equity. *Ibid*.

Bequest of personality to trustees for a lady, to be paid at twenty-one, with a direction to settle her share on her for life, and afterwards on her children. The age of A rendering it impossible that she should have children,—Held, that the absolute interest given to her in the first instance remained intact, and that she was entitled to payment. *Ibid*.

A female, aged fifty-six, was absolutely entitled to a fund, subject to the contingency of her having children. Payment was ordered on her own recognizances. *Ibid*.

Under a direction to raise 5,000*l.* for the benefit of A and her issue, followed by a direction to raise and pay interest at 5*l.* per cent. on that sum to A during her life, with a gift over to her children of the "principal sum,"—Held, that interest at 5*l.* per cent. was not to be charged on the estate during the whole life of A, but merely until the 5,000*l.* had been raised. *Cole v. Lee*, 20 Beav. 265.

A testator empowered his trustees to lend such part of the trust-moneys as they should think proper to A and B, who were respectively his son and son-in-law:—Held, that this authorized a several loan to either. *Parker v. Bloxam*, 20 Beav. 295.

A, by will, directed trustees, upon the death of the present incumbent, to present A to the living of

S, in case he should take orders; and if he should not, or, taking orders, should die in the lifetime of B, then to present B, in case he should take orders, and after their several deceases, or of such of them as should take orders, and be presented, or in the event of neither taking orders, she devised the advowson to C in fee:—Held, that the gifts in favour of A and B were in succession, and not alternative; and that on the death of A, B was entitled to be presented. *Hatch v. Hatch*, 20 Beav. 105.

A testator, having the power of disposing of an advowson (subject to the existing incumbency of A, and a contingent right of B to be afterwards presented), devised "the next avoidance thereof" in favour of C:—Held, that the next meant the next the testator had power to dispose of, viz. that following the incumbency of A and of B. *Ibid*.

Bequest for maintenance of a child, held not to cease on his death, but to pass to his representative. *Bayne v. Crowther*, 20 Beav. 400.

Bequest of leaseholds, in trust to pay one half of the rents to A for life, and the other half to B for life; and in case of the death of either, his share of the rents "to be paid and applied for the maintenance of his children," until the decease of the survivor of A and B, and then to sell and divide equally between the children of A and B. After the death of A, one of his children died:—Held, that his representative was entitled to a share in the rents until the death of B. *Ibid*.

A testator devised the residue of his real estate to a trustee until one of his grandsons attained twenty-one; and in case his grandson Thomas attained twenty-one, in trust to pay him the future rents. He bequeathed to the same trustees the residue of his personal estate, to accumulate until one of his grandsons attained twenty-one; and he directed payment of the aggregate of the residue of his personal estate and its accumulations, and the accumulations of the rents, to his grandson Thomas from and after his attaining twenty-one. There was an interval of three years between the eldest grandson and Thomas attaining twenty-one:—Held, that the rents during that interval were undisposed of, and passed to the heir-at-law. *Marriott v. Turner*, 20 Beav. 557.

By a will, commencing thus, "I give and bequeath the several legacies and annual sums following," a testatrix bequeathed pecuniary legacies and an annuity, and directed two sums of money to be set apart sufficient to produce two other specified annual sums, which the testatrix bequeathed to two specified persons for their respective lives. She gave to trustees the residue of her personal estate, subject to the payment of her debts, funeral and testamentary expenses, and the legacies and annuities which she had bequeathed, or might thereafter bequeath by any codicil. And she devised her real estates to trustees for a term, upon trust to raise sufficient to pay her debts, legacies, funeral and testamentary expenses; but directed that her personal estate should be the primary, and the term the secondary, fund for payment of her debts, legacies, funeral and testamentary expenses:—Held, that the separate specification of "annuities" in some parts of the will did not prevent annuities from being comprehended under the expression "legacies" in the trusts of the term. *Heath v. Weston*, 3 De Gex, M. & G. 601.

A testator by his will desired that his wife might reside during her widowhood in the freehold house in which he dwelt. After directing his business to be carried on by his executrix (who was his wife) and his executors so long as they thought expedient, he gave the house, stock-in-trade, and the residue of his property to his executrix and executors upon trust, to pay the wife an annuity of 20*l.* so long as the business should be carried on, and when his youngest child attained twenty-one to sell the business, stock, and effects, together with the house, and out of the proceeds to pay the wife during her widowhood an annuity of 54*l.* 10*s.* instead of one of 20*l.*, and subject thereto trusts were declared for the benefit of the children:—Held, that the widow's right to reside in the house ceased upon the sale. *Chayman v. Gilbert*, 4 De Gex, M. & G. 366.

Upon the construction of a will, held, that the generality of the word "property" was not restricted by the use of the words "interest" and "dividends" with reference to the income. *Morrison v. Hoppe*, 4 De Gex & S. 234.

A testatrix by will in 1841 gave to two devisees, who were also her executors, all her real and personal estates upon trust for sale, and she gave out of the produce of her real and personal estate 50*l.* to each executor for his trouble, and other pecuniary legacies. There was no gift of the residue, and after payment of debts and legacies a surplus remained. The testatrix left no heir-at-law or next-of-kin. The Court apportioned the legacies and costs of the suit between the proceeds of the real and personal estate, and the Crown was declared to be entitled to the surplus of the personal estate. *Cradock v. Owen*, 2 Sm. & G. 241.

Devise of lands to successive tenants for life, and then in strict settlement, with a condition that "he or they" should reside in the mansion-house on the lands, and a declaration of forfeiture in case of non-residence. The first tenant for life, who was a married woman, was named as such in the will:—Held, that on breach of the condition by her, the estate for life was forfeited. *Dunne v. Dunne*, 3 Sm. & G. 22.

Held, also, that although the mansion-house was inadequate to the income of the devised property, and was also dilapidated, the tenant for life was not authorized to employ towards improving or repairing the mansion-house any part of the capital of funds directed by the testator to be laid out in the purchase of lands to the same uses. *Ibid.*

Testator bequeathed Greenacre to Catherine S for life, with remainder to her son John S in fee, provided that if he should die in his mother's lifetime, then and in such case the testator gave Greenacre, together with all the residue of his real and personal estate, to trustees in trust for Isabella A for life, remainder in trust as to one-fourth for such persons as she should appoint by will, and upon further trust to divide, convey, assign, and transfer all the rest, residue and remainder of the trust property unto and to the use of Maria C, Rose B, and John S absolutely. John S survived his mother, and Isabella A died intestate:—Held, that the trustees took the residuary real estate on the testator's death, and that Maria C, Rose B, and John S were not entitled to the one-fourth of the property which was subjected to Isabella A's appointment, but that it was undisposed of. *Simmons v. Rudall*, 1 Sim. N.S. 115.

Before the Court can resort to the context of a will in search of a meaning for the words of a particular clause, it must be satisfied that the meaning of the clause is different from that which the words naturally import. *Walker v. Tipping*, 9 Hare, 800.

Bequest of the testator's property to his wife to bring up and educate his children, and when they should come of age to settle on them what she should deem prudent, reserving to herself a sufficient maintenance, and at her death the property remaining to be equally divided amongst his children, with a gift to trustees for the children in case of the marriage of his widow:—Held, that the widow took a life interest in the property, with a power to settle or appoint the same on or to the children of the testator, but not on or to his grandchildren, and that the children took vested interests in the property at the testator's death, liable to be divested by such appointment. *Kennerley v. Kennerley*, 10 Hare, 160.

The testator bequeathed his residuary estate to trustees upon trust to pay the interest thereof after the decease of a tenant for life to John, Robert, and Ann, for five years, and at the expiration of that term to pay them 5,000*l.* a-piece, and then to pay the interest of the remainder for a further term of three years to John, Robert, and Ann, in equal shares, and at the expiration of that time to pay the whole to John, Robert, and Ann, in equal shares. Soon after the death of the tenant for life, and before the expiration of the five years, John and Robert claimed and obtained from the trustees payment of the whole of their two-thirds of the residuary estate of the testator; but it was held, that the husband of Ann was not entitled to immediate payment of her share of the capital, and that he was unable to give an effectual release or discharge for the same. *Harley v. Harley*, 10 Hare, 325.

A bequest of "the property which the testatrix had received by the death of B:"—Held, to pass not only the property which the testatrix actually received in her lifetime from the source referred to, but also property to which the testatrix was then entitled in possession, but which was not actually paid until after her decease, and was then received by her representatives. *Girdlestone v. Creed*, 10 Hare, 487.

By a will, property was given to trustees to apply the rents, interest, and proceeds for the maintenance of the testator's son Edward for his life, and not to be paid to any person under an assignment by or execution against the son, and after the decease of the son, for the two daughters absolutely. By a codicil it was declared that in case of assignment by Edward the trustees should stand possessed of the property upon trust for the daughters of the testator in the same manner and form as declared by his will in the event of the death of Edward. By another codicil, the testator gave 600*l.* stock to Edward in addition to what he had left him by his will, subject to the same controuling powers and restrictions as were appointed by the will; and he gave a like sum to his son William, subject to the like controul, "and to the survivor of them; and in the event of both their deaths" for the benefit of the said daughters:—Held, that the true construction of the second codicil was, that in the event of the death of either of the legatees, both legacies of stock

should go to the survivor, and not that on the death of either, his legacy should go to the survivor, which would cut down an absolute gift into a life interest. That although in one codicil the words "in the event of the death of Edward," meant upon the death of Edward, it did not follow that the words in another codicil, "in the event of both their deaths," meant upon both their deaths; for one expression was applied to a life interest, and the other to a capital sum. That the period of survivorship must be referred to the period of distribution, namely, the death of the testator. That, therefore, Edward, having survived the testator, took the legacy of stock absolutely. *In re More's Trust*, 10 Hare, 171.

The rule that added legacies are subject to the same conditions as the legacies to which they are added is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift; and whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given—*quære*. *Ibid*.

In a will made before 1838, a gift of "400*l*." stock was obliterated, and the words "residue of my property" substituted, whereby the words admitted to probate were "residue of my property stock:"—Held, that the will by these words passed to the legatee all the funded property belonging to the testatrix at the time of her death, although much of it was acquired after the date of the will and after the year 1838. *Banks v. Thornton*, 11 Hare, 176.

The testator gave his property to C and D upon various trusts, and among others upon trust for sale; and empowered C and D and the survivor of them, his heirs, executors, &c. to give receipts for the purchase-money, and concluded by appointing his wife and C and D "trustees and executors" of his will:—Held, that this appointment conferred on his wife only the general powers and duties of executrix, and did not make her a trustee with C and D under the specific trusts of the will. *Sidebotham v. Watson*, 11 Hare, 170.

A bequest of residuary personal estate to the testator's wife, daughter, and son-in-law (the husband of the daughter) successively for life, and after the death of the survivor, in trust for all the children of the daughter who should live to attain twenty-one or marry, other than and except the eldest and second sons, if any, and any other child who should by virtue of the limitations contained in the said will be entitled in possession to the said testator's estates thereafter mentioned, or the rents and profits thereof. The estates referred to were by the said will appointed (subject to prior and existing limitations) to the use of the daughter for her life, with remainder to the use of her husband (the said son-in-law) for his life, with remainder to the use of the second and all and every other son and sons other than and except an eldest son of his said daughter, successively in tail male, with remainder to the use of the first and all and every other the daughter and daughters of his said daughter, successively in tail male, with remainders over. The testator's daughter left two sons and several daughters. The second son of the testator's daughter died an infant, unmarried, in the lifetime of his father (the testator's son-in-law), and thereupon the eldest daughter of

the testator's daughter became entitled in the said estates under the appointment contained in the will to an estate tail male in remainder expectant on the termination of the preceding estates (of which the life estate of her father was one) then subsisting. By a settlement made upon the marriage of the eldest daughter, and by a recovery, she, her father, her husband, and the other parties interested in the estates, concurred in declaring new uses thereof, whereby they were limited to such uses as the father, together with a previous tenant for life, and the daughter and her husband, should jointly appoint, and subject thereto and to the confirmation of life estates and certain existing powers and terms of years created by the anterior settlements, so far as they were subsisting, to the use of trustees for a term of ninety-nine years upon trust to pay the rents and profits to the eldest daughter for her separate use, and subject thereto to the use of the husband and his assigns, with remainders over. The eldest daughter died in the lifetime of her father, and, therefore, during the continuance of his life estate, and without having herself come into possession of the settled estates, or become entitled to receive the rents and profits thereof,—Held, that upon the death of the father, the husband of the eldest daughter, as her personal representative, became entitled to an equal share of the residuary personal estate of the testator, as one of the children of his daughter, notwithstanding he (the husband of the eldest daughter) became also, under the recovery and marriage settlement, entitled in possession to a life interest in the said settled estates. *Wyndham v. Fane*, 11 Hare, 287.

The 24th section of the new Wills Act, 7 Will. 4. & 1 Vict. c. 26, that every will shall be construed, with reference to the personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, "unless a contrary intention shall appear by the will," illustrated. If I refer to a particular thing, *e. g.*, a ring or a horse, and bequeath it as "my ring" or "my horse," *semble*, the contrary intention to which the 24th section refers appears by the will, and the will speaks from the date of its execution; but when a bequest is of that which is generic, of that which may be increased or diminished, the act requires something more on the face of the will for the purpose of indicating such contrary intention than the mere circumstance, that the subject of the bequest is designated by the pronoun "my." *Goodlad v. Burnett*, 1 Kay & J. 341.

Testatrix in 1850 bequeathed thus:—"I give my new $3\frac{1}{2}$ per cent. annuities."—Held, that the bequest comprised all the new $3\frac{1}{2}$ per cents. which she had at her death. *Ibid*.

Testatrix gave to trustees 1,500*l*. and certain Danish bonds, which she described thus:—"My four Danish bonds, one of them for the sum of 485*l*., another of them for the sum of 1,004*l*., another of them for the sum of 1,815*l*., and the other of them for the sum of 716*l*., making in the whole, together with the said sum of 1,500*l*., the sum of 5,020*l*." She had not any Danish bonds for the specified amounts, but she had a mass of Danish bonds which before making her will she had received in exchange for other Danish bonds, bequeathed to her by her husband, comprising four lots purchased by him at four

several periods, for sums corresponding with those specified in the bequest:—Held, it appearing that none of such bonds had been sold by the testatrix, that the bequest was a specific bequest of so much of her Danish bonds as were received by her in exchange for the bonds purchased by her husband with the specified sums. *Ibid*.

Bequest of stock in trust for three persons, *nomination*, in equal shares, to be transferred to them when they shall attain twenty-one. But if any of them shall depart this life under the age of twenty-one, and unmarried, then his share, original and accruing, to go to the survivors; and if all of them shall die under twenty-one, and unmarried, then the stock to sink into the residue. One of the three died some months prior to the making of the will:—Held, that the survivors were entitled to the share which the testator attempted to bequeath to the deceased. *In re Shephard's Trusts*, 1 Kay & J. 269.

A person may be said to have more than one residence; if he has houses in different places, at each of which he keeps an establishment, each may be called his residence, though he may not go there for years. But the meaning of the word "residence" is different from "domicil," for an infant has the domicil of his parents until he attains his full age and does some act to acquire a new one, and thus his domicil may be in a country in which he has never personally been, whereas "residence" implies personal presence at some time or other. *Walcott v. Botfield*, Kay, 534.

A proviso in a will requiring the devisee for life of a mansion-house and estates, to "reside" there for six months in every year, and imposing a penalty for breach of such condition; and if he should neglect to observe it for five years, devising the estate to others, rendered it necessary for the devisee to be personally present in the house 168 days in each year, in order to escape the penalty or forfeiture; but held, that it would be sufficient if, keeping up an establishment at the house, he were merely to visit it each day, and that it was not necessary for him to spend a night there. *Ibid*.

Bequest of the interest of residuary personalty to the testator's wife for life, and from and after her death to R D for life, and from and after the death of the survivor of them, the capital to W absolutely, subject to the payment to A, B and C of 1,000*l*. each, which the testator gave to them, to be paid to each of them at the end of twelve months next after the decease of the survivor of his said wife and R D. Provided that if either of the said A, B and C should die "in the lifetime of my said wife and my said brother R D" his legacy should lapse and be void. A survived the testator's wife, and died in the lifetime of R D:—Held, that A's personal representative was entitled to her legacy, and that the gift over had not taken effect. *Day v. Day*, Kay, 703.

"And" is construed "or" when one member of the compound sentence is included in the other, and would be superfluous unless disjoined. This construction is generally made in favour of vesting, not to defeat a previously vested gift. *Ibid*.

A limitation of real estate to A during the life of B and C, without saying "and during the life of the survivor of them," gives A an estate during the lives of B and C and the survivor. But a limitation for 100 years, if A and B should so long live, is deter-

mined by the death of either, because this is a collateral condition. *Ibid*.

Semble—that these rules apply also to limitations of personal estate.

Testator gave property to his trustees, upon trust to pay, distribute and divide equally between his daughters (naming them) to be paid and assured to them as they should attain the age of twenty-one years, or be married under that age, with the consent of his trustees; proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same. There was power of maintenance, and gifts over as between the daughters on dying unmarried under twenty-one; and if all the daughters should die under twenty-one unmarried, and without leaving issue, then over:—Held, that the trustees had no power to direct a settlement when one of the daughters married under twenty-one without consent. *Taylor v. Austen*, 1 Drew. 459.

A gift by will to a particular charitable institution, maintained voluntarily by private means. The particular institution had ceased:—Held, that the gift was not to be disposed of as a charitable gift *cy près*, but failed and fell into the residue. *Clark v. Taylor*, 1 Drew. 642.

A testator, by his will, gave to his married daughter 2,000*l*. for her separate use, "to be in bar and full discharge of all other claims which she or her husband might have or make on his estate":—Held, that this was not like a case of election properly, nor a condition of forfeiture, but that the legacy was a discharge *pro tanto* of any rights which the wife or husband, in her right, might have against the estate, and that the husband and wife were properly joined as plaintiffs. *Hardingham v. Thomas*, 2 Drew. 353.

(b) Power to appoint Trustees.

A testator, after devising real estate to two trustees and bequeathing his personal estate to his wife and the same two trustees, declared that if any of the trustees thereby appointed, or to be appointed as thereafter mentioned, should depart this life, or decline or become incapable to act, it should be lawful for the surviving or continuing trustee for the time being, or the executors, &c. of such survivor, but with the consent of his (the testator's) said wife during her widowhood, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying, or declining or becoming incapable to act, and thereupon the said trust estates, monies and premises, should be vested in the same trustee or trustees solely or jointly with the continuing trustee or trustees, as occasion should require, and that such new trustee should have the same powers, &c. as if he or they had been originally nominated a trustee or trustees. A new trustee having been appointed in the place of one who died, and having survived the widow and the other original trustee:—Held, that he was authorized under the power to appoint two new trustees. *Hillman v. Westwood*, 24 Law J. Rep. (n.s.) Chanc. 57.

(c) Conversion of perishable Property.

A testator gave "all his freehold and leasehold

estates, and also all other his real and personal estate, upon trust to collect and receive all monies due to him, mortgages, bonds, or other securities and rents," and after payment of debts and legacies, to invest the residue in government stock; "and as to one-half of all his said freehold and leasehold estates, and all the said trust monies, stocks, funds and securities, and all other his real and personal estate, upon trust to pay the rents, dividends and annual income," in equal half parts, to each of his daughters for life, with remainders over. The testator's personal estate consisted of leaseholds and several terminable annuities, furniture, &c. The trustees did not convert any of these, but, on the contrary, they divided the rents and the annuities between the tenants for life; and they also divided the furniture between them. Upon a bill filed by parties claiming through those entitled in remainder,—Held, that the trustees were bound to convert the whole of the personal estate other than the leaseholds, including the terminable annuities, and that the tenants for life were not entitled to the enjoyment in specie of both these descriptions of property. *Hood v. Clapham*, 24 Law J. Rep. (N.S.) Chanc. 193; 19 Beav. 90.

By his will, the testator gave his widow a life interest in his personal estate, which consisted partly of leasehold and long annuities, the income of which the widow enjoyed. A bill was filed by the remainderman against the widow (who was an executrix) and the other executors, raising no question as to the enjoyment in specie. At the hearing it was determined that the widow was not entitled to enjoy the long annuities in specie, but nothing was determined as to the leaseholds, and accounts were directed:—Held, that the widow could not, on further directions, be charged with the excess of the rents of the leasehold beyond the income arising from the funds which would have been produced by their sale. *Morgan v. Morgan*, 13 Beav. 441.

The rule laid down in *Howe v. the Earl of Dartmouth*, 7 Ves. 137, is, that when property of a perishable nature is given to be enjoyed in succession, the object of the testator can only be effected by converting the property into permanent annuities, and giving each person in succession the dividends of the fund. This rule prevails, unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, and which it is incumbent on those contesting the application of the rule to point out. *Morgan v. Morgan*, 14 Beav. 72.

Modern cases allow small indications of intention to prevent the application of the rule; but the mere absence of any direction to convert is insufficient. *Ibid*.

Upon the construction of a will, held, that the tenant for life of a residue was not entitled to the perishable property in specie. *Ibid*.

A testator bequeathed all his money, securities for money, money in the funds, household furniture, cattle, and all other his personal estate and effects, unto two trustees, upon trust to pay his debts and legacies, and, subject to the payment of a legacy, to stand possessed upon the trusts after mentioned. He then devised his freehold estates to trustees, upon trust to permit his wife to reside at his house, and to use the household furniture, plate, linen and china

therein for her life, and to "pay the rents and profits of his real estate," and "the interest, dividends and proceeds to arise from his said money and securities for money, money in the funds and personal estate thereinbefore bequeathed" to her for life, and after her decease to sell his real estate, and divide and pay the purchase-moneys; "and pay, assign, or transfer his said money, and securities for money, money in the funds and personal estate" unto his children. The testator possessed long annuities and leaseholds:—Held, that they ought to be converted into 3l. per cent., and that the widow was merely entitled to the dividends thereon. *Ibid*.

The Master of the Rolls (following *Dimes v. Scott*, 4 Russ. 195, *Taylor v. Clarke*, 1 Hare, 161, and *Sutherland v. Cooke*, 1 Coll. 503, in opposition to *Douglas v. Congreve*, 1 Keen, 410, and other cases) held, that a tenant for life of a residue was entitled, during the first year to the dividends on so much 3l. per cents. as would have been produced by the conversion of the property at the end of that year. *Ibid*.

A testator gave the residue of his estate to trustees, who were also his executors, desiring them immediately after his decease to convert all his personal estate into money, and to invest the amount "in the Bank of England," and to permit his daughter to receive the rents and profits, dividends, or "other annual produce" of his personal estate for her life for her own use, and after her death the property was to go to her children equally. The testator died in 1825, possessed of, among other things, 24l. long annuities, which the executors did not convert, but permitted the tenant for life to enjoy in specie. On the death of the survivor of the executors, his executors also neglected to convert the long annuities. The tenant for life had represented, both to the original executors and to the executors of the survivor, the propriety of a conversion. She had mortgaged her interest and two of the children had mortgaged their shares in the residue. Upon bill filed by all the children against the executors of the surviving executor and their mother,—Held, that the non-conversion was a breach of trust, and that the executors must account for the difference between the value of the long annuities at the end of one year from the date of the testator's death and their value when paid into court; that the tenant for life was not liable to refund the over-payments voluntarily made to her; and that the facts disclosed no case of acquiescence either on the part of the tenant for life or those in remainder. *Bate v. Hooper*, 5 De Gex, M. & G. 338.

A testator desired his executors to sell as they might think proper his business and lease of his house, and to place the money in the funds, and to pay to his wife all rents, dividends, or funded property, and all other rents or interests to which he was entitled, for her use, and for bringing up all his children, and at her death all the residue of his estate to be divided equally among his children. The executors were authorized to advance to any child his portion at his wife's approbation, but not to decrease her income below 100l. per annum:—Held, that there was no trust for conversion. *Marshall v. Bremner*, 2 Sm. & G. 237.

The question against the widow was raised by claim, which involved a litigation extending over

four years; the same question might have been raised by bill and demurrer. The Court holding the costs to have been improperly incurred, refused the plaintiff his costs. *Ibid.*

(d) *Misdescription and Ambiguity—Evidence to explain.*

A testator by his will bequeathed to A all his policies of life assurance which he had effected in the U and L Life Assurance Companies, and to B all his goods, chattels and shares in public companies. The testator had shares in both the U and L Life Assurance Companies, but no policies; and had shares and policies in other assurance companies:—Held, that his shares in the U and L Life Assurance Companies did not pass to A under the term "policies." *Waters v. Wood*, 22 Law J. Rep. (N.S.) Chanc. 206; 5 De Gex & S. 717.

A bequest was made to — D, the daughter of S D. At the date of the will, and at the time of the death of the testator, S D had three daughters; M, one of the daughters, claimed the legacy, and adduced, in support of her claim, evidence that the testator knew of her existence, and was ignorant of the existence of her sisters. There was no evidence on the other side:—Held, that M was entitled to the legacy. *Phillips v. Barker*, 23 Law J. Rep. (N.S.) Chanc. 44; 1 Sm. & G. 583.

A testatrix gave to Commodore P D 300*l.*, part of a particular fund, to other persons other parts of the same fund, and to the children of P H D 300*l.*, a further part of the same fund. Commodore P J D and H O D, who were dead, were brothers, and were cousins of the testatrix, but there was no person of the name of P H D. The Court refused to admit parol evidence of the testatrix's meaning by the expression "the children of P H D;" but held, that upon the face of the will there was sufficient to shew that the children of H O D were intended. *Douglas v. Fellows*, 23 Law J. Rep. (N.S.) Chanc. 167; Kay, 114.

A testatrix, the owner of four Spanish certificates of inscription, of the nominal value of 1,000*l.* each, redeemable for 550*l.*, bequeathed to trustees the sum of 2,000*l.* Spanish bonds or coupons, belonging to her, in trust for A B. The testatrix had no Spanish bonds or coupons. She, during her life, was accustomed to describe her certificates as "of 500*l.* each," and the four as "securities for 2,000*l.*"—Held, first, that the legatee was entitled to two only of the certificates of 1,000*l.* each, the same being sufficiently described as bonds or coupons; and, secondly, that evidence of the expressions used by the testatrix was not admissible to explain the bequest. *Horwood v. Griffith*, 23 Law J. Rep. (N.S.) Chanc. 465; 4 De Gex, M. & G. 700.

A charity called "The Benevolent Institution for the Purpose of delivering poor Women at their own Habitations," came to an end in 1836. A had been a subscriber to, and a governor of, this charity. A, by will, dated in 1846, gave a legacy to "The Benevolent Institution for the delivery of poor Women at their own Habitations." At the date of the will and at the death of A, there existed a charity for the same purposes as the extinct charity, called "The Royal Maternity Society for delivering poor Women at their own Habitations":—Held, that the Royal Maternity Society was entitled to the legacy. *Cold-*

well v. Holme, 23 Law J. Rep. (N.S.) Chanc. 594; 2 Sm. & G. 81.

A devise, in 1844, of "all my Quendon Hall estates in Essex." The testatrix, at the date of her will, and at her death, had a mansion called Quendon Hall and land around it, and also other detached farms in Essex. There was no parish of Quendon Hall, nor was the term "Quendon Hall estates" a recognized appellation of any particular property:—Held, that extrinsic evidence was admissible to shew what estates the testatrix understood to be comprised in that description. For this purpose old account-books, in the handwriting of the testatrix, one containing "an account of timber cut down on the Quendon estate," and a paper headed "1844, Quendon Hall Farms," written by the testatrix at or about the date of her will, were received in evidence. Evidence was also admitted to prove that much of the property had been derived by the executrix under the will of a relative, who had appended to her gift a direction that her devisee should assume the name and arms of Cranmer, particularly as the testatrix in this cause had annexed a like condition to the above-mentioned devise. *Webb v. Byng*, 1 Kay & J. 580.

Estates acquired by the testatrix after the date of her will, although she had contracted to purchase some of them before that time, and although they were chiefly small additions to what were clearly comprised in the devise, were held not to pass thereby. *Ibid.*

(B) *VALIDITY.*

(a) *Attestation.*

A will of real property, made before the 1 Vict. c. 26, was written on three sides of a sheet of paper, and duly signed at the end by the testator, and against his signature was a formal attestation clause, at the foot of which A and B, two of the attesting witnesses, signed their names. The signature of C, the other attesting witness, appeared, without any testimonium clause, on the second side in a place where a space had been left, but was followed by part of the will. It was proved that A, B and C had signed the will as attesting witnesses at the same time, and all attested the will:—Held, that the will was properly "attested and subscribed" within the 29 Car. 2. c. 3. s. 5, there being nothing in that statute to indicate the place where the witnesses ought to sign; and that a testimonium clause was not necessary. *Roberts v. Phillips*, 24 Law J. Rep. (N.S.) Q.B. 171; 4 E. & B. 450.

A legatee, under a will, became the attesting witness to a codicil, under which, however, he received no benefit:—Held, that the legacy was not revoked. *Gurney v. Gurney*, 24 Law J. Rep. (N.S.) Chanc. 656; 3 Drew. 208.

One of several residuary legatees, under a will, became attesting witness to a codicil, which revoked a legacy given by the will, the effect of which was, to increase the residuary share of the witness:—Held, that the title of the witness to a share of the residue was not thereby affected. *Ibid.*

(b) *Alteration and Interlineation.*

Where an alteration or interlineation appears upon the face of a will, the presumption is that it was made after the execution of the will, and it lies

upon the party setting up the will to give some evidence to rebut that presumption. *Doe d. Shallcross v. Palmer*, 20 Law J. Rep. (N.S.) Q.B. 367; 16 Q.B. Rep. 747.

A holograph will appeared to have been altered by turning a devise of certain cottages to W F in fee into a limitation to him for life, with remainder in fee to A P, who was nowhere else mentioned in the will. Declarations made by the testator before the will was executed that he intended to make provision by his will for A P (but not specifying any particular property which he intended to leave to her) were offered in evidence for the purpose of raising an inference that the limitation to A P was inserted before the will was executed:—Held, that these declarations were admissible evidence for that purpose. *Ibid*.

Declarations made by a testator after the time when the will is executed that he had provided for a person whose name occurred on an interlineation would not, however, be evidence that the interlineation was made before execution. *Ibid*.

An Italian domiciled at Gibraltar, by will, gave his residuary estate to trustees upon trust for his infant daughter for life, with remainders over. Subsequently he struck out the names of the trustees, and also the declaration that they were to hold the property on the trusts thereafter declared, and he interlined the name of his daughter, but left the specific trusts standing. The will was admitted to probate, and an identical copy issued:—Held, that the striking out the names of the trustees afforded no presumption of an intention to revoke the trusts; and that the will must be construed as it stood, and that the testator's daughter took a life interest only in the property. *Shea v. Boschetti*, 23 Law J. Rep. (N.S.) Chanc. 652; 18 Beav. 321.

A testator, who died in 1821, struck the name of one of the devisees out of his will and interlined the names of two other persons above the erasure, but those alterations were not noticed in the attestation clause, nor was there anything to shew, or from which it could be inferred, that they were made before the will was executed:—Held, that they did not affect the devise. *Simmons v. Rudall*, 1 Sim. N.S. 115.

(C) ESTABLISHING.

A bill by a devisee of lands who was in possession, for the purpose of establishing a copy of a will which had been abstracted against the heir-at-law, but raising no case implicating the heir in the abstraction, was retained for a year. The result of an action in which the copy of the will had been received in evidence, having been in favour of the plaintiff, the Court by its decree established the will upon and according to the copy, and restrained the defendant from bringing any action to disturb the plaintiff in the enjoyment of the lands devised to him. *Davies v. Evans*, 4 De Gex & S. 440.

(D) PUBLICATION AND REPUBLICATION.

A codicil does not for all purposes republish a will so as to make it speak at the time of the testator's death. *Stilwell v. Mellersh*, 20 Law J. Rep. (N.S.) Chanc. 356.

A married woman by her will appointed and devised certain property, and all other "hereditaments (if any) which she had any power to appoint or

devise." She afterwards, when a widow, by codicil, confirmed the will:—Held, that the will, as confirmed, only passed such hereditaments as were subject to her power. *Du Hourmelin v. Sheldon*, 19 Beav. 389.

(E) REVOCATION AND CANCELLATION.

A testator, by his will, devised his real estate to A and B in fee, on certain trusts, and by a codicil appointed G "to be a trustee and executor of his will in the place of A, whom he did not wish to act as executor":—Held, that the codicil acted as a revocation of the devise made to A by the will. *In re Hough's Estate*, 20 Law J. Rep. (N.S.) Chanc. 422; 4 De Gex & S. 371.

Where real estate is contracted to be purchased, and the purchaser then makes a will devising all his real estate which he had contracted to buy, upon trusts for sale, and subsequently takes a conveyance to the ordinary uses to bar dower,—Held, affirming the decree below, that the conveyance operates as a revocation of the devise of this estate. *Plowden v. Hyde*, 21 Law J. Rep. (N.S.) Chanc. 796; 2 De Gex, M. & G. 684; 21 Law J. Rep. (N.S.) Chanc. 329; 2 Sim. N.S. 171.

Where an estate stood limited to the ordinary uses to bar dower, and the owner mortgaged it in fee, with a proviso for redemption, that on payment the estate should be conveyed to the mortgagee, his heirs, appointees, or assigns, or to such uses as he or they should direct, and he then made his will, devising all his real estate upon trust for sale, and afterwards the mortgagee reconveyed to the mortgagor to the ordinary uses to bar dower,—Held, reversing the decree below, that the reconveyance was not a revocation of the will as to this estate. *Ibid*.

A testator drew cross-lines over a part of his will. There was no evidence as to the time when or the circumstances under which the lines were drawn. The probate copy of the will given out by the court of probate was a fac-simile of the will, with the cross-lines drawn over it in the same manner as in the will. In a suit for the administration of the estate of the testator,—Held, that the part within the cross-lines was to be taken as part of the will. *Gann v. Gregory*, 22 Law J. Rep. (N.S.) Chanc. 1059.

A testator entitled in reversion to copyhold hereditaments and in possession to freehold hereditaments, by his will devised and bequeathed all the freehold, leasehold and copyhold estates devised by the will of his late father and also all his estates, freehold, leasehold or copyhold, to his wife for her life or widowhood; and after her decease or second marriage he devised the same to A, B and C, three of his children, their heirs, executors, administrators and assigns, for ever. By a later will, which commenced with the words, "This is my last will and testament," the testator gave the whole of his real and personal estate to his wife for life, and after her decease he gave all his property, personal estate and effects to all his children equally, except his eldest son:—Held, that the second will did not revoke the devise of the copyhold estate contained in the first will. *Freeman v. Freeman*, 23 Law J. Rep. (N.S.) Chanc. 838; 5 De Gex, M. & G. 704; Kay, 479.

Devise to the children of A held not to be revoked

by an expression in a codicil that they were not intended to take any beneficial interest under the will or codicil. *Cleobury v. Beckett*, 14 Beav. 583.

A testator devised his real estate to his brother William for life, with remainder to his first and other sons in tail, with remainders over; and he bequeathed his residuary personal estate between his nephews and nieces. By a codicil he revoked his will so far only as it was altered by the codicil, and he gave to his nephews and nieces, except (as he said) his brother William's children, "who are not intended to take any beneficial interest under his will or this codicil," 1,000*l.* each:—Held, that the devise to the children of William was not revoked. *Ibid.*

The Ecclesiastical Court granted probate of a will of personalty, with cross-lines drawn in ink over the bequests of certain legacies.—Held, on a claim raised by the parties interested in these legacies, that the will must be taken to have been executed after the cross-lines were drawn, and that the only question was, what was the meaning of the testator, and that this was that the legacies were not to stand part of the will. *Gann v. Gregory*, 3 De Gex, M. & G. 777.

A testator, after making and publishing his will, contracted to sell certain real estate devised thereby, to a purchaser, who on payment of the deposit was let into possession, regularly paying interest on the residue of the purchase-money, until his bankruptcy, when his assignees abandoned the contract, and the testator, on a petition to the Court of Review for an account and sale, was declared the purchaser. On his death without republishing his will,—Held, the contract was a revocation of the will. *Andrew v. Andrew*, 3 Sm. & G. 130.

(F) SPOILIATION.

An heir-at-law of a testator obtained possession of the will by force, and tore it up. The pieces were, however, collected and put together and proved. The will contained no devise of the real estate, and a claim was filed against the heir to enforce a sale. On the heir's request, the Court directed an issue *devisavit vel non*, when the will was established:—Held, that the heir had so misconducted himself, that although his misconduct had not increased the costs of the issue, he must pay the costs of it. *Middleton v. Middleton*, 5 De Gex & Sm. 656.

(G) CODICIL.

A testator, by his will, devised certain houses to his son John for life, and after his death unto his children then born, or thereafter to be born, upon their attaining a certain age as tenants in common, and in case of the death of any of them under the specified age, the share and shares of the child or children so dying to go to the survivors and survivor, and in case of the death of all of such children under that age, then to trustees to permit the testator's three daughters S W, A D and E M D, to receive the rents during their lives in equal shares, and after their decease to their children in fee. The testator made a codicil in these words:—"I likewise revoke that part of my last will and testament whereby I give, &c. (the houses in question) unto my son John Doley and to his heirs; and my will is, that my daughters A D and E M D should enjoy them, and I hereby give and bequeath the said freehold ground and houses

to my said daughters A D and E M D equally and jointly between them and to the survivor of them, and after their decease to their child or children equally, and if they should both die leaving no child or children, then the said freeholds to go as ordered by my said will." *Doe d. Evers v. Ward*, 21 Law J. Rep. (N.S.) Q.B. 145; 18 Q.B. Rep. 197.

The daughters, A D and E M D, died, leaving no child; John, the son, died in 1850, leaving a daughter, his only surviving child (one of the lessors of the plaintiff), who was born in the testator's lifetime and attained the required age. John had another daughter born in the testator's lifetime, and who married and had a son, but she and her son both died in the lifetime of John. The testator's third daughter, S W, died leaving children, who were the defendants:—Held, that the codicil operated as a revocation, only so far as to effectuate the intention of the testator to prefer A D and E M D and their children, to John and his children, and, therefore, that the lessors of the plaintiff were entitled to a moiety of the houses in question. *Ibid.*

The testator appointed A, B and C his executors and trustees, and devised and bequeathed to them his real and personal estate in trust. By a codicil he desired that A, named in his will as "executor," be no longer such, and he nominated D to succeed him, but he made no alteration in the devise:—Held, that A still remained a trustee of the will. *Cartwright v. Shepherd*, 17 Beav. 301.

The testator appointed A, B, and C to be trustees and executors. He revoked the appointment of C as executor and trustee by his first codicil. By a second codicil he revoked the appointment of B and C as executors, but ratified his will, except as altered thereby:—Held, that the first codicil was not revoked and that C was not a trustee. *Ibid.*

The testatrix directed so much of a sum of money as would produce 100*l.* a year to be set apart, and the 100*l.* a year paid to A for life, and that after her death the capital should be divided among the children of B. By a codicil she revoked the bequest of the 100*l.* a year to A:—Held, that the gift to the children of B was thereby accelerated. *Evestaff v. Austin*, 19 Beav. 591.

A testator bequeathed all the residue of the estate and effects which at his death he should have power to dispose of to trustees in trust for the separate use of a married woman for her life, with a general power of appointment over the capital of the fund, and a limitation (in default of appointment) in trust for such persons of her blood and kindred as would be entitled under the Statute of Distributions to her personal estate if she had died unmarried. By a codicil he bequeathed an annuity, and gave all his property in houses or in funds, or of any other sort not disposed of by his will, and which had accumulated since the making thereof, in trust for the married woman and three other legatees, equally to be divided amongst them. There was at the testator's death no description of property not disposed of by his will or accumulated since:—Held, that the beneficial title to the testator's property was not affected by the codicil, unless in the event of the married woman's death without having fully exercised her power, and without having any person of her blood and kindred living at her death. *Lee v. Delane*, 4 De Gex & S. 1.

Although the Court decides against the plaintiff,

it may order the costs of all parties to be paid out of the estate. *Ibid.*

Testator gave 4,000*l.* to his granddaughter, and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance during her minority. By a codicil he directed that his granddaughter should have only the interest of 2,000*l.* for her maintenance until she attained twenty-three, and that the interest of the other 2,000*l.* should be accumulated, and that on her attaining twenty-three his executors should have the whole settled upon her for her life, and after her death to her child or children in equal proportions, so that no husband of hers might spend it. The granddaughter attained twenty-three, and died without having had a child, and without the executors having made any settlement of the legacy:—Held, that the gift in the will was an absolute gift, and that in the events that had happened it was not affected by the codicil, *Bell v. Jackson*, 1 Sim. N.S. 547.

Testator by his will gave real estate with various limitations, and also stock, to his wife for life or widowhood, and after her death to the person who should be entitled to his residuary real estate, either as tenant for life or in tail male. By his first codicil he gave his residuary estate to his widow. By the fourth codicil he revoked the dispositions made of his real and personal estate, and instead he gave his real and personal estate to his daughter, remainder as to the same to his grandson and his heirs in strict entail as in his will directed, but he was not to take possession till he should attain thirty-one; and on failure of issue of his grandson he ordered that his estate and effects should go and descend as by his will directed:—Held, that the gift of the residuary property by the first codicil was not revoked by the fourth codicil; that the funded property did not fall into the residue, but was given for life to the daughter, remainder in strict settlement to the grandson for life, remainder to his eldest son. *Patch v. Graves*, 3 Drew. 347.

(H) ELECTION UNDER.

Real estate was settled on A in tail, with remainder to B and her children, and A was absolutely entitled to certain personal estate. A, being so entitled, by one settlement, dated the 1st of July 1841, and made on her marriage, assigned her personal estate to trustees, upon trust for herself for life, with remainder to C for life, with remainder to B and her children; and, by another settlement of the same date, also made on her marriage, conveyed the real estate, to which she was entitled as tenant in tail, to trustees, upon trust for herself for life, with remainder to C for life, with remainder to B and her children. A died without having barred the entail:—Held, that B and her children were put to their election between the life estate in the realty given to C by the second deed, and the benefits in the personality given to them by the first deed. *Bacon v. Cosby*, 20 Law J. Rep. (N.S.) Chanc. 213; 4 De Gex & S. 261.

A testator by will disposed of his own property, and then, by virtue of a power in his marriage settlement, appointed the trust property among six of his children, *nominatione*, in equal shares, and requested them "not to sink into or spend their respective shares, but to leave the same for the benefit of their

respective children, and if any of them have no children then to leave the same so that their share may go in the same way as my general estate and effects are limited":—Held, that the words formed no part of the appointment; that they were inconsistent with the power; that no trust was raised for the grandchildren; that no case of election arose; and that the children were entitled to their shares absolutely. *Blackett v. Lamb*, 21 Law J. Rep. (N.S.) Chanc. 46; 14 Beav. 482.

A Scotchman, domiciled in England, and having real and personal estate here, and also real estate (heritable bonds) in Scotland, made his will in this country, and in the English form, by which, "by virtue of every right, power, or authority enabling" him "in this behalf," he devised and bequeathed all his real and personal estate whatsoever and wheresoever, upon certain trusts for the benefit of his children. It appeared that the will was wholly inoperative to pass real estate according to the law of Scotland:—Held, affirming a decision of the Master of the Rolls, that the eldest son (the heir-at-law according to the Scotch law) was not put to his election, whether he would take the benefits given to him as one of the children of the testator in the real and personal estate in England, or would take the Scotch real property. *Maxwell v. Maxwell*, 22 Law J. Rep. (N.S.) Chanc. 43; 2 De Gex, M. & G. 705; 16 Beav. 106.

A B, by his will, dated in 1825, devised all his real estates of or to which he then was or at the time of his death should be seised or entitled, to trustees, to the use of his wife for life or widowhood, and after her second marriage as to one moiety, and after her decease as to the other moiety, to the use of his children, as tenants in common, in fee. In October 1827 A B purchased other real estate at C, and the same was conveyed to him. In the following month he contracted for the purchase of freehold estate at S, and afterwards executed a codicil reciting the purchase at C and the agreement for the purchase at S, and devising the property at C to the trustees upon the trusts of the will, and directing the trustees to complete the purchase at S, and to hold the property upon the trusts of the will. In December 1827 the property at S was conveyed to A B to uses to bar dower. A B died in 1832; his widow married in 1835, and died in 1838. Besides the eldest son and heir-at-law of A B, he left three other children, who respectively attained twenty-one in 1840, 1842, and 1851:—Held, that the estate at S descended to the heir of A B, but that he was put to his election, and in case of his electing to take under the will, he must account to the youngest child for his share of the back rents since the right to them accrued, but to the two other children from the filing of the special case. *Schroder v. Schroder*, 23 Law J. Rep. (N.S.) Chanc. 916; Kay, 578.

A husband transferred a sum of stock into the joint names of himself and his wife; he afterwards made his will and gave her an estate for life in the stock and in certain freehold and leasehold estates, with remainder to other persons, and he made her his residuary legatee. She treated the stock as her own, and enjoyed the estates during her life:—Held, in a suit instituted after her decease, that she was cognizant of her rights, and was bound to elect between the stock and the benefits given to her by the

testator, and that her acts shewed she had elected to take under the will. *Worthington v. Wigington*, 24 Law J. Rep. (N.S.) Chanc. 773; 20 Beav. 67.

A sum of 10,000*l.* consols was held in trust for two sisters for life, and after their deaths two-thirds of the capital in trust for their brother, and one-third in trust for the two sisters. The brother bequeathed "the whole of his property" to trustees, as to part upon certain trusts for his sisters; and he afterwards bequeathed the property, including the 10,000*l.* trust money, to other parties:—Held, that the sisters must be put to their election between the interests taken by them under the will, and their interest in the 10,000*l.* *Swan v. Holmes*, 19 Beav. 471.

WITNESS.

- (A) COMPETENCY.
- (B) PRIVILEGE.
- (C) COMMISSION AND ORDER TO EXAMINE.
- (D) INTERROGATORIES.
- (E) DISOBEYING SUBPÆNA.
- (F) EXPENSES.

(A) COMPETENCY.

If a lunatic be tendered as a witness it is for the Judge to examine whether the lunatic be of competent understanding to give rational evidence, and is aware of the nature and obligation of an oath. If the Judge is satisfied on these points he should admit the lunatic as a witness. *Regina v. Hill*, 20 Law J. Rep. (N.S.) M.C. 222.

Before being sworn the lunatic may be examined and witnesses may be called as to his competency. *Ibid.*

If he be admitted, it is for the jury to judge whether his evidence be tainted by his insanity, and to decide upon the degree of credit to be attached to it. *Ibid.*

A creditor, who is a party to a deed of assignment by his debtor to a trustee for creditors, is a competent witness for the trustee in an action to enforce the deed. *Black v. Jones*, 20 Law J. Rep. (N.S.) Exch. 152; 6 Exch. Rep. 213.

A person entitled to a share in the proceeds of land devised to A in trust for sale, is a competent witness in an action brought by A to establish his right to the land. *Harding v. Hodgkinson*, 20 Law J. Rep. (N.S.) Exch. 236; 5 Exch. Rep. 845.

The 14 & 15 Vict. c. 99. has not either expressly or impliedly rendered the wife of a party to a civil suit a competent witness for or against her husband:—So held, *dissentiente Erle, J.* *Stapleton v. Craft*, 21 Law J. Rep. (N.S.) Q.B. 246; 18 Q.B. Rep. 367.

The 14 & 15 Vict. c. 99. has not rendered a wife a competent witness for or against her husband in civil proceedings. Whether by consent she might be examined as a witness, *quære*. But, assuming that such consent would render her admissible, where the objection had been taken, it was held to be discretionary with the Judge whether he would allow the objection to be withdrawn. *Barbat v. Allen*, 21 Law J. Rep. (N.S.) Exch. 156; 7 Exch. Rep. 609.

In an information for penalties under the Smuggling Acts, 8 & 9 Vict. cc. 86, 87, the defendant tendered

himself as a witness:—Held, by *Pollock, C.B.* and *Parke, B.*, that he was not a competent witness, because it was a criminal proceeding punishable on summary conviction, within the exception in the 14 & 15 Vict. c. 99. s. 3; but *per Platt, B.* and *Martin, B.*, that it was not within the exception, and that he was a competent witness. *Attorney General v. Radloff*, 23 Law J. Rep. (N.S.) Exch. 240; 10 Exch. Rep. 84.

Semble—That a bill of exceptions will not lie in an information for penalties, even with the consent of the Attorney General. *Ibid.*

(B) PRIVILEGE.

A witness cannot be asked on cross-examination whether he did not write a certain letter in answer to another which charged him with an offence without such other letter being first produced (its non-production being unexplained), even although the object of the cross-examination was only to discredit the witness. *Macdonnell v. Evans*, 24 Law J. Rep. (N.S.) C.P. 141; 11 Com. B. Rep. 930.

Per Cresswell, J.—If a witness be asked, on cross-examination, whether he has been convicted, the question, if objected to, ought to be rejected, unless the record be produced. *Ibid.*

A witness, called to support a plea that the consideration for a bill was money lost at play, stated that he was present when the money was alleged to have been lost in his own house, but saw no gaming. He was then asked, "Was there a roulette-table in the room?" The Judge told him that his answer might tend to subject him to a prosecution under the 8 & 9 Vict. c. 100. s. 2, for keeping a common gaming-house, and the witness declined to answer:—Held, that the witness was not compellable to answer, as his answer might have had that tendency; and the Judge was right in cautioning him. *Fisher v. Ronalds*, 22 Law J. Rep. (N.S.) C.P. 62; 12 Com. B. Rep. 762.

A party to a suit may be put into the box by his opponent and sworn, although the counsel for such party objects that the questions intended to be put to him will criminate him, and that he will object to answer them. It is for the party himself to make such objection. *Boyle v. Wiseman*, 24 Law J. Rep. (N.S.) Exch. 160; 11 Exch. Rep. 360.

The Court out of which the *Nisi Prius* record is sent has jurisdiction to punish a contempt committed by the arrest of a witness in the cause during the continuance of his privilege *eundo, morando et redeundo*. *Kimpton v. the London and North-Western Rail. Co., ex parte Kimpton*, 23 Law J. Rep. (N.S.) Exch. 239; 9 Exch. Rep. 766.

Semble—A warrant of commitment issued by the county court Judge, under the 9 & 10 Vict. c. 95. s. 99. is so far a criminal process that a witness in a cause at *Nisi Prius* is not privileged from arrest *redeundo*. *Ibid.*

Where a witness had been so arrested, and a rule *nisi* had been obtained for his discharge, and for costs against the officer of the county court, the Court, no one appearing to support the arrest, made the rule absolute for his discharge, but without costs. *Ibid.*

(C) COMMISSION AND ORDER TO EXAMINE.

The omission to state time and place, both in the

order for a commission to examine a witness under the 1 Will. 4. c. 22, and in the commission itself, amounts, at most, to no more than an irregularity. Where, therefore, upon such a defective proceeding being obtained solely at the instance of the plaintiff, the attorneys on both sides had agreed between themselves to a certain time and place, at which the examination under the commission took place, and the witness was then and there cross-examined on behalf of the defendant, and afterwards at the trial of the cause, certain letters proved under the commission were put in evidence without objection,—Held, that the defendant could not take advantage of the defect in the proceedings, so as to deprive the plaintiff of the costs of such commission allowed him upon taxation. *Hawkins v. Baldwin*, 20 Law J. Rep. (n.s.) Q.B. 198; 16 Q.B. Rep. 375.

The general rule is, that an order for the examination of a witness under 1 Will. 4. c. 22. s. 4. will not be made until after issue joined in the cause; but the practice in that respect is not imperative, and the rule may be relaxed where a case of urgent necessity is made out. *Fynney v. Beasley*, 20 Law J. Rep. (n.s.) Q.B. 395; 17 Q.B. Rep. 86.

Where a commission had issued to a foreign country, requiring the commissioners to be sworn and to administer an oath to the witnesses, and depositions had been taken by the commissioners and returned, but no oath had been taken by the commissioners or witnesses, owing to a law of the foreign country that burgomasters alone should administer oaths, and that no voluntary oaths should be taken, a new commission was ordered to be issued to burgomasters to examine the witnesses, without requiring the burgomasters to be sworn. *Bölin v. Mellidew*, 20 Law J. Rep. (n.s.) C.P. 172; 10 Com. B. Rep. 989.

It is discretionary with the Court to grant a commission to examine parties to an action resident abroad, under the 1 Will. 4. c. 22. s. 4, and the Court will do so only where it appears from the affidavits in support of the application to be conducive to the due administration of justice. *Castelli v. Groom*, 21 Law J. Rep. (n.s.) Q.B. 308; 18 Q.B. Rep. 490.

A commission may issue under the 1 Will. 4. c. 22. to the Judges of a foreign court (as individuals) to examine witnesses, although it appears that, according to the foreign law, the mode of examination will be conducted differently from the English practice, counsel not being allowed to put questions to the witnesses except through the Judge; and although hearsay evidence is there receivable. *Lumley v. Gye*, 23 Law J. Rep. (n.s.) Q.B. 112; 2 E. & B. 216.

If at the trial it should appear either on the face of the depositions or by extrinsic proof that illegal evidence has been admitted, or proper questions refused to be put to the witnesses, the Judge would have a discretion as to rejecting the whole or the illegal portion of the evidence. *Ibid*.

Where a former commission, issued to an English commissioner, had been abortive by reason of the witness, in accordance with the foreign law, refusing to be examined except by a Judge of the foreign court, the Court granted a fresh commission to the Judges of that court, on payment of the costs of the former commission. *Ibid*.

Digest, 1850—1855.

The Court refused to rescind an order made by a Judge under the 1 Will. 4. c. 22. s. 4. and 14 & 15 Vict. c. 99. for the examination, by the Master, of the plaintiff in a cause, before issue joined or declaration delivered, which had been obtained on his application, supported by an affidavit that he was master of a ship, and about to sail to Stettin, and was not likely to be present at the trial. *Brown v. Mollett*, 24 Law J. Rep. (n.s.) C.P. 213.

(D) INTERROGATORIES.

It is no ground for refusing leave to administer interrogatories, under the 17 & 18 Vict. c. 125. s. 51, that the attorney for the party to be interrogated states in his affidavit that the questions, if answered, may tend to criminate his client. It is for the client himself to take the objection on oath. *Osborne v. the London Dock Co.*, 24 Law J. Rep. (n.s.) Exch. 140; 10 Exch. Rep. 698.

The right to deliver interrogatories under that act is not limited to matters respecting which a discovery may be obtained in a court of equity. *Ibid*.

Quære—if a witness is exempted from liability to answer a question if he swears that the answer tends to criminate him, or whether the Court must be first satisfied that the question has that tendency. *Ibid*.

The plaintiff directed the defendant, as his broker, to buy goods for him. The defendant bought the goods, and delivered to the plaintiff a bought note, which stated that he bought them from a principal, A B. The plaintiff paid the price, and received from the defendant a delivery order, which turned out to be void. The plaintiff having brought an action for money had and received and for non-delivery of the goods, was allowed to deliver interrogatories to the defendant, under the 17 & 18 Vict. c. 125. s. 51, for the purpose of discovering whether the defendant entered into the contract as agent or as principal, and if as agent, for whom and by what authority. *Thol v. Leaske*, 24 Law J. Rep. (n.s.) Exch. 142; 10 Exch. Rep. 704.

(E) DISOBEYING SUBPÆNA.

Where a witness served with a *subpœna duces tecum* to produce a written document either does not attend, or does attend and refuses to produce the document (not on the ground of privilege), the party seeking to avail himself of the document cannot give secondary evidence of its contents: the remedy is to punish the witness for a contempt. *Regina v. the Inhabitants of Llanfhaethly*, 23 Law J. Rep. (n.s.) M.C. 33; 2 E. & B. 940.

On the trial of an appeal against an order of removal, the appellants, in order to prove a settlement by rating in a third parish, served a *subpœna duces tecum* on the person in whose possession the rate-book was supposed to be, and also gave the respondents a notice to produce the rate-book. The witness did not attend, and the rate-book was not produced:—Held, that parol evidence of a rating in the third parish was not admissible. *Ibid*.

(F) EXPENSES.

A party served with a subpoena in a civil action, receiving a sum of money therewith, and making no further demand, may maintain an action, against the party on whose behalf he has been subpoenaed, for additional expenses incurred by him in attending

the trial, but not for loss of time. *Pell v. Daubney*, 20 Law J. Rep. (n.s.) Exch. 44; 5 Exch. Rep. 955.

WORK AND LABOUR.

The plaintiff contracted by deed with the defendants, as a Local Board of Health, to execute certain works, according to a specification, and that the works should be begun, proceeded with, and completed, to the satisfaction of their surveyor. Payment was to be made by instalments, upon the certificate of the surveyor. By the deed it was provided "that if the plaintiff, from bankruptcy, insolvency, or any cause whatsoever, should not proceed with the works to the satisfaction of the surveyor, it should be lawful for the defendants, after three days' notice, signed by their surveyor, to employ other persons to complete the works; and that the deed should, at the expiration of the said notice, be void, at the option of the defendants, and the amount already paid to the plaintiff should be considered the full value of the works which should up to that time have been executed, and the materials on the premises should become the property of the defendants without any further payment".—Held, that this forfeiture clause might be enforced by the defendants, although the plaintiff had not become entitled to any payment for the work done. *Davies v. the Mayor, &c. of Swansea*, 22 Law J. Rep. (n.s.) Exch. 297; 8 Exch. Rep. 808.

WRIT OF TRIAL.

A writ of trial from the superior courts cannot be directed to a Judge of a county court under the statute 3 & 4 Will. 4. c. 42. s. 17, as a county court is not a court of record within the meaning of that statute. *Owens v. Breese* (in error), 20 Law J. Rep. (n.s.) Exch. 359; 6 Exch. Rep. 916; in the court below, *Breese v. Owens*, 20 Law J. Rep. (n.s.) Exch. 228; 6 Exch. Rep. 413.

In an action in which two issues were joined, the writ of trial directed the trial of "the issue" not "issues." The defendant, on the case coming on for trial, objected that the writ was irregular; but the objection being overruled, he did not appear at the trial, and a verdict was found for the plaintiff. The Court refused to set aside the writ of trial, or to arrest the judgment for the irregularity. *Watson v. Humphries*, 21 Law J. Rep. (n.s.) Q.B. 336.

WRIT, NE EXEAT REGNO.

A writ of *ne exeat regno* granted against a contributory in default under an order of the Master for a call in the matter of a company, under the Winding-up Acts, without bill filed. *In re the North of England Joint-Stock Banking Co., Mawer's Case*, 4 De Gex & S. 349.

Writ of *ne exeat regno* granted on an affidavit that the defendant, an Englishman, resident in Italy, was about shortly to return to Italy. *Anonymous*, 4 De Gex & S. 547.

WRIT, DE CORONATORE ELIGENDO.

After judgment of ouster upon an information in the nature of a *quo warranto* against a person returned by the sheriff as duly elected to the office of coroner, a new writ *de coronatore eligendo* issues as of course, and held to be no ground for withholding the writ that the judgment of ouster was founded upon the fact that the votes constituting the majority for the person returned were bad, and though it was alleged on oath that the result of a scrutiny would be to place the opposing candidate in a majority. *In re the Coronership of Hemel Hempstead*, 5 De Gex, M. & G. 228.

Semble—the sheriff cannot under the provisions of the 13th section of the act, 7 & 8 Vict. c. 92, enter into the question of a scrutiny. *Ibid*.

TABLE OF CASES

REFERRED TO IN THE PRECEDING

ANALYTICAL DIGESTED INDEX.

1850—1855.

[In the following Table the asterisk* signifies that the case occurs twice in the same page.]

- Aaron v. Aaron, 591
 Abbott, in re, 57
 — v. Calton, 781
 — v. Rogers, 170
 — v. Sworder, (Specific Performance), 678; (Vendor and Purchaser), 731
 Aberdeen Rail. Co. v. Blackie, 166
 Aberdein v. Jerdan, 25
 Abingdon v. Thornhill, 572
 Abley v. Dale, 212; (Inferior Court) 343*; (Insolvent) 357
 Abraham v. Great Northern Rail. Co., 620
 Abrey v. Newman, 413
 Acaster v. Anderson, 578
 Acraman v. Herniman, 78
 Adams v. Andrews, (Pews), 138; (New Trial), 567
 — v. Jones, 411
 — v. Smyth, 594
 Adamson, re, 55
 Adcock v. Wood, 31
 Addington v. Magan, 22
 Addison v. Preston, Mayor, &c. of, 496
 — v. Tate, 192
 Adey v. Arnold, 702
 — v. Trinity House, Deputy Master of, in re, 339
 Advocate General v. Smith, 439
 African Steam Ship Co. v. Swanzy, 666
 Agassiz v. Squire, 555
 Aglionby v. James, 593
 Agriculturist Cattle Insur. Co. v. Fitzgerald (Company), 170*; (Deed), 240
 Ainslie v. Sims, 223, 535, 574
 Ainsworth v. Alman, 601
 Alcard v. Messon, 80
 Alenius v. Nygren (Alien), 20; (Bail), 60
 Alcock v. Alcock (Baron and Feme), 96; (Costs), 223
 Aldis v. Fraser, 536
 — v. Mason, 383
 Alexander v. Alexander, 260
 — v. Brame, 225
 — v. Simms, (Costs, in Equity), 222; (Shipping), 673
 — v. Thomas, 99
 Alhusen v. Prest, (Assumpsit), 43; (Guarantie), 323
 Allen's Will, Trusts of, 711
 —, ex parte, 689
 — v. Davis, 311
 — v. Preece, 539
 — v. Loder, 578
 — v. Williams, 579
 Alleyne v. Regina, 279
 Allfrey v. Allfrey, 605
 Allin v. Crawshaw, 655
 Allison, ex parte, 380
 —, in re, (Affidavit), 19; (Certiorari), 127
 — v. Monkwearmouth Shore, Township of, 637
 Allum v. Boulton, 568
 Alston v. Grant, 500
 — v. Sims, 515
 Ambergate, Nottingham and Boston and Eastern Junc. Rail. Co. v. Midland Rail. Co., 158
 — Rail. Co. v. Norcliffe, 150
 Ambrose v. Kerrison, (Baron and Feme), 88; (Money paid), 474
 Ames v. Ames, 582
 — v. Birkenhead Docks, Trustees of, 479
 Amies v. Kelsey, 525
 Amott v. Holden, (Bankruptcy), 69; (Bond), 115
 Amsinck's case, 186
 Amson v. Harris (Construction of Legacy), 410; (Who take as Legatees), 416
 Anderson v. Fitzgerald, 363
 — v. Guichard, 599
 — v. Hillies, (Payment), 526; (Principal and Agent), 608
 — v. Kemshead, 45
 — v. Lanenville, 269
 — v. Noble, 354
 Anderson v. Thornton, 363
 Anderton v. Yates, 334
 Andrew, in re, 55
 — v. Andrew, 758
 Andrews v. Chapman, 442
 — v. Deeks, (Bankruptcy), 79; (Practice, at Law), 570
 — v. Diggs, 79
 — v. Eaton, 35
 — v. Hailes, 145, 291
 — v. Marris, 343
 — v. Pugh, 513
 — v. Shakeshaft, 742
 Angelo, in re, 713
 Anonymous, (Attorney and Solicitor), 46, 48; (Bankruptcy), 80; (Fine and Recovery), 308; (Parent and Child), 502; (Practice, at Law), 561*; (Practice, in Equity), 572, 577, 583, 587, 600; (Writ, Ne exeat Regno), 762
 Ansell v. Baker, 288
 Ansett v. Marshall, 218
 Anstey v. Edwards, 277
 — v. Hobson, 333
 Anwyl v. Owens, 349
 Archer v. Baynes, 315
 Archibald v. Hartley, 417
 Arden v. Goodacre, (Amendment), 25; (Sheriff), 656
 Arding v. Lomax, (Master and Servant), 467; (Pleading, at Law), 529
 Armistead v. Wilde, 356
 — v. White, 356
 Armstrong v. Armstrong, 668, 669
 — v. Bowdidge, 195
 — v. Buckland, 750
 — v. Burnet, 439
 — v. Stockholm, 597
 — v. Storer, 489
 Arnell v. Regent's Canal Co., 686
 Arnold v. Coape, 257
 — v. Dimsdale, 376
 — v. Gaussen, 376
 — v. Hamel, (Action), 14; (Revenue), 644

- Arnold v. Rigge, 295
 Arnott v. Tyrrell, 557
 Ash v. Dawnay, 657
 Ashford v. Haines, 424
 Ashley v. Sewell, 578
 Ashlin, in re, 73
 Ashton v. Langdale, 490
 Ashworth v. Mounsey, 478
 Askew, in re (Conviction), 379;
 (Master and Servant), 469
 — v. Millington, 589
 Askham v. Barker, 555
 Aspland v. Watte, 702
 Asplin v. Blackman, 213
 Astbury v. Belbin, 39
 — v. Henderson, 505
 Atherton v. Crowther, 415
 Atkinson, in re (Bankruptcy), 76
 and 79; (Insolvent), 361
 —, ex parte, 79
 — v. Abbott, 50
 — v. Grey, 15
 — v. Gylby, (Accumulation), 15;
 (Principal and Surety),
 611
 — v. Parker, 590
 — v. Stephens, 665
 Atlee v. Hook, 421
 Attenborough v. Attenborough, 552
 — v. London, 525
 Attorney General v. Alford, (Cha-
 rity), 138; (Trust and
 Trustee), 706
 — v. Andrews, 347
 — v. Armitstead, 138
 — v. Beverley, Corporation of,
 131
 — v. Birmingham and Oxford
 Junc. Rail. Co., (Injunc-
 tion), 354; (Railway), 625
 — v. Bradbury, 686
 — v. Carrington, 136
 — v. Chambers, 229
 — v. Chester, Corporation of,
 (Practice, in Equity), 591,
 595
 — v. Chesterfield, Earl of, 610
 — v. Clapham, (Practice, in
 Equity), 584; (Wesleyan
 Trusts), 740
 — v. Dalton, 135
 — v. Davey, 136
 — v. Donnington Hospital, Go-
 vernors of, 579
 — v. Eastlake, (Charity), 131;
 (Injunction), 355; (Way),
 739
 — v. Ewelme, (Alms-house), 131
 — v. Exeter, (Mayor, &c. of),
 (Charity), 134; (Practice,
 in Equity), 602
 — v. Great Northern Rail. Co.,
 624
 — v. Haberdashers Co., 136,
 137
 — v. Hall, 135
 — v. Hardy, 740
 — v. Henderson, 579
 Attorney General v. Henniker, 440
 — v. Hudson, 580
 — v. Hull, 492
 — v. London, Corporation of, 574
 — v. Louth Free School, 133
 — v. Magdalen College, 447
 — v. Metcalfe, 440
 — v. Moor, 132
 — v. Murdoch, 130
 — v. Napier, 439
 — v. Norwich Corporation, 498
 — v. Powis, Earl of, 700
 — v. Pretymann, 135
 — v. Radloff, 760
 — v. Rees, 229
 — v. Robson, 643
 — v. Rochester, Corporation of,
 131, 133, 138
 — v. St. Cross Hospital, (Charity),
 131, 133, 136*
 — v. Salkeld, 137
 — v. Sheffield Gas Consumers'
 Co., 352
 — v. Sherborne Grammar School
 136
 — v. Smythies (Apportionment),
 27; Charity, 138
 — v. Southmolton, Corporation
 of, (Charity), 130, 135
 — v. Stephens, 145
 — v. Sturge, 132
 — v. Wigan, Mayor, &c. of, 498
 — v. Wilkins, 728
 — v. Worcester, Bishop of, 132
 — v. Wyggeston Hospital, 137
 — v. Wynford, 441
 — v. York, Archbishop of, 133
 Attorney General of the Prince of
 Wales v. Bristol Waterworks, 687
 Attwater v. Attwater, (Devise),
 247; (Legacy), 437; (Will),
 746
 Attwood v. Attwood, 647
 Atwood v. Ernest, 244
 Austin v. Llewellyn, 446
 — v. Manchester, Sheffield and
 Lincolnshire Rail. Co.,
 (Carrier), 122; * (Rail-
 way), 621
 — v. Mills, (Action), 9; (Ar-
 rest), 39
 Australasia, Bank of, v. Harding, 8
 — v. Nias, 8
 Australia, Royal Bank of, in re,
 (Company), 178, 181*
 Avanyo v. Mudie, 207
 Avars v. Rhodes, 338
 Aveling v. Martin, 573
 Avery v. Langford, 197
 — v. Scott, 29
 Awde v. Dixon, 100
 Ayles v. Cox, (Specific Perform-
 ance), 677; (Trust and Trustee),
 714
 Backhouse v. Taylor, 610
 Bacon v. Cosby, (Evidence), 292;
 (Legacy), 418; (Will), 759
 Badeley v. Vigours, 11
 — v. Vigurs, 385
 Bagge, ex parte, 183
 — v. Mawby, 267
 Bagne v. Dumergue, 438
 Bagshaw v. Winter, 91
 Bailey, ex parte, (Attorney and So-
 licitor), 48; (Bankrupt-
 cy), 66; (Friendly So-
 ciety), 317; (Justice of
 the Peace), 380; Lands
 Clauses Act), 391; (Mas-
 ter and Servant), 470
 — v. Boulton, 441
 — v. Collett, 730
 — v. Hughes, 557
 — v. Richardson, 729
 Baillie v. Jackson, (Evidence), 285;
 (Settlement), 652
 Bailly, ex parte, 184
 — v. Curling, 36
 Bainbridge v. Cream, 749
 — v. Wade, 323
 Bainbridge, re, 54
 — v. Baddeley, 598
 — v. Bainbridge, 698
 — v. Orton (Pleading, in Equity),
 539; (Practice, in Equity), 589,
 Baines v. Holland, 663
 — v. Ridge, 572
 Baker, in re, 437
 — v. Anthony, 578
 — v. Baker, 437
 — v. Bradley, 717
 — v. Heard, 6
 — v. Marsh, 494
 — v. Read, 575
 — v. Rusk, 506
 Baldwin v. Baldwin, 455
 — v. Bauerman, 18
 — v. Rogers, 425
 Balfe v. West, 322
 Balguy v. Broadhurst, (Pleading,
 in Equity), 537; (Practice, in
 Equity), 585
 Ball v. Bowden, 72
 Balzy v. Collett, 601
 Bamberger v. Commercial Credit
 Mutual Assur. Co., 243
 Bamfield v. Tupper, 452
 Bamford v. Chadwick, 247
 — v. Lord, 247
 Bancks v. Ollerton, (Devise), 259;
 (Fine and Recovery), 307
 Bandy v. Cartwright, (Covenant),
 225; (Landlord and Tenant),
 387
 Bangle's Trust, in re, 711
 Banks v. Banks (Power), 557;
 (Practice, in Equity), 595
 — v. Rebbeck, 341
 — v. Thornton, 753
 Barbary, in re (Bankruptcy; Cer-
 tificate), 85; (Bankruptcy; Costs),
 87
 Barbat v. Allen, 760
 Barber, in re, 46
 —, ex parte, 178

- Barber's Will, Trusts of, in re, 415
 — v. Richards, 102
 Barbot v. Allen, 283
 Bargate v. Shortridge, 172
 Barham v. Clarendon, 261
 Barker, in re, 72
 — v. Barker, 425
 — v. Birch, 587
 — v. Sterne, 100
 Barlow, ex parte, 64
 Barnard, in re, (Attorney and Solicitor; Duties), 48; (Attorney and Solicitor; Costs), 56, 58
 Barnes v. Marshall, 337
 — v. Ridgway, 574
 Barnett, ex parte, (Bankruptcy; Jurisdiction), 64; (Bankruptcy; Arrangement), 80
 — v. Guildford, Earl of, 695
 — v. Sheffield, 436
 Baronnet, ex parte, 60
 Barrell, in re, (Bankruptcy), 66; (Friendly Society), 317
 Barrett v. Long, 374
 — v. Power, 215
 — v. Ring, 677
 — v. White, 748
 Barringer v. Handley, 562
 Barrington v. Liddell, 691
 Barron v. Lancefield, 486
 Barrow, in re, (Attorney and Solicitor; Costs), 54, 57
 — v. Barrow, 91
 — v. Buckmaster, 505
 Bartheleny, re, 60
 Bartlett v. Harton, 575
 — v. Holmes, (Action), 12; (Damages), 231; (Sale), 644
 — v. Kirkwood, 141
 Bartley v. Bartley, (Practice, in Equity), 583; (Trust and Trustee), 708
 Barton, ex parte, 57
 —'s Will, Trusts of, 91
 — v. Bricknell, 695
 — v. Latour, 595
 — v. Vanheythuysen, 313
 — v. Whitcomb, 581
 Basingstoke, Mayor, &c. of, v. Bolton (Copyhold), 203*; (Exchange), 294
 Baskett v. Cafe, (Bankruptcy), 76; (Pleading, in Equity), 537
 Bassil v. Lister, (Baron and Feme), 90; (Thellusson Act), 690
 Bastow, ex parte, 208
 — v. Gant, 60
 Batard, in re, 597
 — v. Douglas, 168
 — v. Hawes, (Company), 168; (Executor), 301
 Bate v. Hooper, 755
 Bateman, ex parte, (Bankruptcy), 85, 87
 —'s Estate, in re, 398
 — v. Bluck, (Highway), 326; (Paving Act), 471
 — v. Cooke, 586
 Bateman v. Gray, (Patent; when valid), 519; (Patent; Specification), 521
 — v. Margerison, 237
 Bates, ex parte, 74
 — v. Brothers, (Judgment a Charge on Lands), 370; (Judgment; Right of Creditors), 372; (Practice, in Equity), 590
 — v. Hillcoat, 372
 Bath, St. John's Hospital, in re, 135
 Bathurst's Estates, in re, 704
 Baxendale v. Hart, 123
 — v. Seale, 722
 Baxter's Trusts, in re, 714
 — v. Losh, 434
 Bayley, re, 57
 Bayly, ex parte, 388
 Baynard v. Simmons, 45
 — v. Woolley, (Trust and Trustee), 702, 707, 710
 Bayne v. Crowther, 751
 Bazalgette v. Lowe, 575
 Beadon v. King, 402
 Beale v. Symonds, 280
 — v. Tennent, 710
 Beamish v. Stoke, Overseers of, (Friendly Society), 320; (Parliament), 504
 Bean, ex parte, 69
 Beanland v. Bradley, 312
 Bear v. Bromley, 169
 — v. Smith, (Practice, in Equity; Staying Proceedings), 589; (Practice, in Equity; References), 593
 Beardshaw v. Londesborough, 174
 Beaucherk v. Hook, (Outlawry), 500; (Practice, at Law), 564
 Beaufort v. Patrick, 118
 — v. Vivian, 695
 Beaufoy's Trust, in re, 398
 Beaumont v. Salisbury, 654
 — v. Squire, 245
 Beavan, in re, (Attorney and Solicitor), 55; (Stamp), 686
 — v. McDonnell, (Evidence), 284; (Lunatic), 454*
 — v. Oxford, Earl of, 371
 Bebb v. Bunny, 730
 Becke, re, 48
 Beddoes, ex parte, 400
 Bedfordshire, Justices of, v. Bedford Improvement Commissioners, 629
 Beech v. Keep, 734
 Beeching v. Lloyd, 536
 Beer v. Beer, (Account), 4; (Apportionment of Rent), 388
 Beeson v. Burton, (Inclosure), 329; (Parliament), 505
 Begg v. Forbes, 561
 Beldon v. Campbell, 666
 Bell, ex parte, 68
 — v. Barchard, 406
 — v. Carter, 484
 Bell v. Fisk, 18
 — v. Hamilton, 75
 — v. Hornby, 578
 — v. Jackson, 759
 — v. London and North-Western Rail. Co., 41
 — v. Port of London Assur. Co. (Affidavit), 19; (Costs), 210
 — v. Young, 65
 Bellamy v. Cockle, 486
 — v. Hill, 427
 — v. Majoribanks, 108
 Beloved Wilkes's Charity, in re, 134
 Belshaw v. Bush, (Accord and Satisfaction), 3; (Payment), 526
 Belton, in re, 82
 Beman v. Rufford, 348
 Bengal, Bank of, v. Macleod, 102
 Benge v. Swaine (Costs), 215; (Practice, at Law), 569
 Benham v. Newell, 734
 — v. United Guarantee and Life Assur. Co., 365
 Benison v. Wortley, 600
 Bennett, ex parte, 184
 — v. Powell, 372
 Bensusan v. Nehemias, 432
 Bentley v. Craven, (Partners), 517; (Principal and Agent), 611; (Vendor and Purchaser), 723
 — v. Dawes, (Costs), 210; (Pleading), 530
 — v. Mackay, 734
 — v. Oldfield, (Devise; Particular Limitations), 256; (Devise; Charges), 261
 — v. Robinson, 600
 Beny v. Alderman, 105
 Benyon v. Nettlefold, 535
 Beresford v. Driver, 615*
 Berkeley v. Elderkin, 9
 Bernard, ex parte, 184
 Bernasconi v. Atkinson, 411
 Berry, in re, 455
 —'s Patent, in re, 521
 Berton v. Lawrence, 529
 Berwick-upon-Tweed, Mayor, &c. v. Dobee, (Accord and Satisfaction), 2; (Bond, 112; (Municipal Corporation), 496
 — v. Oswald, (Accord and Satisfaction), 2; (Bond, 112; (Municipal Corporation), 496
 — v. Renton, (Accord and Satisfaction), 2; (Bond, 112; (Municipal Corporation), 496
 Besant v. Cross, (Bills and Notes), 108; (Practice, at Law), 564
 Besemeres v. Besemeres, 687
 Besley, ex parte, (Company; Contributory), 178, 189
 Bessant v. Cross, 564
 Bessell v. Wilson (Barrister), 96; (Justice of the Peace), 377

- Best, *ex parte*, 190
 Beswick v. Boffey, (Inferior Court; Title in question), 341; (Inferior Court; Interpleader), 345
 Bevan v. Walker, 357
 Bhear v. Harradine, (Arbitration; Award), 82; (Arbitration; Costs), 38
 Bickford v. Chalker, 427
 Biddle, in re, 489
 Biddulph's Trusts, in re, 597
 — v. Camoys, 294*
 — v. Chamberlayne, 443
 Bierton Charity Land, in re, 135
 Biggs v. Gibbs, 419
 Bignall v. Rose, 747
 Billing v. Southee, 716
 Bilson, *ex parte*, 64
 Bingle, in re, 308
 Bingley School and Charity Estate, in re, 129
 Birch, Torr and Vitifer Co., in re, 174
 —, in re, 606
 — v. Jay, 602
 — v. Joy, 730
 Bird, *ex parte*, (Company), 170; (Principal and Agent), 610
 — v. Bird, 597
 — v. Fox, 264
 — v. Higginson, 216
 — v. Pegrum, 94
 — v. Webster, 419
 Birkenhead Docks, Trustees of, v. Birkenhead Dock Co., (Practice, in Equity), 591; (Specific Performance), 687
 — v. Shrewsbury and Chester Rail. Co., 573
 Birkenhead, Lancashire, and Cheshire Junction Rail. Co. v. Pilcher, 151
 — v. Webster, 150
 Birmingham, Mayor, &c. of, v. Wright (Bond), 111; (Poor), 543
 Birmingham and Oxford Junction Rail. Co. v. Regina, 621
 Bishop v. Curtis, (Attainder), 45; (Devise), 252; (Executor), 302; (Legacy), 438
 — v. Jersey, 516
 Black, in re, 103
 — v. Green, 561
 — v. Jones, (Practice, at Law), 567; (Witness), 760
 Blackburn v. Ravenhill, 598
 Blacket v. Lamb, 759
 Blackman, in re, 413
 — v. Asplin, 369
 Blackmore, in re, (Attorney and Solicitor; Costs), 52, 57
 Blackwell v. Pennant, 411
 Blaikie v. Clark, (Settlement), 655; (Undue Influence), 717
 Blair v. Jones, 37
 — v. Ormond, 114
 Blake, *ex parte*, 653
 — v. Cooper, 562
 — v. Midland Rail. Co., 230
 Blakeley's Executors, 182
 Blakely, in re, 612
 Blakemore's Settlement, in re, 265
 Blakeney v. Dufaur, (Costs, in Equity), 223; (Partners), 517
 Bland v. Crowley, 157
 — v. Lipscombe, (Custom and Prescription), 230; (Fishery), 308
 Blann v. Bell, (Legacy), 421; (Practice, in Equity), 602; (Will), 743
 Blaxland v. Blaxland, 596
 Blenkinsopp v. Blenkinsopp (Baron and Feme), 95; (Costs, in Equity), 219
 Bligh v. Tredgett, 221
 Blind School v. Goren, 597
 Blisset v. Daniel, 514
 Bloor v. Huston, (Inferior Court; Bailiffs), 337; (Inferior Court; Interpleader), 341
 Blowers v. Rackham, 344
 Bluck, in re, 641
 — v. Boyes, 641
 — v. Gompertz, (Statute of Frauds), 316; (Production of Documents), 616
 Blues, *ex parte*, 646
 Blundell v. Gladstone, 254
 Blyth v. Dennett, 383
 Boddington v. Castelli, (Bankruptcy), 75; (Parties), 507
 — v. De Melfort, 60
 Boden's Estate, 712
 — v. French, (Principal and Agent), 606; (Sale), 644
 — v. Wright, 105
 Bodenham v. Hoskins, 608
 Bodger v. Arch, (Executor), 301; (Limitations), 453
 Bodmer's Patent, in re, 522
 Bogg v. Pearse, 462
 Bogue v. Houlston, 206
 Bolekow v. Herne Bay Pier Co. (Action), 12; (Debentures), 232
 Bold v. Hutchinson, 464
 Bölin v. Mellidew, 761
 Bolton v. Powell, 17
 — v. Ridsdale, 574
 Bonaker v. Evans, 140
 Bond v. England, 484
 Bonner v. Bonner, 92
 Boodle v. Davis, 370
 Boosey v. Gardner, 423
 — v. Gardener, (Legacy), 419; (Will), 750
 — v. Jefferies, 208
 Booth v. Clive, (Action), 13; (Writ of Inquiry), 356; (Practice, at Law), 567
 Boothby v. Boothby, 731
 Boreham, in re, 334
 Borradaile v. Nelson, (Costs, at Law), 213; (Practice, at Law), 570
 Borthwick v. Walton, 340
 Bosanquet v. Shortridge, 62
 Bostock v. North Staffordshire Rail. Co. (Canal), 118; (Injunction), 351; (Jury), 375
 Boston, Newark and Sheffield Rail. Co., in re, 173
 Bottomley v. Squire, 575
 Bougleux v. Swayne, 280
 Boulcott v. Boulcott, 745
 Boulton v. Beard, 423
 Bourne, in re, 610
 — v. Buckton, 690
 — v. Seymour, 198
 Bouts v. Ellis, 270
 Bowden v. Henderson, 606
 Bowen, *ex parte*, 182
 — in re, 356
 — v. Price, 585
 Bower, *ex parte*, 67, 69
 — v. Hodges, 229
 Bowers, *ex parte*, 80
 — in re, (Bankruptcy; Petitioning Creditor), 67; (Bankruptcy; Proof), 69; (Bankruptcy; Assignees), 74; (Bankruptcy; Arrangement), 80
 Bowes v. Ravensworth, 329
 Bowett v. Long, 442
 Bowker v. Bull, 482
 Bowra v. Wright, 511
 Box v. Green (Certiorari), 127; (Inferior Court), 341
 Boyce, in re, 544
 — v. Higgins, 619
 Boyd v. Jaggard, 582
 Boydell v. Manby, 487
 Boyle, *ex parte*, 70
 — in re, (Attorney and Solicitor), 57; (Bankruptcy), 70
 — v. Webster, (Evidence), 291; (Infant), 333
 — v. Wiseman, (Evidence), 288; (Practice, at Law), 567; (Witness), 760
 Boys v. Bradley, 414
 Boyse v. Colclough, (Jurisdiction), 373; (Practice, in Equity), 602
 — v. Rossborough, 372
 Bracegirdle v. Hincks, (Carrier), 126; (Pleading, at Law), 531
 Bradbury, *ex parte*, 79
 — in re, 69
 — v. Manchester, Sheffield and Lincolnshire Rail. Co., 605
 Brady, in re, 619
 Bradford v. Tupper, 452
 Bradley v. Ibbetson, 31
 — v. James, 452
 — v. London and North-Western Railway Co., 392
 — v. Master Pilots and Seamen of Newcastle - upon - Tyne, 493

- Bradley v. Munton, (Practice, in Equity), 595; (Vendor and Purchaser), 731
 — v. Phelps, 35
 Bradshaw, ex parte, 714
 — v. Mellings, 413
 Braggiotti, ex parte, 82
 — in re, 82
 Brain v. Brain, 572
 Braithwaite's Trust, in re, 172
 Brandling v. Plummer, 722
 Brandon v. Smith, 37
 Branford v. Freeman, 566
 Brassey v. Chalmers, (Power), 506; (Trust and Trustee), 708; (Vendor and Purchaser), 727
 Brassy v. Chalmers, 512
 Braye, in re, 399
 Brearcliffe v. Dorrington, 15
 Brearey v. Kemp, 31
 Breese v. Owens, 762
 Brennan v. Preston, (Injunction), 349, 354
 Brennan v. Preston, 586
 Brettell v. Dawes, 174
 Brewer, in re, 86
 — v. Jones, 50
 — v. Swirles, 705
 Brewster, ex parte, 75
 — in re, 76*
 Bridge v. Bridge, 733
 Bridge v. Penfold, 595
 — v. Ramsey, 257
 Bridges v. Fisher, (Contract), 196; (Lottery), 454
 — v. Hawkesworth, 696
 Bridgman v. Dean, 43
 Bridson's Patent, in re, 522
 Brien v. Rust, 567
 Brierly v. Kendall, 696
 — v. Ward, 485
 Briggs v. Chamberlaine, 90
 — v. Oxford, Earl of, 649
 — v. Penny, 420
 — v. Wilson, (Limitations; when available), 447; (Limitations; how barred), 451
 Bright's case, 187
 — Trust, in re, 423
 — v. Hutton, (Company; Dis-solution), 173, 183; (Parliament), 503
 Brighton, Lewes, and Tunbridge Wells Railway Co., in re, 179
 Bristow v. De Secqueville, 283
 British Alkali Co., in re, 173
 British and American Steam Navigation Co., Goldsmid's case, in re, 185
 — Meyer's case, in re, 185
 British Empire Mutual Life Assurance Co. v. Browne, 171
 Brittain, ex parte, 179
 Broadbent v. Thornton, 237
 Broadhurst, ex parte, 67
 — in re, 67
 Broadwood v. Granara, 356
 Brocklebank v. Johnson, 426
 Brocklehurst v. Flint, 410
 Brodrick v. Brown, 558
 Brogden v. Merton, 5
 Bromage v. Vaughan, 645
 Bromitt v. Moor, (Devise), 258; (Practice, in Equity), 577
 Brompton, Incumbent, &c. of, ex parte, (Charity), 130, 136
 Brook v. Biddall, 587
 — v. Brook, 60
 — v. Chaplin, 357
 Brookes v. Tichborne, (Evidence), 284; (Libel), 443
 Brookman, in re, v. Wenham, 126
 Brotherton v. Bury, 426
 Brougham v. Powlett, 221
 — v. Squire, 243
 Broughton v. Broughton, 221
 — v. Jackson, 305
 Brown, ex parte, 380, 384
 — in re, (Attorney and Solicitor), 56; (Land Clauses Act), 397; (Power), 558
 — v. Brown, 223
 — v. Byrne, 288
 — v. Freeman, (Debtor and Creditor), 234; (Insurance), 363
 — v. Glenn, 268
 — v. Gordon, 448
 — v. Millington, 23
 — v. Mollett, 761
 — v. Monmouthshire Rail. and Canal Co., 623
 — v. North, 669
 — v. Sewell, 482
 — v. Smith, (Domicil), 270; (Slander), 674
 Browne v. Collyer, 34
 — v. Cross, 709
 — v. Paull, 332
 Bruce v. Elwin, 367
 — v. Nicolopulo, 659
 Brueford v. Griffin, 217
 Bruiton v. Birch, 603
 Brunswick, ex parte, (Libel), 443; (Scire Facias), 645
 — v. Harmer, 442
 — v. Sloman, 19
 Brutton, ex parte, 46
 Bryan's Trust, ex parte, 411
 — v. Clay, (Clergy), 141; (Executor), 298
 — v. Collins, 413
 — v. Mansion, 742
 — v. Wastell, 574
 Bryant v. Blackwell, 489
 Bryson v. Warwick and Birmingham Canal Navigation Co., 162
 Buchannan v. Kinning, 695
 Buckell v. Blenkhorn, 552
 Buckland v. Johnson, (Action), 9; (Trove), 698
 Buckley's Trust, in re, 710
 — v. Barber, (Executor), 301; (Partners), 515
 — v. Cooke, 587
 Buckmaster v. Meicklejohn, 284
 Buck's Rail. Co., in re, 255
 Bulkeley v. Hope, 402
 Bull v. Chapman, (Company), 169; (Pleading, at Law), 532
 — v. Robison, 645
 Bullivant v. Bellairs, 577
 Bullock v. Bennett, 748
 — v. Jenkins, (Arrest), 38, 39
 Bulmer, in re, 72
 Bunbury v. Fuller, 330
 Bunting v. Marriott, (Legacy; Who take), 413; (Legacy; Payment), 431; (Legacy; Ademption), 432; (Mortmain), 492
 Burbidge, in re, 455
 — v. Cotton, 318
 Burchell, in re, 53
 Burchfield v. Moore, 100
 Burgess v. Burgess, 352
 — v. Sturgis, 485
 Burke v. Annis, 256
 Burkinshaw v. Birmingham and Oxford Junction Rail. Co., 395
 Burlington v. Richardson, 569
 Burmester v. Barron, 106
 — v. Norris, 473
 Burnett v. Phillips, 501
 Burnley v. Eastern Counties Rail. Co., 578
 Burroughes v. Brown, 728
 Burrows v. Walls, 702
 Burt's Estate, in re, 251
 — in re, 712
 — v. Sturt, 691
 Burton, ex parte, 182
 — in re, 458
 — v. Blake, 505*
 — v. Brooks, (Parliament), 504, 505
 — v. Cove, (Parliament), 504, 505
 — v. White, 255
 Bush v. Fox, 519
 — v. Watkins, (Practice, in Equity), 594; (Settlement), 651
 Bushby v. Ellis, 575
 Butchart v. Dresser, 603
 Butchari v. Dresser, 517
 Butcher v. Butcher, 653
 — v. London and South-Western Rail. Co., 120
 Butler v. Meredith, 276
 Butt v. Great Western Rail. Co., 126
 — v. Monteaux, (Company), 169; (Partners), 517
 — v. Thomas, 255
 Butterfield v. Heath, (Vendor and Purchaser), 725; (Voluntary Conveyance), 733
 — v. Marler, 608
 Buttler v. Mathews, 575
 Buxton v. James, (Copyright), 206, 207
 Byam v. Byam, 650
 — v. Sutton, (Legacy), 437; (Practice, in Equity), 604
 Byrne v. Norcott, 701

- Byrom, in re, 72
 Byron's Settlement, in re, 543
 Bythesea v. Bythesea, 426
- Cable v. Cable, 414
 Caddick, in re, 397
 —'s Settlement, 398
 Cadogan v. Essex, Earl of, 709
 Caldicott v. Griffiths, 507
 Caldwell v. Dawson, 685
 — v. Rolfe, 348
 — v. Van Vlissingen, 348
 — v. Verbeck, 348
 Callander v. Howard, 216
 Calley v. Richards, 585
 Callow v. Jenkins, 50
 — v. Jenkinson, 281
 Calvert v. Sebright, 228
 Cameron's Coalbrook Steam Coal, &c. Rail. Co., in re, (Company; Dissolution), 184, 189
 Camoys v. Best, 704
 Campanari v. Woodburn, (Executor), 301; (Principal and Agent), 610
 Campbell, in re, 58
 — v. Allgood, 706
 — v. Hooper, 486
 — v. Lang, 326
 — v. Paddington, Parishioners of, 138
 Canham v. Barry, (Evidence), 289; (Pleading, at Law), 531
 Cannan v. Evans, 594
 — v. Fowler, 197
 — v. South-Eastern Rail. Co., 78
 Canning v. Canning, 511
 — v. Raper, 685
 Cannock v. Jauncey, 584
 Cannon v. Johnson, (Amendment), 21; (Inferior Court), 342, 345
 — v. Rimington, (Costs, at Law), 217; (Limitations), 446
 Cape's Executor, ex parte, 186
 Capper, ex parte, 182
 Cardigan, in re, 37
 Carew, ex parte, (Company; Dissolution), 186, 190
 Carlisle v. South-Eastern Rail. Co., 150
 Carmichael, ex parte, 178
 — v. Hughes, 332
 Carne, in re, 85
 — v. Malins, 23
 Carpenter, in re, 713
 —'s Executors, ex parte, 175
 — v. Dunsmure, 260
 Carpmal v. Proffitt, 400
 Carr v. Jackson, 607
 — v. Lancashire and Yorkshire Rail. Co., 122
 Carrick, ex parte, 179
 Carrodus v. Sharp, (Vendor and Purchaser), 780, 781
 Carron Company v. Maclaren, (Domicil), 269; (Jurisdiction), 373
- Carter, ex parte, (Bankruptcy; Jurisdiction), 64; (Bankruptcy; Petitioning Creditors), 68 *
 —, in re (Bastardy), 98
 — v. Dimmock, 69
 — v. Sanders, 511
 — v. Smith, 343
 — v. Taggart, 89
 Cartwright v. Cartwright, 94
 — v. Shephard, (Practice, in Equity), 592; (Will), 758
 Carver v. Burgess, 747
 Carwardine v. Wishlade, 600
 Casse v. Wight, 570
 Castelli, 'ex parte, (Bankruptcy; Certificate), 82; (Bankruptcy; Costs), 87
 —, in re, (Bankruptcy; Petitioning Creditor), 68
 — v. Boddington, 75
 — v. Groome, 761
 Castrique v. Page, 214
 Catchpole v. Ambergate, Nottingham, &c. Rail. Co., 150
 Cathrow v. Eade, (Evidence), 288; (Judgment), 372; (Presumption), 606
 Catlin, in re, 54
 Catling, in re, 590
 Cato v. Irving, 673
 Caton v. Lewis, 583
 Cator v. Cator, 419
 — v. Reeves, 485
 Cattley v. Vincent, 422
 Cautley, ex parte, 252
 Cave v. Cave, 335
 Cawley v. Furnell, (Inferior Court), 345; (Limitations), 449
 Cawood v. Thompson, 490
 Chadwick v. Chadwick, 579
 — v. Maden, 721
 Chaffers v. Baker, 575
 — v. Headlam, (Practice, in Equity), 596, 604
 Challie v. Gwynne, 487
 Challis v. Doe d. Evers, 260
 Chalmers v. Laurie, 591
 Chamberlain v. Chamberlain, 591
 Chambers v. Wiles, 213
 Chamley v. Grundy, 23
 Champneys v. Buchan, 581
 Chandos v. Inland Revenue, Commissioners of, (Practice, at Law), 568; (Stamp), 684
 Chance v. Chance, 433
 Chant v. Brown, 287
 Chaplin v. Levy, (Bills and Notes), 102; (Costs, at Law), 210; (Evidence), 291
 Chapman v. Chapman, 478
 — v. Esgar, 17
 — v. Gilbert, 752
 Chappell v. Rees, (Legacy), 435; (Mortgage), 489
 — v. Sheard, 350
 Chapple's case, 182
- Charing Cross Bridge Co. v. Mitchell, 401
 Charles v. Alton, 12
 Charlton v. Allen, 577
 — v. Kendall, 654
 Charwood v. Greig, 24
 Charnley v. Grundy, 107
 Chatfield v. Bercholdt, 572
 — v. Cox, 683
 Chedgrave, Overseers of, in re, 550
 Cheeseman v. Axall, 525
 Cheesman v. Exall, 696
 — v. Excell, (Bill of Sale), 109; (Pawnbroker), 525; (Trove), 696
 Cheetham, ex parte, 64*
 Chelmsford Grammar School, in re, 133
 Chelsea Waterworks Co. in re, (Jury), 373; (Lands Clauses Act), 394
 — v. Bowley, (Easement), 272; (Land Tax), 401
 Chepstow, Gloucester, and Forest of Dean Rail. Co. in re, 190
 Chester and Manchester Direct Rail Co. in re, 174
 Chester v. Rolfe, 459
 Chesterman v. Mann, (Lease), 409; (Specific Performance), 679
 Cheveley v. Fuller, 195
 Chew v. Holroyd, 339
 Chick v. Blackmore, (Assignment), 41; (Executor), 296
 Child v. Child, 710
 — v. Douglas, 355
 — v. Elsworth, 431
 Chilton v. Campbell, 355
 — v. Carrington, (Contract), 198; (Pleading, at Law), 534; (Practice, at Law), 571
 Chippendale, ex parte, 187
 — v. Lancashire and Yorkshire Rail. Co., 122
 Choyce v. Oltey, 652
 Christchurch, Dean and Chapter of, ex parte, 398
 Christie, ex parte, (Inferior Court), 343; (Insolvent), 358
 — v. Winnington, 109
 Christmas, in re, 591
 Chubb v. Salomons, (Evidence), 285; (Parliament), 503
 Church Building Society v. Barlow, 490
 Churchill v. Siggers, (Action), 11; (Malicious Prosecution), 460
 Clabburn, in re, 357
 Clack v. Holland, 708
 — v. Sainsbury, 718
 Clancy, in re, 492
 Clarendon v. St. James's, Westminster, 632
 Claridge's Patent, in re, 522
 Claringbould v. Curtis, 676
 Clark v. Browne, 432
 — v. Gill, 587
 — v. May, 729
 — v. Taylor, 754

- Clarke, *ex parte*, 178
 —, in re, (Attorney and Solicitor), 53, 58
 —'s case, 190
 —'s Trust, 484
 — v. Arden, 205
 — v. Battens, 673
 — v. Cuckfield Union, Guardians of, 542
 — v. Gant, (Churchwardens), 139; (Municipal Corporation), 495
 — v. Tipping, 573
 Clay v. Crofts, 683
 — v. Rufford, 680
 — v. Southen, (Company), 189; (Parties), 507
 Clayton v. Illingworth, 681
 Cleave v. Jones, (Evidence), 289; (Limitations), 452
 Clee, in re, 378
 Clegg, *ex parte*, 85
 — in re, 85
 Clements v. Bowes, 5*
 Cleobury v. Beckett, 758
 Clericetti, in re, 308
 Clifford v. Clifford, 558
 Clifton, *ex parte*, 190
 — v. Robinson, 355
 Clive v. Clive, 439
 Close v. Close, 613
 Clossey, in re, 406
 Clothier v. Gann, 216
 Clowes v. Beck, (Costs, in Equity), 219; (Injunction), 348
 — v. Waters, 237
 Clulee v. Bradley, 732
 Coape v. Arnold, 257
 Coard v. Holderness, 250
 Coate v. Williams, (Debtor and Creditor), 235; (Partners), 512
 Coates, in re, 86
 Cobbett v. Brock, 717
 — v. Hudson, (Barrister), 96; (Practice, at Law), 566*
 — v. Slowman, 325
 Cock v. Clark, 717
 Cockburn, *ex parte*, 178
 — v. Green, 585
 — v. Raphael, 433
 Cocke v. Cholmondeley, 263
 Cockell v. Bacon, 481
 — v. Taylor, 477
 Coe v. Lawrence, 496
 — v. Platt, 303*
 Colbourn v. Dawson, 323
 Coldwell v. Holme, 756
 Cole v. Burgess, 355
 — v. Goble, 260
 — v. Lee, 751
 — v. Miles, 300
 — v. Muddle, 300
 — v. Sims, 227
 Coleman v. Riches, 607
 Coles, in re, (Lunatic), 455; (Partners), 513
 — v. Lovell, 383
 Collard v. Sampson, 552
- Colledge v. Harty, 660
 Collett v. London and North-Western Rail. Co., 120
 — v. Morrison, 363*
 — v. Newnham, 234
 — v. Preston, (Costs, in Equity), 221; (Mortgage), 477; (Practice, in Equity), 574
 Collier, *ex parte*, (Justice of the Peace), 380; (Master and Servant), 470
 Collingridge v. Paxton, 295
 Collins, in re, 48
 — Charity and London and Birmingham Rail. Act, in re, 398
 — v. Johnson, 571
 — v. South Staffordshire Rail. Co., 392
 — v. Thomas, 504
 Collinson, in re, 699
 — v. Collinson, 699
 — v. Lister, (Executor), 297; (Practice, in Equity), 603
 Colombine v. Penhall, 734
 Colquhoun, in re, 54
 Colson's Trusts, in re, 252
 Colyer v. Finch, (Mortgage), 482, 485
 Comerall v. Hall, 590
 Commerell v. Beauchlerk, (Auction), 60; (Outlawry), 501
 Congreve v. Evetts, (Bankruptcy), 79; (Bill of Sale), 110
 — v. Palmer, (Legacy), 413, 414
 Connelly v. Connelly, 269
 Constable v. Bull, 419
 Conway, *ex parte*, 179
 Conyers, Free Grammar School, in re, 137
 Cooch v. Maltby, 215
 Cook v. Darwin, 107
 — v. Gregson, 16
 — v. Hall, 587
 Cooke, in re, (Baron and Feme), 87; (Infant), 333
 — v. Cunliffe, 554
 — v. Gillard, 53
 — v. Lamotte, 716
 — v. Wagster, 418
 Cookson v. Bingham, 254
 — v. Lee, 687
 Coombs v. Mansfield, 668
 Coomer v. Bromley, 48
 Coope v. Carter, 594
 Cooper's Trusts, 745
 — v. Cooper, 419
 — v. Dodd, 140
 — v. Grant, 735
 — v. Knox, 590
 — v. Parker, (Accord and Satisfaction), 2; (Error), 279
 — v. Pegg, 211
 — v. Stephenson, 49
 — v. Thornton, 81
 Cope, *ex parte*, 177
 — v. Albinson, 195
 Copeland, *ex parte*, 83
- Copeland, in re, 83
 — v. Child, 39
 Copley v. Smithson, 600
 Coppeard v. Mayhew, 577
 Copper Miners, Governor and Co. of, in re, 192
 — v. Fox, 472
 Copper Mining Co. v. Beach, 409
 Corbett d. Clymer v. Nicholls, 276
 Corcoran v. Gurney, 661
 Cork and Bandon Rail. Co. v. Goode, (Company), 152; (Limitations), 448*; (Practice, at Law), 564
 Corlett v. Booker, (Accord and Satisfaction), 4; (Bills and Notes), 107
 Cormack v. Copous, (Devise), 264; (Legacy), 434
 Cornes v. Taylor, 107
 Cornish v. Hocking, 23
 Cornthwaite v. Frith, 700
 Corsar v. Reed, (Error), 280; (Practice, at Law), 567
 Cort v. Ambergate, Nottingham, &c. Junction Rail. Co., 227
 — v. Ambergate Rail. Co., 230
 Cossar v. Reed, 280
 Cottee v. Richardson, 408
 Cotterell v. Jones, (Action), 11; (Damages), 230
 Cotton v. Clark, 299
 — v. Cotton, 425
 — v. Scudamore, 725
 Cottrell v. Hughes, 275
 Couch v. Steel, (Action), 11; (Shipping), 667
 Coulthurst v. Carter, 742
 Courtenay v. Earle, 15
 Courtier v. Oram, 434
 Courtivron v. Meunier, 83
 Courtois' Trust, in re, 597
 Courty v. Vincent, 7
 Cousins v. Vasey, 582*
 Couturier v. Hastie, (Statute of Frauds), 314; (Principal and Agent), 608; (Shipping), 664
 Covas v. Bingham, 664
 Coventry, Justices of, in re, 390
 Coward v. Hughes, 105
 Cowburn v. Wearing, 23
 Cowgill, in re, 79
 Cowley v. Watts, 722
 Cowman v. Harrison, 421
 Cowpe v. Bakewell, 730
 Cox v. Cox, (Copyright), 206; (Vendor and Purchaser), 729
 — v. Dolman, 446
 — v. Middleton, 679
 — v. Taylor, 603
 — v. Toole, 479
 Coyle v. Alleyne, (Practice, in Equity), 578, 595
 Cozens v. Graham, 52
 Crabbe v. Moxhay, 600
 Cradock v. Owen, (Practice, in Equity), 591; (Will), 752

- Crafton v. Frith, 490
 Craig, ex parte, 601
 Crake v. Powell, 213
 Cramer v. Cramer, 713
 — v. Moore, 652
 Crauford v. Cox, 23
 Crawford's Trust, in re, 415
 Crawford v. Cocks, (Amendment), 23; (Partners), 515
 Crawshaw v. York and North Midland Rail. Co., 33
 Creasor v. Robinson, 510
 Creech St. Michael, Vicar of, ex parte, 400
 Creed, in re, 606
 — v. Fisher, 374
 Creswick v. Gaskell, 749
 — v. Harrison, 37
 Croft v. Lumley, 275
 Crofts v. Beale, 104
 — v. Middleton, (Practice, in Equity), 586, 589
 Croly v. Weld, 436
 Crook v. Crook, 586
 Cropper, ex parte, 177
 — v. Mellersh, 510
 Cross, in re, 73
 — v. Beavan, 333
 — v. Brown, 333
 — v. Cheshire, (Affidavit), 18; (Money paid), 475; (Partners), 517
 — v. Jordan, (Landlord and Tenant), 383; (Lease), 408
 — v. Seaman, 212
 — v. Thomas, 579
 Crosse v. General Reversionary and Investment Co., 681
 — v. Keene, 721
 — v. Lawrence, 721
 Crossfield, ex parte, (Company; Winding up), 181, 190, 191
 — v. Such, (Detinue), 244*; (Executor), 301
 Crossley v. Crowther, 50
 Crosthwaite, in re, (Bankruptcy), 72, 86
 — v. Gardner, 301
 Crouch v. Great Northern Rail. Co., 622
 — v. Hooper, 289
 — v. London and North-Western Rail. Co. (Carrier beyond the realm), 119; (Carrier; Duty of), 121; (Carrier; Charges), 125
 Crow v. Wood, 598
 Crowe v. Crisford, 749
 Crowhurst v. Laverack, 196
 Crowley v. Vitty, 388
 Crowther v. Crowther, 209
 — v. Farrer, 2
 Croxton's case, (Company; Winding-up), 177, 183
 Cubitt v. Blake, 200
 — v. Thompson, 111
 Cuckfield Burial Board, in re, 390
 Cumberland v. Glamis, 387
 Cumens v. Elderton, 465
 Cumming, in re, (Lunatic), 458*, 459
 Cunliffe v. Harrison, 316
 — v. Whalley, 353
 Curson v. Belworthy, 313
 Curties, ex parte, 84
 —, in re, 84
 Curtois' Will, Trusts of, in re, (Trust and Trustee), 711; (Will), 74*
 Cust v. Goring, 417
 — v. Southee, 538
 Custance v. Cunningham, (Injunction), 349, 355
 Cuthbert v. Cumming, (Evidence), 289; (Shipping), 659
 Cuthbertson v. Parsons, 468
 Cutler's Trust, in re, 89
 Cutts v. Salmon, 679
 — v. Surridge, 564
 Dakins, ex parte, 325
 — v. Dakins, 39
 Dalby v. India and London Life Ins. Co., 361
 Dale, ex parte, 188
 — v. Hamilton, 595
 — v. Hayes, 604
 Dalglish v. Jarvie, (Copyright), 208; (Injunction), 355
 D'Almaine v. Moseley, (Baron and Feme), 87; (Will), 744
 Dalton's Settlement, 649
 — v. Midland Counties Rail. Co., 94
 Daniel's Trust, 92
 — v. Charsley, (Inferior Court), 345, 346; (Limitations), 466
 — v. Davies, 262
 — v. Gossett, 426
 — v. Morton, 141
 — v. Wilkin, (Costs, at Law), 217; (Evidence), 286
 Danks, ex parte, 67
 Danson v. Le Capelain, (Attachment), 44; (Practice, at Law), 562
 Darby v. Baines, 666
 — v. Darby, (Legacy), 410; (Parties), 509
 Darkin v. Darkin, 93
 Darley v. Martin, 744
 Darlington v. Hamilton, 679
 Darwin v. Darwin, 604
 Davenport's Charity, in re, 129
 — Trust, in re, 413
 — v. Davenport, 596
 — v. Stafford, (Executor), 299*, 301
 Davey v. Miller, 714
 Davidson, ex parte, 208
 Davies, ex parte, 260
 —, in re, (Lunatic), 455; (Trust and Trustee), 712
 — v. Davies, (Lunatic), 455; (Parties), 511; (Practice, in Equity), 577
 — v. Evans, 757
 Davies v. South Staffordshire Rail. Co., 392
 — v. Swansea, Mayor, &c. of, 762
 — v. Williams, (Common), 145; (Easement), 272
 Davis v. Amer, 516
 — v. Barrett, (Merger), 470; (Practice, in Equity), 588
 — v. Browne, 597
 — v. Cary, 111
 — v. Dysart, Earl of, 690
 — v. Edwards, 452
 — v. Fletcher, 344
 — v. Potter, 37
 — v. Swansea, Mayor, &c. of, 14
 — v. Walton, 339
 Davison, in re, 713
 — v. Farmer, (Bankers), 62; (Bankruptcy), 68*; (Isle of Man), 367
 — v. Mason, 578
 Davell v. Roper, 511
 Dawson, in re, (Bankruptcy), 71; (Infant), 333
 — v. Bourne, 749
 — v. Brickman, 724
 — v. Collis, 531
 — v. Jay, (Infant), 333, 335
 — v. Lawes, 612
 Day v. Carr, 44
 — v. Croft, (Practice, in Equity), 581, 594, 598
 — v. Crofts, 589
 — v. Day, (Legacy), 425; (Will), 754
 Deacon v. Colquhoun, 441
 — v. Gridley, 43
 Dean v. Allen, (Executor), 296, 302
 — v. Hornby, 662
 Dearden, in re, (Attorney; Change of Name), 46; (Attorney's Bill), 56
 Death, ex parte, (Barrister), 96; (Prohibition), 618
 Deaville v. Deaville, 588
 De Balinhard v. Bullock, 591
 De Beauvoir v. De Beauvoir, 411
 De Bernardy v. Harding, (Assumpsit), 42; (Practice, at Law), 567
 De Bode v. Regina, 201
 Deeks v. Stanhope, (Company), 176; (Practice, in Equity), 592
 Deere v. Kirkhouse, 37
 De Haber v. Portugal, Queen of, (Attachment), 44; (Prohibition), 618
 De la Beche v. St. James's, Westminster, 630
 Delarue v. Church, (Annuity), 26; (Presumption), 606
 Delay v. Alcock, 283
 Deller v. Prickett, 366
 De Medina v. Owen, 287
 Dendy v. Henderson, 197
 Denison, Archdeacon of Taunton, ex parte, 140

- Dennison's Trust, in re, 714
 Densem v. Elworthy, 508
 Dent v. Basham, 9
 De Porquet v. Page, 683
 Derbyshire v. Home, 702
 Derbyshire and Staffordshire, &c.
 Rail. Co. v. Bainbrigge, 372
 Derecourt v. Corbishley, 305
 De Rothschild v. Royal Mail Steam
 Packet Co., 657
 — v. Shilston, 731
 Derry v. Toll, 718
 Desborough v. Harris, 367
 — v. D'Urban, 191
 Devanoge v. Borthwick, 374
 Devaynes v. Robinson, 290
 Devereux v. Kilkenny, &c. Rail.
 Co., 191
 Devey v. Thornton, 221
 De Visme v. De Visme, 730
 Devonshire, Duke of, v. Elgin,
 737
 Dew v. Clark, 605
 Dewell v. Tuffnell, 595
 Dewhurst v. Clarkson, 317
 De Windt v. De Windt, 135
 Dewley v. Great Northern Rail.
 Co., 210
 Dews v. Ryley, (Inferior Court),
 343; (Pleading, at Law), 532
 Dibble v. Bowater, 267
 Dickens v. Unthank, 88
 Dickenson v. Grand Junction
 Canal Co., 349
 Dickin v. Ward, 287
 Dickinson v. Grand Junction Canal
 Co., 737
 Dickson, in re, 429
 Dimes v. Grand Junction Canal
 Co., (Copyhold), 205;
 (Interested Judge), 367;
 (Practice, in Equity), 603
 — v. Steinberg, 349
 Dimsdale, ex parte, 85
 Dinn v. Grant, 724
 Diplock v. Hammond, (Interpleader),
 367; (Stamp), 686
 Dipple v. Corles, 699
 Direct Birmingham, Oxford, Reading
 and Brighton Rail. Co., in re, ex
 parte Sichel, 178; ex parte
 Capper, 182; Onion's case, 183;
 ex parte Upfill, 185; ex parte
 Hunter, 188; ex parte Best, 190;
 Bright's case, 187; ex parte Wal-
 stab, 183
 Direct Exeter, Plymouth and De-
 vonport Rail. Co., in re, ex parte
 Woolmer, 175; ex parte Besley,
 178; ex parte Tanner, 179; ex
 parte Besley, 189; ex parte Wool-
 mer, 189; ex parte D'Urban, 191
 Direct Shrewsbury and Leicester
 Rail. Co., in re, 179
 Direct West-End and Croydon
 Rail. Co., in re, 178
 Dismore, in re, 519
 Dix v. Burford, 706
 Dixon v. Gayfere, (Conversion),
 202; (Limitations), 447
 — v. Peacock, 690
 — v. Wilkinson, 700
 Dobson v. Brocklebank, 369
 — v. Laud, (Mortgage), 481, 485
 Dodd v. Dodd, 298
 — v. Wake, 92
 Dodgson's Trust, 427
 — v. Bell, 62
 Dodsworth's Trust, in re, 455
 Doe d. Agar v. Brown, 389
 — d. Armistead v. North Staf-
 fordshire Rail. Co. (Eject-
 ment), 274; (Lands
 Clauses Act), 390, 397
 — d. Ashburton v. Michael, (Evi-
 dence), 285; (Jury), 374
 — d. Avery v. Langford, 616
 — d. Baddeley v. Massey, (Lease),
 406; (Limitations), 445
 — d. Beech v. Nall, 553
 — d. Biddulph v. Hole, 559
 — d. Blakiston v. Haslewood, 248
 — d. Braby v. Roe, 276
 — d. Butt v. Rous, 715
 — d. Campton v. Carpenter, 250
 — d. Child v. Roe, 616
 — d. — v. Willis, (Charity),
 132, 134
 — d. Cornwall v. Matthews, 383
 — d. Croft v. Tidbury, 146
 — d. Davies v. Davies, 246
 — d. — v. Thomas, 382
 — d. Dixie v. Davies, (Eject-
 ment), 275; (Mortgage),
 479
 — d. Evers v. Challis, 260
 — d. — v. Ward, 758
 — d. Foucan v. Roe, 276
 — d. France v. Andrews, 232
 — d. Guest v. Bennett, 251
 — d. Hellyer v. King, 275
 — d. Hopkinson v. Ferrant, 559
 — d. Hubbard v. Hubbard, 250
 — d. Hudson v. Leeds and Brad-
 ford Rail. Co. (Ejectment),
 275; (Lands Clauses Act),
 397
 — d. — v. Roe, 276
 — d. Hyde v. Manchester, Mayor,
 &c. of, 394
 — d. Johnson v. Johnson, 255
 — d. Jones v. Hughes, (Devise),
 261; (Executor), 297
 — d. Kimber v. Cafe, 253
 — d. King v. Grafton, (Landlord
 and Tenant), 382, 383
 — d. Lansdell v. Gower, 445
 — d. Lees v. Ford, 89
 — d. Leigh v. Holt, (Ejectment),
 276; (Judgment), 368
 — d. Lloyd v. Davies, 359
 — d. Mays v. Cannell, 35
 — d. Mence v. Hadley, 218
 — d. Morrison v. Glover, 318
 — d. Nanny v. Gore, 330
 — d. Newman v. Rusham, 240
 Doe d. Padwick v. Wittcomb, 285
 — d. Palmer v. Eyre, 445
 — d. Panton v. Roe, 276
 — d. Patrick v. Beaufort, 117
 — d. Pottow v. Fricker, (Baron
 and Feme), 88; (Deed),
 241; (Devise), 255
 — d. Prior v. Ongley, 407
 — d. Richards v. Lewis, (Deed),
 238, 239; (Evidence), 288
 — d. Robertson v. Gardener,
 (Deed), 241; (Estoppel),
 382
 — d. Roberts v. Mostyn, 330
 — d. Saxton v. Turner, 276
 — d. Shallcross v. Palmer, 757
 — d. Smith v. Roe, 276
 — d. Starling v. Prince, 240
 — d. Tatham v. Cattamore, 240
 — d. Whittington v. Hards, 276
 — d. Whitty v. Carr, 567
 — d. Wilton v. Beck, 22
 Dolland v. Johnson, 16
 Dolling v. White, 78
 Domville's Trusts, in re, 430
 Donald v. Bather, 509
 Donaldson v. Donaldson, 734
 Doody v. Higgins, 509
 Dormer v. Philipps, 412
 Dornford, ex parte, 83
 Dorrett v. Meux, 285
 Dorsett v. Aspdin, 565
 Douglas v. Andrews, 417
 — v. Douglas, 746
 — v. Fellows, 756
 Douthwaite v. Spensley, 596
 Dover and Deal Rail. Co., in re,
 (Company; Winding-up), 180,
 185
 Dover, Deal and Cinque Ports
 Rail. Co., in re, (Company;
 Winding-up), 187, 188, 190
 Dover, Hastings and Brighton
 Junction Rail. Co., in re (Com-
 pany; Winding-up), 186, 190
 Dover, Warden, &c. of Harbour of,
 v. South-Eastern Rail. Co., 623
 Dowdell v. Royal Australian Steam
 Nav. Co., 218
 Dowling v. Hudson, (Practice, in
 Equity), 599; (Vendor and Pur-
 chaser), 729
 Down v. Pinto, 466
 Downing v. Picker, 598
 Doyle v. Lawrence, 211
 Drake v. West, 352
 — v. Whitmore, 262
 Drakeley's Estate, in re, 750
 Drayson v. Andrews, 567
 Drew v. Collins, 81
 — v. Long, 87
 — v. Woolcock, (Arbitrations),
 37; (Practice, at Law), 570
 Dring v. Greetham, 453
 Driscoll v. Whalley, 369
 Driver v. Burton, (Money paid),
 475; (Parties), 507
 Drosier v. Brereton, 701

- Drummond v. Tillinghist, 215
 Drysdale v. Mace, (Practice, in Equity), 583; (Vendor and Purchaser), 722
 Duberly v. Day, (Baron and Feme), 90; (Mortgage), 487
 Dublin and Wicklow Rail. Co. v. Black, 161
 Dufaur, ex parte, 65
 —, in re, 47
 — v. Sigel, 46
 Duffield v. Sturges, 581
 Dugdale v. Regina, 474
 Du Hourmelin v. Sheldon, 757
 Dunboyne v. Brander, 431
 Duncan v. Cannan, (Conflict of Laws), 193; (Marriage), 465
 — v. Tindal, 669
 — v. Watts, 431
 Dundee Harbour Trustees v. Dougall, 445
 Dunkley v. Dunkley, (Baron and Feme), 91, 92
 Dunn v. Barnas, 492
 — v. Cox, 537
 — v. Dunn, 600
 — v. West, 37
 Dunne v. Dunne, 752
 D'Urban, ex parte, 191
 Durnford v. Wood, 297
 Durrant v. Friend, (Legacy), 416, 417
 Dwyer v. Collins, 288
 Dyce v. Hay, 230
 Dyke v. Rendall, 271
 Dyne v. Costobadie, 555
 — v. Nutley, 407
 Dyson v. Hornby, 730

 Eaden v. Cooper, 505
 — v. Roberts, 563
 Eads v. Williams, 679
 Earle, ex parte, 46
 — v. Ferris, 96
 Early v. Middleton, 429
 East v. Twyford, (Devise), 240, 257; (Will), 748
 East and West India Docks and Birmingham Junction Rail. Co. v. Gattke, 395
 East Anglian Rail. Co. v. Eastern Counties Rail. Co., 154
 — v. Lythgoe, 344
 East Dereham, Vicar of, ex parte, 397
 Eastern Archipelago Co. v. Regina, 148
 Eastern Counties and Southend Junction Rail. Co., in re, (Company; Winding-up), 179, 190
 Eastern Counties Rail. Co. v. Broom, (Company), 159; (Trespass), 694
 — v. Hawkes, 167
 — v. Philipson, 226
 Eastern Union Rail. Co. v. Cochran, 113
 Eastern Union Rail. Co. v. Eastern Counties Rail. Co., 31
 — v. Hart, (Company), 169; (Debentures), 233
 Eastham v. Blackburn Rail. Co., 391
 East Lancashire Rail. Co. v. Lancashire and Yorkshire Rail. Co., 163
 East Lincolnshire Rail. Act, in re, 399
 East of England Banking Co., ex parte, 176
 Eaton v. Swansea Waterworks Co., (Easement), 272, 273, 284
 Eavestaff v. Austin, (Legacy), 431; (Will), 758
 Eccles v. Birkett, 418
 — v. Cheyne, 577
 Ecclesall Bierlow, Overseers of Poor of, ex parte, 135
 Ecclesiastical Commissioners v. London and North-Western Rail. Co., 204
 Eckersley, ex parte, 72
 Eclipse Mutual Benefit Association, in re, 321*
 Eddleston v. Collins, 477
 Eden v. Wilson, 248
 Edge v. Hillary, 566
 Edgell v. Burnaby, 117
 Edgington's Trusts, in re, 652
 Edie v. Kingsford, (Evidence), 289; (Executor), 301
 Edlesten v. Vick, 550
 Edleston, ex parte, 717
 — v. Collins, 203
 Edmond, in re, 172
 Edmonds v. Goater, 450
 — v. Millett, 261
 — v. Watermen and Lightermen, Co. of, 738
 Edmondson, in re, (Justice of the Peace), 379; (Lands Clauses Act), 390
 Edward v. Trevellick, 667
 Edwards v. Batley, 573
 — v. Burt, 721
 — v. Cameron's Coalbrook Steam Coal, and Swansea, and Loughor Rail. Co., 101
 — v. Champion, 204
 — v. Davies, 35
 — v. Edwards, (Legacy), 424; (Practice, in Equity), 575, 596
 — v. Great Western Rail. Co., (Carrier), 125; (Costs, at Law), 216, 217; (Interest), 365
 — v. Griffith, 276
 — v. Hall, (Mortmain), 491; (Practice, in Equity), 581
 — v. Havell, 667
 — v. Hodges, (Justice of the Peace), 376; (Pleading, at Law), 532
 — v. Jones, 451
 Edwards v. Lowndes, 619
 — v. Martyn, (Affidavit), 19; (Baron and Feme), 88
 — v. Regina, 303
 — v. Tuck, 691
 Egerton v. Brownlow, (Devise), 246; (Parliament), 503
 Eggington, ex parte, (Execution), 295; (Habeas Corpus), 325
 — v. Lichfield, Mayor, &c. of, 381
 Egremont v. Egremont, 600
 Eld v. Vero, 38
 Electric Telegraph Co. v. Brett, (Patent), 519, 520
 — v. Salford, 631
 Elias, in re, 455
 Ellaby v. Moore, 568
 Ellcock v. Mapp, 253
 Ellen v. Topp, 27
 Ellershaw v. Magniac, 645
 Elliot v. Clayton, 75
 Elliott v. Bishop, (Costs, at Law), 210; (Lease), 407; (Practice, at Law), 568*
 Ellis v. Bowman, 593
 — v. Lafone, 661
 — v. Maxwell, 595
 — v. Regina, (Extent), 303; (Power), 550
 — v. Sheffield Gas Consumers' Co., 468
 Ellison v. Ackroyd, 38
 Elliston v. Berryman, 331
 Elsam v. Denny, 104
 Elstob v. Wright, 14
 Elston v. Elston, 590
 Elt v. St. Mary's, Islington, Burial Board of, 732
 Elvy v. Norwood, 485
 Ely v. Moule, (Inferior Court), 343, 344
 Ely, Dean of, v. Bliss, 694
 — v. Edwards, (Practice, in Equity), 592, 603
 — v. Gayford, 603
 Embden v. Dewy, 368
 Embrey v. Owen, 736
 Emery, ex parte, 69
 — in re, 191*
 — v. Binns, 211
 — v. Webster, (Amendment), 22; (Practice, at Law), 570
 Emmet v. Dewhirst, 679
 — v. Tottenham, 102
 Empson v. Bowley, 585
 English v. Hayman, 592
 Enthoven v. Cobb, 585
 — v. Hoyle, (Bills and Notes), 99; (Debentures), 232
 Entwistle, in re, 87
 Erskine's Trust, in re, 91
 Espey v. Lake, 716
 Esposito v. Bowden, 658
 Essex, Justices of, ex parte, 603
 — v. Essex, 513
 Este v. Smyth, 193

- Eton College, *ex parte*, 399
 Evans, *ex parte*, 70
 — v. Coventry, 599*
 — v. Edmonds, 94
 — v. Erle, 111
 — v. Evans, (Power), 556;
 (Practice, in Equity), 581
 — v. Evans, 650
 — v. Jones, 265
 — v. Lancashire and Yorkshire
 Rail. Co., 392
 — v. Prothero, 284*
 — v. Robinson, 568
 — v. Saunders, 556
 — v. Simon, 450
 Evatt v. Hunt, 25
 Everall v. Browne, 417
 Everard, *in re*, 79
 — v. Watson, 106
 Everett v. Belding, 598
 Ewart v. Ewart, 654
 — v. Williams, 286
 Ewington v. Fenn, 577*
 Eyre, *ex parte*, 82

 Fagg v. Mudd, (Account stated),
 7; (Pleading, at Law), 531
 — v. Nudd, (Account stated), 7;
 (Pleading, at Law), 531
 Fairclough v. Pavia, 102
 Fairhurst v. Liverpool Adelphi
 Loan Association, 88
 Fairlie v. Danks, 12
 Falkner v. Grace, (Legacy), 422, 430
 Falmouth, Helston, and Penzance
 Rail. Co., *in re*, 178
 Farebrother v. Welchman, 354
 Farina v. Silverlock, 350
 Farley, *in re*, 67
 — v. Danks, (Action), 12;
 (Malicious Prosecution), 461
 Farrance v. Viley, 333
 Farrant, *in re*, 209
 —'s Trust, 713
 Farrar v. Barraclough, 710
 Farrer v. Barker, 423
 Farthing v. Castles, (Judgment),
 369; (Practice, at Law), 569
 Faversham, Mayor, &c. of, v. Ryder,
 491
 Faviell v. Gaskoin, 386
 Fawcett's Patent, 519
 — v. York and North Midland
 Rail. Co., 156
 Fearon v. Desbrisay, (Power), 554;
 (Practice, in Equity), 590
 Feddon v. Sawyers, 505
 Fell v. Goslin, (Guarantee), 323;
 (Parties), 507
 — v. Jones, 597
 Feltham's Trusts, *in re*, 412
 Fenn, *ex parte*, 183
 — v. Bittleston, 77
 — v. Edmonds, 367
 Fenton v. Clegg, 432
 Feret v. Hill, (Ejectment), 274;
 (Lease), 405
 Fernley v. Branson, 31

 Ferris v. Mullins, 479
 Feversham v. Emerson, 282
 Few v. Guppy, (Evidence), 290;
 (Practice, in Equity), 572, 584
 Ffooks v. South-Western Rail. Co.,
 626
 Field's Mortgage, 251
 —'s Trust, *in re*, 711
 —, *re*, 58
 — v. Brown, 335
 — v. Moore, (Baron and Feme),
 91; (Infant), 334
 — v. Partridge, (Costs, at Law),
 215; (Execution), 295
 — v. Titmuss, 589
 Figg v. Wilkinson, 345*
 Finch, *in re*, 57
 — v. Hollingsworth, 551
 — v. Shaw, (Mortgage), 482, 485
 Finlay v. Bristol and Exeter Rail.
 Co., (Company), 160; (Use and
 Occupation), 717
 Fiott v. Mullins, 583
 Fisher, *re*, 57
 — v. Baldwin, 356
 — v. Bell, 81
 — v. Bridges, (Error), 280;
 (Lottery), 454; (Practice,
 at Law), 565
 — v. Hepburn, 435
 — v. Ronalds, 760
 Fishmongers' Co. v. Dimsdale, 683
 Fitzgerald v. Bult, 355
 Fitzhenry v. Bonner, 410
 Fitzwilliams v. Kelly, 408
 Flack's Trust, 597
 — v. Downing College, Master,
 Fellows, &c. of, 203
 Flamant, *ex parte*, 399
 Flavell v. Harrison, 352
 Fleet, *ex parte*, 72
 Fleming v. Buchanan, 16
 — v. East, 586
 — v. Self, 320
 Fletcher, *ex parte*, 705
 — v. Inglis, 661
 — v. Rogers, 591
 Flint v. Woodin, 721
 Flood, *ex parte*, 85
 Flory v. Denny, 476
 Flowers v. Welch, 566
 Fluker, *in re*, 56
 — v. Gordon, 447
 — v. Taylor, 353
 Foley v. Smith, (Attorney and Soli-
 citor), 53; (Practice, in Equity),
 596
 Foligno v. Martin, (Contract), 195;
 (Stamp), 682
 Follett v. Jefferyes, 290
 Footner v. Cooper, 255
 — v. Sturgis, 372
 Forbes v. Forbes, (Charity), 131,
 136; (Domicil), 270;
 (Practice, in Equity), 585,
 587
 — v. Limond, 236
 — v. Smith, 562

 Ford, *ex parte*, 54
 —, *in re*, 85
 —'s Charity, 129
 — v. Batley, 411
 — v. Chesterfield, (Mortgage),
 485, 486
 — v. Dolphin, 584
 — v. Graham, 324
 — v. Rackham, 487
 — v. Smedley, 504
 — v. Stuart, 732
 — v. White, 479
 Fordham v. Wallis, 450
 Forman v. Wright, 104
 Forquet v. Moore, (Statute of
 Frauds), 314; (Landlord and
 Tenant), 383
 Forshaw v. Higginson, 704
 Forster v. Menzies, 578
 — v. Oxford, Worcester, and
 Wolverhampton Rail. Co., 166
 Forsyth v. Bristowe, (Amendment),
 21; (Deed), 242; (Limita-
 tions), 453; (Practice,
 at Law), 565
 — v. Ellice, 587
 Foster, *in re*, 601
 — v. Cautley, (Power), 551;
 (Practice, in Equity), 600
 — v. Crabb, (Detinue), 244;
 (Pleading, at Law), 533
 — v. Dawber, (Bills and Notes),
 103; (Limitations), 452
 — v. Handley, 16
 — v. Hayes, 259
 — v. McKenzie, 591
 — v. Mentor Life Assurance Co.,
 362
 Fowke, *re*, 73
 Fowler v. Bayldon, 604
 — v. Reynal, 700
 Fowles v. Great Western Rail. Co.,
 121
 Foxhall v. Barnett, 303
 Fozard's Trust, *in re*, 711
 Frail v. Ellis, 727
 Francis v. Brocking, 92
 — v. Clemow, 421
 — v. Francis, (Attorney and So-
 licitor), 59; (Executor), 302
 Frank v. Edwards, 112
 Fraser v. Hill, 525
 — v. Fothergill, (Inferior Court),
 341, 345
 Fream v. Dowling, 262
 Freegard v. Barnes, 15, 540
 Freeland v. Stansfield, 515
 Freeman v. Freeman, 757
 — v. Lomas, 647
 — v. Tranah, 1
 — v. Tranch, (Abatement), 1;
 (Judgment), 369
 Freer v. Hesse, (Vendor and Pur-
 chaser), 725, 731
 Freeston v. Claydon, 575
 Fremlin v. Hamilton, 42
 Friar v. Grey, (Covenant), 226;
 (Landlord and Tenant), 387

- Fripp v. Bridgewater and Taunton Canal and Rail Co., 624
 — v. Chard Rail. Co., 624
 Frith, ex parte, 713
 — v. Wollaston, 9
 Fromant v. Ashley, (Practice, at Law), 561, 563
 Frost's Trust, in re, 713
 — v. Beavan, 676
 — v. Hilton, 575
 — v. Oliver, 666
 Fruer v. Bouquet, 435
 Fry v. Capper, 553
 — v. Noble, 272
 — v. Whittle, 214
 Fryer v. Roe, 6
 — v. Sturt, 218
 Fuller, in re, v. Mackay, 340
 Fullerton v. Martin, (Devise), 250; (Practice, in Equity), 592
 Fullford v. Fullford, 413
 Fussell v. Daniel, 718
 Fussell v. Gordon, 563
 Fynney v. Beasley, 761

 Gabb v. Prendergast, 650
 Gabriel v. Dresser, 3
 — v. Smith, 720
 Gadsden v. Barrow, 366
 Gage v. Newmarket Rail. Co., (Company), 157; (Lands Clauses Act), 389
 Gale v. Gale, 269
 Gallemore v. Gill, 421
 Galloway v. Keyworth, (Arbitration), 38; (Costs, at Law), 218
 Galloway v. Marshall, 675
 Galsworthy v. Norman, 616
 Galvanized Iron Co. v. Westoby, 151
 Gambier v. Lydford, 630
 Gann v. Gregory, (Will), 757, 758
 Gapp v. Robinson, 23
 Garbell v. Davison, 414
 Garby v. Harris, 210
 Garden v. Ingram, 480
 Gardner v. Garrett, 17
 — v. Perry, 654
 — v. Walsh, 100
 Garlick v. Lawson, 591
 Garner v. Moore, 298
 Gascoyne, in re, 333
 Gauntlett v. Carter, 250
 Gavin v. Allan, 369
 Gay, ex parte, 188
 Gayford v. Nicholls, 469
 Gedy, in re, (Attorney and Solicitor), 52, 53, 55, 56
 Gee v. Manchester, Mayor, &c. of, 255
 Geils v. Geils, (Divorce), 268; (Parliament), 503
 General Lying-in Hospital v. Knight, 411
 General Steam Navigation Co. v. Morrison, 673
 Gent v. Harris, 91
 George v. Somers, (Inferior Court), 343; (Insolvent), 358
 — v. Summers, 358
 Geralopulo v. Wieler, 106
 Gerhard v. Bates, (Assumpsit), 42; (Evidence), 283; (Fraud), 311
 German Mining Co., in re, (Company), 177, 187*; (Mine), 473; (Partners), 512
 Gerrard v. Butler, 557
 Geswood, in re, (Justice of the Peace), 380; (Master and Servant), 469
 Gether v. Capper, 671
 Gibbon v. Gibbon, (Devise), 252; (Money had), 476
 Gibbs v. Fremont, (Bills and Notes), 107; (Contract), 197; (Interest), 366
 — v. Flight, 295
 Gibson, in re, 84
 — v. Bradford, 668
 — v. Gibson, 271
 — v. Goldsmid, 677
 — v. May, 444
 — v. Seagrim, 481
 — v. Sturge, 672
 — v. Woollard, 596
 Giles v. Jones, 731
 Gill v. Rayner, 574
 Gillies v. Longlands, 201
 Gilpin v. Fowler, 442
 — v. Magee, 577
 Ginder's Settlement, in re, 704
 Girdlestone v. Creed, (Charity), 132; (Will), 752
 — v. Lavender, 487
 Gittins v. Symes, 524
 Glass v. Richardson, 203
 Gleadow v. Hull Glass Co., 188
 Glen v. Lewis, (Insurance), 364; (Judgment), 368; (Practice, at Law), 564
 Gloucester, Aberystwith and Central Wales Rail. Co., in re, 171
 Gloucester Charities, in re, 135
 Glover v. Dixon, 533
 — v. North Staffordshire Rail. Co., 395
 Glyn, ex parte, 73
 — v. Caulfield, 585
 Glynne v. Roberts, 211
 Goatley v. Emmart, 215
 Goddard v. Lethbridge, 719
 — v. Parr, 294
 Godson v. Turner, 726
 Golder v. Golder, 589
 Goldham v. Edwards, 674
 Golding v. Caudwell, 126
 Goldney v. Crabb, 258
 Golds v. Greenfield, 432
 Goldsmid's case, 185
 Goldsmith v. Stonehewer, 510
 Gompertz v. Bartlett, 108
 Gooch v. Gooch, 264
 Goodale v. Gawthorn, (Practice, in Equity), 588; (Rents), 642
 Goodall v. Little, 615
 Goodall v. Skerratt, (Limitations), 447; (Practice, in Equity), 592
 Gooday v. Colchester, &c. Rail. Co., 624
 Goode v. Waters, 693
 — v. West, 577
 Goodfellow v. Goodfellow, 750
 Gooding v. Read, 265
 Goodlad v. Burnett, 753
 Goodliffe v. Neaves, 562
 Goodman v. Drury, 424
 Goodwin v. Cremer, (Accord and Satisfaction), 2; (Bills and Notes), 103
 — v. Fielding, 677
 — v. Lee, 747
 Gould v. White, 727
 Gordon v. Dalzell, 54
 — v. Jesson, 592
 Gore v. Baker, 34
 — v. Bowser, (Evidence), 290; (Judgment), 372
 — v. Harris, (Evidence), 290; (Parties), 509
 Gorringe v. Terrewest, 562
 Gosling v. Gosling, 91
 — v. Townshend, 430
 Gosset's Settlement, in re, (Power), 557; (Settlement), 651
 Gott v. Gandy, 384
 Gottlieb v. Cranch, 363
 Gough v. Findon, 7
 — v. Offley, 584
 — v. Tindon, (Account stated), 7; (Executor), 298
 Gould v. Robertson, 237
 — v. Webb, 10
 Gouthwaite, ex parte, 181
 Governesses' Benevolent Institution v. Rusbridger, (Costs, in Equity), 222; (Trust and Trustee), 711
 Graeme v. Wroughton, 196
 Graham, ex parte, 103
 — v. Ackroyd, 236
 — v. Birkenhead, Lancashire and Cheshire Junc. Rail. Co., 623
 — v. Chapman, 65
 — v. Furber, (Bankruptcy), 66, 75
 — v. Graham, (Trust and Trustee), 704; (Will), 744
 — v. Van Diemen's Land Co., 74
 Grand Trunk or Stafford and Peterborough Union Rail. Co. v. Brodie, (Company), 167, 175
 — v. Sturgis, (Company), 167, 175
 Grange v. Trickett, 358
 Grant, ex parte, 79
 —, in re, 79
 — v. Norway, 666
 — v. Wimbolt, 436
 Grantham Canal Co. v. Ambergate, Nottingham and Boston and Eastern Junction Rail. Co., 157

- Gravatt v. Attwood, 216
 Graves v. Legg, 665
 Gray, in re, 18
 — v. Gray, 698
 — v. Haig, (Evidence), 293, 294;
 (Practice, in Equity), 593;
 (Principal and Agent),
 608
 — v. Haigh, 5
 — v. Knight, 374
 Great Northern Rail. Co. v. Eastern
 Counties Rail. Co., 623
 — v. Harrison, (Carrier), 119;
 (Company), 161
 — v. Hawcroft, 119
 — v. Lancashire and Yorkshire
 Rail. Co., 349
 — v. Manchester, Sheffield and
 Lincolnshire Rail. Co.,
 164
 — v. Morville, 122
 — v. Shepherd, 120
 — v. South Yorkshire Rail. and
 River Dun Co., 164
 Great North of England Rail. Co.,
 in re, 179
 Great Western Extension Atmo-
 spheric Rail. Co., in re, (Com-
 pany), 176, 178
 Great Western Rail. Co. v. Good-
 man, 120
 — v. Oxford, Worcester and
 Wolverhampton Rail.
 Co., 354
 — v. Regina, 156
 — v. Rushout, 152
 Greatrex v. Hayward, 737
 Greaves v. Humphreys, 21
 Green, ex parte, 189
 — v. Barrow, 427
 — v. Dunn, 265
 — v. Marsden, 421
 Greenaway v. Hart, (Ejectment),
 275; (Landlord and Tenant),
 388; (Power), 559
 Greenshields, ex parte, 182
 Greenslade v. Dare, (Injunction),
 349; (Vendor and Purchaser), 728
 Greenway v. Bromfield, 446
 Greenwich Hospital Improvement
 Act, in re, 250
 Greenwood, ex parte, 170
 —, in re, 458
 — v. Churchill, 591
 — v. Roberts, 433
 — v. Sutcliffe, 248
 — v. Sutherland, 591
 — v. Verdon, 260
 Gregory v. Cotterell, 696
 — v. Smith, 415
 — v. Wilson, 679
 Greisley v. Chesterfield, 262
 Grey v. Friar, 226
 Grice v. Funnell, 434
 — v. Shaw, 470
 Griesbach v. Fremantle, 749
 Grieves v. Rawley, 590
 Griffenhoofe v. Daubuz, 693
 Griffin v. Clowes, 481
 Griffith v. Selby, 564
 — v. Van Heythuysen, 510
 Griffiths, ex parte, 67
 — v. Hatchard, 722
 — v. Teetgen, 645
 Grimes, ex parte, 97
 Grinham v. Card, 320
 Grissell v. Peto, 727
 Grizewood v. Blane, (Gaming), 322;
 (Pleading, at Law), 529
 Groom v. Booth, 701
 Grove v. Bastard, 727
 — v. Young, (Costs, in Equity),
 221; (Practice, in Equity), 587
 Groves v. Groves, 583
 — v. Janssens, 345
 Grundy v. Buckeridge, 714
 Guepratte v. Young, 91
 Guest v. Warren, 9
 Gull, ex parte, 83
 —, in re, 83
 Gullard v. Watson, 601
 Gundry v. Pinniger, 414
 Gurney v. Behrend, (Practice, in
 Equity), 604; (Shipping),
 663
 — v. Gurney, 756
 — v. Jackson, (Mortgage), 487,
 489
 — v. Womersley, (Bills and
 Notes), 108; (Inspection), 610
 Gwynne v. British Peat, Charcoal
 and Manure Co., 574
 Gwyon v. Gwyon, 582
 Habershon v. Vardon, 131
 Hackwood v. Lockerby, 579
 Haddon v. Lott, (Malice), 461;
 (Slander), 674
 Hadley's Trusts, in re, 703
 — v. Baxendale, 126
 Haggitt v. Ineff, 586
 Haggard v. Neatby, 437
 Haig v. Gray, 293
 Hakewill, in re, 601
 — v. Webber, 590
 Haldane v. Johnson, (Landlord
 and Tenant), 388; (Lease), 407
 Halford v. Cameron's Coalbrook
 Steam Coal, &c. Rail. Co., 101
 Hall, ex parte, 189
 —'s Charity, re, 131
 —'s Estate, in re, 285
 — v. Clive, 592
 — v. Dyson, 359
 — v. Flockton, 3
 — v. Green, 619
 — v. Hall, (Partners), 516, 517
 — v. Janson, 663
 — v. Nalder, 415
 — v. Norfolk Estuary Co., 150
 — v. Robertson, 412
 — v. Scotson, 562
 Hallett v. Dowdall, 661
 Ham's Trust, in re, 434
 Hamber v. Hall, (Bankruptcy),
 86; (Insolvent), 360
 Hambrook v. Smith, 582
 Hamer's Devises, ex parte, 180
 Hamilton v. Baldwin, 437
 — v. Bass, 504
 — v. Marks, 367
 — v. Terry, 316
 Hammond, ex parte, 85
 —, in re, 85*
 — v. Bradstreet, 286
 — v. Hammond, (Baron and
 Feme), 93; (Deed), 243
 — v. Ward, 353
 Hanbury v. Hussey, 511
 Hancock v. Moyes, 524
 — v. Reid, (Arbitration), 29, 30
 Handley v. Wood, 446
 Hankin v. Bennett, 71
 Hannam v. Riley, 510
 Hanner v. Bell, 10
 Harborough, ex parte, 399
 Harcourt v. Seymour, 202
 Harding, ex parte, 70
 — v. Hodgkinson, 760
 — v. Roberts, 258
 Hardingham v. Thomas, (Will),
 747, 754
 Hardwick, ex parte, 399
 Hardy v. Dartnell, 573
 — v. Hull, 222
 — v. Walker, 341
 Haré v. Fleay, (Arbitration), 32,
 37
 — v. Hyde, 38
 Hares v. Stringer, 508
 Harford v. Lloyd, (Legacy), 428;
 (Practice, in Equity), 586
 — v. Rees, (Practice, in Equity),
 588, 589
 Hargrave v. Hargrave, 603
 Hargraves v. White, 590
 Hargreaves v. Wright, 535
 Harland v. Binks, 235
 Harley v. Harley, 752
 Harman v. Johnson, (Partners),
 516; (Practice, at Law),
 567
 — v. Richards, 733
 Harmer v. Bean, 388
 — v. Priestley, 485
 Harnor v. Groves, 289
 Harrington v. Moffat, 417
 — v. Ramsay, (Inferior Court),
 341*, 345
 Harris, in re, (Devise), 253; (Le-
 gacy), 440
 — v. Carter, 667
 — v. Dreesman, (Inferior Court),
 345; (Shipping), 658
 — v. Farwell, 16
 — v. Great Northern Rail. Co.,
 370
 — v. Montgomery, 563
 — v. Mott, 682
 — v. North Devon Rail. Co.,
 150
 — v. Phillips, 530
 — v. Poyner, 742
 — v. Watkins, 261

- Harris v. Willis, 9
 Harrison, ex parte, (Company), 185; (Highway), 328
 —'s Trusts, in re, 704
 — v. Brown, 508
 — v. Creswick, 32
 — v. Goodall, 335
 — v. Great Northern Rail. Co., (Company), 161; (Judgment), 370
 — v. Kennedy, 487
 — v. Lane, 17
 — v. Masselin, 710
 — v. Randall, (Trust and Trustee), 705, 706
 — v. Round, 649
 — v. Southampton Corporation, (Evidence), 285; (Mortmain), 491
 — v. Tysan, 63
 Harrod v. Harrod, 464
 Harrold, in re, 593
 Harryman v. Collins, 481
 Hart, in re, 459
 — v. Baxendale, 123
 — v. Clarke, 474
 — v. Eastern Union Rail. Co., 169
 — v. Tribe, (Infant), 332; (Legacy), 416, 418, 419
 — v. Tulk, 743
 Hartland v. Dancox, 592
 Hartley v. Tribber, 416
 Hartnall's Trusts, in re, 712
 Hartwell v. Colvin, 601
 Harvey, ex parte, 612
 —'s Settlement, in re, 222
 — v. Brook, 596
 — v. Divers, 218
 — v. Hudson, (Pleading, at Law), 532; (Prisoner), 614
 — v. Palmer, 410
 — v. Starcey, 551
 — v. Towers, 105
 Harwich, Mayor, &c. of, in re, 495
 Hastie v. Couturier, 664
 Hastings v. Brown, 521
 Hatch v. Hatch, 751
 — v. Searles, (Bills and Notes), 101; (Costs, in Equity), 220
 — v. Skelton, 471
 Havens v. Middleton, 407
 Haverd v. Davis, 246
 Hawker v. Field, 647
 — v. Hallowell, 361
 Hawkes v. Eastern Counties Rail. Co., 622
 Hawkins, in re, 302
 — v. Akril, 19
 — v. Baldwin, 761
 — v. Gardiner, 711
 — v. Gathercole, (Judgment), 370; (Practice, in Equity), 584
 Hawksbee v. Hawksbee, 250
 Hawtry v. East and West India Docks, &c. Rail. Co., 153
 Hay v. Ayling, 322
 Hay v. Flintoff, 185
 — v. Willoughby, (Company), 185; (Practice, in Equity), 590
 Hayes v. Keene, 344
 — v. Kindersley, 93
 Hayling v. Okey, (False Imprisonment), 304; (Landlord and Tenant), 387
 Haylock v. Sparke, (Action), 14; (Articles of the Peace), 40; (Justice of the Peace), 377
 Hayne v. Robertson, 19
 Haynes v. Forshaw, 299
 — v. Haynes, 438
 Hayward v. Parkes, (Contract), 197; (Lease), 405
 — v. Price, 579
 Haywood, in re, 67
 Heald v. Carey, 697
 — v. Kenworthy, 608
 Heale v. Knight, 441
 Healey v. Spence, 2
 Heap v. Tonge, 648
 Hearn v. London and South-Western Rail. Co., 123
 Heath, ex parte, 80
 —, in re, (Bankruptcy), 80; (Trust and Trustee), 704
 —'s Patent, in re, 522
 — v. Chapman, (Charity), 130; (Practice, in Equity), 587
 — v. Lewis, (Legacy), 436; (Practice, in Equity), 590
 — v. Samson, 270
 — v. Smith, 518
 — v. Unwin, 523
 — v. Weston, 751
 Heathcote's Divorce Bill, (Baron and Feme), 96; (Evidence), 268
 — v. North Staffordshire Rail. Co., 678
 Heaton v. Dearden, 512
 Hebblethwaite v. Leeds and Thirsk Rail. Co., 18
 Hedges v. Hedges, 484
 Hegarty v. Milne, 684
 Hele v. Bexley, (Elegit), 277; (Mortgage), 488; (Practice, in Equity), 603
 Hellawell v. Eastwood, (Distress), 266; (Court Baron), 347; (Replevin), 643
 Helsham v. Blackwood, (Estoppel), 281; (Libel), 443
 Hemel Hempstead, Coronership of, in re, 762
 Hemsworth, in re, 79
 Henderson, ex parte, 184
 — v. Eason, 4
 — v. Gilchrist, 299
 — v. Philipson, 293
 — v. Thomas, 575
 Henniker v. Attorney General, 440
 — v. Henniker, 685
 Henning v. Burnet, 241
 — v. Burnett, 738
 Hereford, Bishop of, ex parte, 205
 — v. Anon., 140
 Heritage, ex parte, 175
 Hernaman v. Smith, 340
 — v. Barber, (Bankruptcy), 65, 68
 Hersey v. Giblett, 406
 Hervey v. Fitzpatrick, 373
 — v. Smith, 349
 Heseltine v. Siely, 360
 Hesketh v. Fleming, 562
 Heslop, ex parte, 76
 — v. Baker, (Bankruptcy), 75*, 77
 — v. Chapman, 460
 Heston, Churchwardens, &c. of, v. St. Bride, Churchwardens, &c. of, (Lunatic), 457; (Poor), 548
 Heward v. Wheatley, 62*
 Hewetson v. Todhunter, 586
 Hewison v. Negus, 648
 Hewitson v. Todhunter, (Legacy), 434; (Practice, in Equity), 603
 Hewitt v. George, 410
 — v. Isham, (Lease), 406; (Licence), 444
 — v. Loosemoore, 482
 — v. Macquire, (Evidence), 291; (Pleading, at Law), 533
 — v. Paterson, 214
 Hewson, in re, (Baron and Feme), 87; (Lunatic), 455
 Hexall v. Cheatle, 588
 Hey's Will, in re, 714
 Heywood v. Potter, 208
 Hichens v. Kelly, 510
 Hichens v. Kelly, 510
 Hickie v. Salomo, (Costs, at Law), 211; (Inferior Court), 338
 Hickling v. Boyer, 438
 Hicks v. Sallitt, 746
 Higgins v. Frankis, 488
 Higginson, ex parte, (Bankruptcy), 64, 81
 High Court of Chancery, Suitors of, in re, 689
 Hight, ex parte, 180
 Hiles v. Moore, 487
 Hill v. Audus, 666
 — v. Bexley, 453
 — v. Edmunds, 486
 — v. Great Northern Rail. Co. (Lands Clauses Act), 391; (Specific Performance), 679
 — v. Philp, 617
 — v. Pritchard, 265
 — v. Regina, 461
 — v. Swift, 338
 — v. Travis, 578
 Hillman v. Westwood, 754
 Hills v. Laming, 242*
 — v. Macrae, (Parties to Suits), 508; (Practice, in Equity), 581
 — v. Mitson, 360
 — v. Rowland, 354
 Hincley v. Stafford, Mayor, &c. of, 686
 Hind v. Poole, 484

- Hinder v. Streeten, 731
 Hindle v. Taylor, 429
 Hindson v. Weatherill, (Attorney and Solicitor), 51; (Practice, in Equity), 589
 Hinton, in re, (Attorney and Solicitor), 48, 55
 — v. Galli, 598
 — v. Meade, 36
 Hiorns v. Holtom, 482
 Hitchcock v. Carew, 293
 Hitchings v. Hollingsworth, 566
 — v. Kilkenny, &c. Rail. Co., 191
 Hitchins v. Hollingsworth, 279
 Hitchman v. Stewart, 613
 Hobbs v. Parsons, 427
 Hobby v. Allen, 89
 — v. Collins, 89
 Hobson v. Kingston-upon-Hull, Mayor, &c. of, (Municipal Corporation), 496; (Police Officer), 540
 — v. Neale, (Legacy), 440, 442; (Practice, at Law), 568
 — v. Sherwood, 599
 Hochster v. De Latour, 199
 Hockpayton v. Bussell, 359
 Hodges, in re, 594
 — v. Ancrum, 566
 — v. Blaggrave, 409
 Hodgson's Settlement, in re, 712
 —, ex parte, 82
 —, in re, (Bankruptcy), 82; (Debtor and Creditor), 236
 —'s Trust, in re, 420
 — v. Powis, 151
 Hodson's Will, Trusts of, in re, 711
 — v. Micklethwaite, 425
 Hoghton v. Hoghton, (Evidence), 286, 287; (Parent and Child), 501
 Holdgate v. Slight, 47
 Holding v. Barton, 580
 Holford v. Yate, (Mortgage), 487; (Practice, in Equity), 577
 Holgate v. Haworth, 17
 Holland, re, 55
 — v. Fox, 524*
 — v. Lea, 113
 — v. Vincent, 215
 Holliday v. Overton, (Deed), 242; (Power), 551
 Hollingsworth v. Shakeshaft, (Executor), 299; (Pleading, in Equity), 535; (Will), 742
 Hollingworth, ex parte, 81
 — in re, 81
 Holloway v. Holloway, 350
 — v. Phillips, 581
 Holman v. Loynes, 51
 Holme, ex parte, 186
 — v. Browne, 355
 Holmes's Trust, in re, 411
 — v. Bagge, 304
 — v. London and North-Western Rail. Co., 521
 Holmes v. Penney, (Attorney and Solicitor), 53; (Costs, at Law), 210
 — v. Service, 562
 — v. Sixsmith, (Evidence), 283; (Stamp), 683
 — v. Sparks, 656
 — v. Staines, 107
 — v. Tutton, (Attachment), 45; (Bankruptcy), 73
 Holsgrove v. Hedges, 361
 Holt, ex parte, 180
 — v. Daw, 738
 — v. Ely, 475
 Holthouse, ex parte, 84
 —, in re, 82
 Homer v. Gould, 423
 Homersham v. Wolverhampton Waterworks Co., 160
 Honeyman v. Lewis, 567
 — v. Marryat, 723
 Honiball v. Bloomer, 525
 Honeywood v. Honeywood, 335
 Hood v. Clapham, 755
 Hook, ex parte, 190
 Hookpayton v. Bussell, (Action), 9; (Insolvent), 359
 Hooper, ex parte, 256
 Hope v. Beadon, 288
 — v. Hope, 334
 — v. Liddell, (Attorney and Solicitor), 59; (Evidence), 294
 — v. Threlfall, (Practice, in Equity), 586, 587
 Hopkin v. Hopkin, 585
 Hopkins v. Tanqueray, 727
 Hopwood v. Derby, 593
 Horlock v. Horlock, 652
 — v. Smith, 653
 Horn v. Coleman, 414
 — v. Kilkenny and Great Southern and Western Rail. Co., 192
 Hornby's Patent, in re, 522
 Horner's Trusts, 201
 — v. Gould, 423
 — v. Horner, 538
 Horton v. Westminster Improvement Commissioners, (Bond), 115; (Costs, at Law), 209; (Es-toppel), 281
 Horwood v. Griffith, 756
 Hough's Estate, in re, 757
 Houghton v. Barnett, 579
 Howard, ex parte, 47
 —, in re, 713
 — v. Brownhill, 6
 — v. Howard, 588
 — v. Hudson, 282
 — v. Kershaw, 501
 — v. Prince, 601
 — v. Remer, (Action), 14; (In-ferior Court), 342
 Howell v. Rodbard, 216
 — v. Williams, 579
 Howes v. Barber, 217
 Hubbard, re, 57
 Hubbersty v. Ward, 667
 Huddleston v. Whelpdale, 409
 Hudson v. Carmichael, 93
 — v. Roberts, 24
 Hues v. Jackson, (Legacy), 430, 436
 Huffman v. Hubbard, 430
 Huggett v. Lewis, 505
 Hughes, ex parte, 470
 — v. Clark, 406
 — v. Ellis, 265
 — v. Great Western Rail. Co., 123
 — v. Humphreys, 739
 — v. Key, 702
 — v. Lumley, (Ejectment), 274; (Error), 280; (Judgment), 371
 — v. Morris, 669
 — v. Paramore, 451
 — v. Wells, (Baron and Feme), 93; (Escheat), 280; (Power), 553; (Trust and Trustee), 708
 — v. Williams, (Mortgage), 478, 489
 Hull and Selby Rail. Co. v. North-Eastern Rail. Co., 596
 Hulse, ex parte, 39
 Hume v. Bentley, (Specific Performance), 678; (Vendor and Purchaser), 721
 Hume v. Gilchrist, 270
 Humfrey v. London and North-Western Rail. Co., 695
 Humphrey v. Humphrey, 417
 — v. Pearce, 34
 Humphreys v. Jenkinson, 25
 — v. Jones, 160
 Humphries v. Brogden, 473
 — v. Smith, 358
 Hungerford's Trusts, 400
 Hunt, ex parte, (Bankruptcy), 82, 87
 — v. Bishop, 226
 — v. Great Northern Rail. Co., 339
 — v. Hecht, 317
 — v. Hewitt, 617
 — v. Jessel, 647
 — v. Penrice, 538
 — v. Remnant, (Deed), 241; (Lease), 408
 — v. Wray, (Costs, at Law), 210; (Inferior Court), 346
 Hunter, ex parte, 188
 — v. Emmanuel, (Amendment), 21; (Pleading, at Law), 533
 — v. Liddell, 217
 Huntley, ex parte, 35
 Hurst, in re, 307
 — v. Hurst, (Practice, in Equity), 580; (Settlement), 654
 Husband v. Davis, 113
 Huskisson v. Bridge, 420
 Hutchinson's Settlement, in re, 652
 — v. Greenwood, 277
 — v. Hutchinson, 591

- Hutchinson v. Newark, 230
 — v. Sidney, 324
 — v. Surrey Consumers Gaslight and Coke Association, 169
 Hutton v. Cooper, 78
 — v. Cruttwell, 65
 — v. Rosseter, 300
 — v. Smith, 605
 — v. Thompson, 182
 Hyatt v. Griffiths, 382
 Hyde v. Manchester, Mayor, &c. of, 394
 Hyder v. Coleman, 219
 Hyne v. Dewdney, 99
 Illingworth v. Cooke, 741
 Imperial Gas Co. v. London Gas Co., 449
 Imperial Salt and Alkali Co., in re, 188
 Imray v. Magnay, 656
 Incorporated Church Building Society v. Coles, 492
 Independent Assurance Co., in re, (Company), 170, 177*, 180
 India and Australia Mail Steam-Packet Co., in re, 183
 India and London Assurance Co. v. Dalby, 363
 Ingate v. Christie, 119
 Inge v. Birmingham, Wolverhampton and Stour Valley Rail. Co., 391
 Inglis v. Great Northern Rail. Co., 150
 Innes v. Sayer, 552
 Irby, in re, 455
 Iredell v. Iredell, 700
 Irish West Coast Rail. Co., in re, 178
 Isaacs v. Weatherstone, 597
 — v. Wyld, 338
 Isberg v. Bowden, 647
 Ive v. King, 424
 Ivens v. Elwes, 236
 Ivison v. Gassiot, 236
 — v. Grassiot, 586
 Jackson v. Burnham, 359
 — v. Chichester, 360
 — v. Craig, (Costs, in Equity), 219; (Will), 741
 — v. Jackson, 676
 — v. Marshall, 279
 — v. Turnley, 590
 Jacobs v. Jacobs, 743
 — v. Richards, (Mortgage), 486; (Practice, in Equity), 572, 602
 James, ex parte, (Bankruptcy), 86; (Company), 173
 —, in re, 56
 — v. Cochrane, 60; (Covenant), 225; (Mine), 472
 — v. Harding, 592
 — v. Isaacs, (Accord and Satisfaction), 4; (Payment), 526
 — v. Rice, 719
 James v. Wynford, (Devise), 264; (Will), 747
 Jameson v. Stein, 464
 Jamieson v. Trevelyan, (Costs, at Law), 210; (Devise), 249; (Legacy), 431
 Janes v. Whitbread, (Debtor and Creditor), 235; (Deed), 238; (Interest), 366
 Jardine, in re, 72
 Jarvis v. Peele, 504
 Jaynes v. Hughes, (Deed), 241; (Limitations), 446
 Jeakes v. White, 314
 Jebb v. Tagwell, (Power), 556; (Practice, in Equity), 592
 Jefferies v. Biggs, 577
 — v. Michell, (Legacy), 413, 432
 Jefferys v. Boosey, (Copyright), 205, 208
 Jeffries v. Williams, 473
 Jennings v. Bailey, 418
 Jenkin v. Row, 489
 Jenkins v. Betham, 141
 — v. Bryant, 50
 — v. Robertson, (Administration of Estate), 16; (Principal and Surety), 612
 Jenkinson v. Harcourt, 484
 Jenkyn v. Vaughan, 581
 Jennings v. Broughton, 728
 — v. Paterson, 17
 — v. Roberts, 106
 Jervoise v. Jervoise, 90
 Jessop v. Lutwyche, 322
 Jewell v. Parr, 100
 Job v. Butterfield, 731
 Jodrell v. Jodrell, 650
 Johns v. Mason, 576
 Johnson, ex parte, (Bankruptcy), 72, 73, 82, 84
 —, in re, 35
 — v. Ball, 420
 — v. Cope, 419
 — v. Diamond, 45
 — v. Gibson, 233
 — v. Harris, 295
 — v. Holdsworth, 371
 — v. Latham, (Arbitration), 30, 31, 32*, 38
 — v. Lucas, 6
 — v. Shrewsbury and Birmingham Rail. Co., 199
 — v. Smiley, 725
 Johnston v. Newton, 299
 — v. Webster, 470
 Johnstone, ex parte, 64
 —, in re, 64
 Joint-Stock Companies Winding-up Acts, in re, (Company), 170, 175, 189
 Jolly v. Hancock, (Fine and Recovery), 327; (Vendor and Purchaser), 725
 Jonas v. Adams, 345
 Jonassohn v. Great Northern Rail. Co., 165
 Jones, ex parte, (Bankruptcy), 71; (Justice of the Peace), 379
 —'s Settled Estates, 596
 — Trust, 441
 — v. Bailey, 372
 — v. Batten, (Practice, in Equity), 572, 581
 — v. Beach, 612
 — v. Cannock, (Error), 279; (Lease), 407
 — v. Currey, 342
 — v. Davies, 698
 — v. Foxall, 701
 — v. Gibbons, 644
 — v. Giles, 739
 — v. Greatwood, 419
 — v. Gretton, (Bills and Notes), 105; (Payment), 527
 — v. Harrison, 213
 — v. Howell, 582
 — v. Hutchinson, 22
 — v. Ives, 36
 — v. James, 591
 — v. Johnson, (Borough Rate), 638; (Replevin), 643*
 — v. Jones, 616
 — v. Maggs, 691
 — v. Morrall, 299
 — v. Nicholson, 662
 — v. Phillips, 325
 — v. Powell, 219
 — v. Robinson, 511
 — v. Thomas, 367
 — v. Tinney, 487
 — v. Turnbull, 293
 — v. Welch, 219
 Jorden v. Money, 353
 Jortin v. South-Eastern Rail. Co., 148
 Joule v. Taylor, (Action), 13; (Inferior Court), 346
 Joyce, ex parte, (Churchwardens), 139; (Mandamus), 461
 Judkins v. Atherton, 369
 Justice v. Gosling, 540
 Kane v. Reynolds, 220
 Kavanagh v. Morland, 257
 Kay v. Smith, 586
 Keane v. Reynolds, 381
 Keates v. Cadogan, 311
 Keene's Executors' case, 181
 Kekewich v. Manning, 733
 — v. Marker, 649
 Kelly v. Webster, 313
 Kelsey, in re, 307
 Kelson v. Kelson, (Practice, in Equity), 594; (Voluntary Conveyance), 733
 Kembell v. Walduck, 576
 Kemble v. Kean, 348
 Kemp v. Balls, 4
 — v. Hurry, 357
 — v. Sober, 228
 — v. West of London and Crystal Palace Co., 625
 Kempe v. Kempé, 437

- Kendall, in re, 417
 — v. Baker, 387
 — v. Wilkinson, 98
 Kennedy, ex parte, 87
 Kennerley v. Kennerley, 752
 Kennett and Avon Canal Navigation Co. v. Witherington, (Canal), 118; (Lands Clauses Act), 389
 Kensington v. Bouverie, (Mortgage), 488; (Parties), 510
 Kent v. Jackson, 309
 Kenworthy v. Ward, 420
 Keogh's Estate, in re, 330
 Kepp v. Wiggett, 111
 Kerby v. Harding, 267
 Kerkin v. Kerkin, 339
 Kernot v. Pittis, 358*
 Kerr v. Ailsa, 18
 — v. Middlesex Hospital, 436
 Kershaw v. Kershaw, 258
 Key v. Cotesworth, 689
 — v. Key, 743
 — v. Thimbleby, 527
 Keyse v. Powell, (Limitations), 446; (Mine), 472
 Kidd v. North, 427
 Kilderbee v. Ambrose, (Clergy), 143; (Land Tax), 401
 Kilham v. Collier, (Highway), 326; (Parties), 507
 Kilkeny and Great Southern and Western Rail. Co. v. Fielden, 215
 Killymaenllwydd v. St. Michael's, Pembroke, 550
 Kimberley v. Jennings, 348
 Kimpton, ex parte, 760
 — v. London and North-Western Rail. Co., (Arrest), 38; (Witness), 760
 Kincaid's Trust, in re, 90
 King's College, Cambridge, ex parte, 400
 King's College Hospital v. Wheel- don, 412
 King's Estate, 251
 — v. Chuck, 512
 — v. Heenan, 488
 — v. Isaacson, 247
 — v. Mallicott, 407
 — v. Mullins, 710
 — v. Phillips, 710
 — v. Savory, 52
 Kingston-upon-Hull, Governor, Guardians, &c. of Poor of, v. Petch, 195
 Kinning, ex parte, 348
 Kirby's Trust, in re, 589
 — v. Simpson, 13
 Kirk v. Unwin, 34
 Kitson v. Julian, 118
 Kollmann's Railway Locomotive and Carriage Improvement Co., in re, 184
 Knaggs v. Knaggs, 368
 Knapp v. St. Mary, Willesden, 138
 Knight v. Cambers, 322
 — v. Fitch, (Gaming), 322; (Stock), 688
 Knight v. Fox, (Master and Servant), 468; (Negligence), 499
 — v. Knight, 604
 Knott v. Cottee, (Practice, in Equity), 595; (Trust and Trustee), 709
 — v. Coatee, 605
 Knowles, in re, 710
 — v. Holden, 619
 Lachlan v. Reynolds, (Legacy), 434; (Vendor and Purchaser), 722
 Ladbroke v. Lee, 663
 Ladbroke v. Bleaden, 602
 Lafond v. Raddock, 449
 Lainson v. Lainson, (Devise), 246; (Legacy), 436
 Laird, in re, 85
 Lake v. Brutton, 488
 — v. Butler, (Costs, at Law), 212; (Inferior Court), 338
 — v. Currie, (Power), 556, 557
 — v. Plaxton, 145
 Lamb v. Orton, 588
 Lambard v. Older, 233
 Lambert v. Lomas, 585
 — v. St. Thomas, New Sarum, Overseers of, 505
 Lambeth Charities, in re, 132
 Lambie v. Lambie, 591
 La Mert v. Stanhope, 576
 Lamotte v. Cooke, 716
 Lancashire and Yorkshire Rail. Co., in re, 397
 — v. East Lancashire Rail. Co., 163
 — v. Evans, (Lands Clauses Act), 396; (Practice, in Equity), 575
 Lancaster, ex parte, 363
 Landmann v. Entwisle, 168
 Land-Tax Commissioners, in re, 401
 Lane v. Debenham, 708
 — v. Green, 412
 — v. Hill, 6
 — v. Hooper, 279
 — v. Horlock, 719
 — v. Jackson, 729
 — v. Smith, (Company), 148
 Langdale v. Gill, 598
 Langford v. May, (Evidence), 293; (Injunction), 355
 Langham's Trust, 492
 Langhorn v. Langhorn, 714
 Langmead's Trusts, 513
 Langton v. Langton, 481
 Laslett v. Cliffe, 487
 Latham v. Spedding, (Costs, at Law), 211, 213; (Inferior Court), 339
 Latt v. Booth, 333
 Laurie v. Clutton, 441, 556
 Laveroni v. Drury, 666
 Lavey v. Regina, 528
 Law v. Blackburn, 33
 Law v. London Indisputable Life Policy Co., (Insurance), 362; (Practice, in Equity), 595
 Lawes, ex parte, 182
 Lawrence, in re, 48
 — v. Boston, 685
 — v. Great Northern Rail. Co., 394
 Lawton, ex parte, 174
 — v. Campion, 243
 — v. Swetenham, 655
 Laxton v. Eedle, 426
 Layton v. Layton, 91
 Lazonby v. Rawson, 300
 Lea (Rector of), ex parte, 398
 — v. Hinton, 613
 Leaf v. Coles, (Lunatic), 455; (Partners), 513
 Leake, in re, 719
 Leblé v. Carrell, 570
 Lechmere v. Curtler, 131
 Lee v. Busk, 410
 — v. Delane, 758
 — v. Egremont, 648
 — v. Flood, (Administration of Estate), 17; (Partners), 516
 — v. Hart, 66
 — v. Head, 556
 — v. Hutchinson, 504
 — v. Lee, (Practice, in Equity), 573, 590, 605
 — v. Lys, 605
 — v. Smith, 382
 Leech v. Clabburn, 562
 Leeds, Duke of, v. Amherst, Earl of, 5
 Leeming, in re, 333
 — v. Snaith, 198
 Lees, ex parte, 81
 — v. Laforest, 516
 Le Feuvre v. Lankester, 493
 Legge, ex parte, 79
 —, in re, 307
 Leggo v. Young, 31
 Leideman v. Schultz, 657
 Leigh v. Byron, 417
 — v. Leigh, 416
 — v. Mosley, 749
 Lennard v. Robinson, 610
 Leroux v. Brown, 313
 Leslie v. Smith, 509
 — v. Tompson, 721
 L'Estrange v. L'Estrange, 347
 Lethbridge v. Thurlow, 435
 Lett v. Randall, (Legacy), 433, 437; (Will), 748
 Letts v. London and Blackwall Rail. Co., 197
 — v. London Corn Exchange Co., 692
 Leverick v. Mercer, 638
 Levett's Trust, in re, 711
 Levi v. M'Rae, 214
 Levinson v. Syer, 735
 Levy v. Moylan, 368
 Lewellin v. Cobbold, (Baron and Feme), 95; (Practice, in Equity), 573

- Lewin, in re, 55
 —'s Trust, in re, 92
 Lewis v. Bond, 682
 — v. Bright, 141
 — v. Clifton, (Contract), 200;
 (Estoppel), 282
 — v. Clowes, 589
 — v. Collard, 49
 — v. Duncombe, 489
 — v. Dyson, (Executor), 295;
 (Judgment), 370
 — v. Forsyth, 214
 — v. Hillman, 47
 — v. Lewis, 749
 — v. Morris, 414
 — v. Nicholson, (Attorney and
 Solicitor), 50; (Principal
 and Agent), 609
 — v. South Wales Rail. Co., 398
 Lexden Union, Guardians of, v.
 Southgate, 542
 Liddell v. Norton, 583
 Lincoln, Mayor, &c. of, ex parte,
 132
 — v. Windsor, 220
 Lindall v. Taylor, 671
 Lindsey, Earl of, v. Great Northern
 Rail. Co., 624
 Linegar v. Pearce, 32
 — v. Price, 32
 Linnean Society of London v. St.
 Anne's, Westminster, 633
 Litchfield v. Brown, 730
 — v. Ready, (Ejectment), 276;
 (Trespas), 694
 Little v. Newport, Abergavenny
 and Hereford Rail. Co., 622
 Littledale, ex parte, 76
 Littlejohns v. Household, 247
 Liverpool Adelphi Loan Association
 v. Fairhurst, 88
 Liverpool Dock Acts, in re, 398
 Liverpool, &c. Rail. Co., in re, 400
 Liverpool Marine Assurance Co.,
 in re, 182
 Liverpool, Mayor, &c. v. Chorley
 Waterworks, 353
 Livingstone v. Ralli, 12
 Llanelly, Local Board of Health of,
 ex parte, 619
 Llewellyn's Divorce Bill, 269
 Lloyd, ex parte, 178
 — v. Cocker, 650
 — v. Howard, 102
 — v. Lloyd, 429
 — v. Mansell, 58
 — v. Oliver, 100
 — v. Peers, 605
 — v. Powis, 329
 — v. Solicitors' and General Life
 Assurance Society, 581
 — v. Whitty, 478
 — v. Whitty, 294
 Lobley v. Stocks, 429
 Lock v. De Burgh, 27
 — v. Lomas, 707
 Lockwood, ex parte, 397
 — v. Fenton, 332
 Lodge v. Pritchard, (Evidence),
 290, 294
 Logan v. Courtown, Earl of, 623
 Loinsworth v. Rowley, 582
 Lomax v. Ripley, 491
 Londesborough, ex parte, (Com-
 pany), 187, 188
 — v. Mowatt, 168, 365
 — v. Somerville, (Apportion-
 ment), 26; (Legacy), 435, 441
 London and Birmingham Rail. Co.'s
 Act, in re, 399
 London and Birmingham Extension
 and Northampton, &c. Rail. Co.,
 in re, (Company), 175, 176, 177,
 188
 London and North-Western Rail.
 Co.'s Act, in re, 399
 — v. Bradley, 396
 — v. Lancaster, Corporation of,
 596
 — v. M'Michael, (Company),
 149, 150, 151
 — v. Smith, (Lands Clauses Act),
 395, 396
 — v. Wetherall, 621
 London and North-Western Rail.
 Co. and Shropshire Union Rails.
 and Canal Co. v. Shrewsbury and
 Birmingham Rail. Co., 162
 London and South-Western Rail.
 Co. v. South-Eastern Rail. Co.,
 166
 London, Bishop of v. M'Niel, 115
 London, Brighton and South Coast
 Rail. Co., in re, 400
 London Conveyance Co., in re, 173
 London Dock Act, in re, 265
 London Dock Co., in re, 653
 London Gaslight Co. v. Spottis-
 woode, 508
 London, Mayor of v. Parkinson,
 144
 Long v. Long, 421
 — v. Stone, 488
 — v. Storie, (Practice, in Equity),
 603; (Usury), 718
 — v. Watkinson, 421
 Longbottom v. Longbottom, (Cer-
 tiorari), 127; (Inferior Court), 340
 Longmeid v. Holliday, (Baron and
 Feme), 94; (Warranty), 735
 Longstaff v. Rennison, 741
 Longworth's Estate, re, 26
 Lonsdale v. Beckett, 703
 — v. Berchtoldt, 747
 Loosemore v. Knapman, 655
 Lord Advocate v. Hamilton, 209
 Lord, in re, 192
 — v. Colvin, (Evidence), 294;
 (Practice, in Equity), 583
 — v. Purchase, 302
 — v. Wightwick, 297
 Lougher, in re, 388
 Loveday, in re, 458
 Lovegrove v. Cooper, (Administra-
 tion of Estate), 16; (Practice, in
 Equity), 595
 Lovell v. Galloway, (Injunction),
 356; (Practice, in Equity), 572
 Low v. London and North-Western
 Rail. Co., 160
 Lowe, in re, 443, 645
 —'s Patent, in re, 522
 — v. Carpenter, 273
 — v. Peskett, (Debtor and Cre-
 ditor), 234; (Executor),
 298, 300
 — v. Thomas, 418
 — v. Watson, 592
 Lowes v. Ives, 592
 — v. Lowes, 592
 Lowndes' Trust, 590
 — v. Stamford and Warrington,
 Earl of, 27, 466
 Luard v. Pease, 744
 Lucas v. Beale, (Contract), 198;
 (Parties), 506, 507
 — v. Golder, 589*
 — v. Roberts, 52
 Luckie v. Bushby, 661
 Lucy, ex parte, 176
 Ludgater v. Channell, 598
 Lukey v. Higgs, 677
 Lumley v. Gye, 565, 761
 — v. Robins, 435
 — v. Wagner, 348
 Lushington v. Boldero, 735
 Lush's Estate, in re, 713
 Lyddon v. Ellison, (Parent and
 Child), 501; (Practice, in Equity),
 597; (Will), 751
 Lygo v. Newbold, 468*
 Lyne v. Pennell, 366
 Lyon v. Baker, 221
 Lyons v. Hyman, 210
 Lyth v. Ault, 43
 Macaulay, ex parte, 397
 Mac Birnie, in re, 70
 —'s Trustees, 70
 Macbride v. Lindsay, (Company),
 153; (Parties to Suits), 508
 M'Calmont v. Rankin, 668
 M'Cormick v. Garnett, (Baron and
 Feme), 90; (Foreign
 Law), 309
 — v. Parry, (Company), 169;
 (Debentures), 232; (Mortgage),
 477
 M'Culloch v. Gregory, (Practice,
 in Equity), 595; (Watercourse),
 726
 Macdonald v. Bryce, 422
 — v. Walker, 708
 Macdonnell v. Evans, 760
 — v. Hesilrige, 648
 M'Donnell v. Pope, 383
 Macdougall v. Paterson, (Costs, at
 Law), 211; (Inferior Court), 338
 M'Fee, ex parte, 341
 M'Gachen v. Dew, 706
 M'Gregor, ex parte, 85
 Macgregor v. Deal and Dover, &c.
 Rail. Co., 154
 — v. Galsworthy, 13

- Macintosh v. Great Western Rail. Co., (Account), 5; (Evidence), 293; (Practice, in Equity), 574, 583
 M'Intosh v. Great Western Rail. Co., 580*
 Macintyre v. Connell, (Company), 169; (Pleading, in Equity), 536; (Practice, in Equity), 581
 M'Kenna, in re, 87
 Mackenzie v. Mackenzie, (Settlement), 649; (Trust and Trustee), 712
 Mackenzie v. Mackenzie, 605
 — v. Sligo and Shannon Rail. Co., 192
 M'Kenzie v. Sligo and Shannon Rail. Co., 174*
 M'Keone v. Seaber, 580
 Mackinnon v. Penson, (Action), 12; (Highway), 326
 — v. Stewart, 235
 Macclae v. Sutherland, (Banker), 61; (Bills and Notes), 100
 Macclaren v. Stainton, 348
 M'Lean's Divorce, 268
 M'Leod v. Annesley, 709
 — v. Lyttleton, 574
 Macnab v. Whitbread, 421
 M'Neill v. Acton, 586
 M'Neillie v. Acton, (Baron and Feme), 96; (Executor), 297
 Macrory v. Scott, 316
 Madrall v. Thelluson, 370
 Madrid and Valentia Rail. Co., in re, 175
 Magawley's Trust, 699
 Magdalen Land Charity, in re, 137
 Magnay v. Davidson, 704
 — v. Edwards, (Bankruptcy), 74; (Covenant), 227
 — v. Mines Royal Co., 354
 Magnus v. Buttemer, 651
 Maguire v. Kincaird, 566
 Mahon's Trust, in re, 293
 Mahony v. Kekulé, 609
 Mainwaring, ex parte, 179
 Mais, in re, 712
 Maitland, ex parte, 171
 Major v. Major, (Bond), 115; (Costs, in Equity), 220
 Malcolm v. Scott, 219
 Mallalieu v. Hodgson, 237
 Man v. Ricketts, 596
 — v. Topham, (Specific Performance), 683; (Vendor and Purchaser), 726
 Manby v. Bewicke, 223
 — v. Cremonini, 530
 Manchester and Leeds Rail. Co., in re, 399
 Manchester and Southport Rail. Co., in re, 250
 Manchester and Stafford Rail. Co. v. How, 578
 Manchester College, in re, (Charity), 134, 136
 Manchester, Sheffield and Lincolnshire Rail. Co. v. Great Northern Rail. Co., (Injunction), 349; (Practice, in Equity), 593
 — v. Wallis, 156
 Mandeno v. Mandeno, 221
 Mangin v. Mangin, (Legacy), 417, 419
 Mangles v. Dixon, 482
 Manico, ex parte, 84
 Maniere v. Leicester and Kamp, 581
 Manley v. Boycot, (Bill and Notes), 104; (Practice, at Law), 565
 Mann v. Buckerfield, (Costs, at Law), 212; (Inferior Court), 337
 — v. Fuller, 746
 — v. Thompson, 413
 Manning's Trusts, in re, 713
 — v. Phelps, 446
 — v. Purcell, (Legacy), 418*; 428; (Practice, in Equity), 585
 Manser v. Dix, 615
 Mansfield, Earl of, v. Ogle, (Limitations), 447; (Usury), 719
 Manson, in re, 458
 Mant v. Leith, 701
 Mapp v. Elcock, (Legacy), 435; (Practice, in Equity), 590
 Mardall v. Thelluson, 302
 Marianski v. Cairns, (Amendment), 21; (Evidence), 291
 Maries v. Maries, 50
 Marker v. Kenrick, 15
 — v. Marker, (Injunction), 347; (Parties to Suits), 507
 Markham v. Ivatt, (Legacy), 415, 417
 Marks v. Hamilton, (Insolvent), 359; (Insurance), 364
 Markwell, in re, 129
 —'s case, 180
 Marlborough, Duke of, v. St. John, 735
 Marriott v. Turner, 751
 Marryat v. Marryat, 596
 Marsden v. Blundell, 578
 — v. Wardle, 618
 Marshall v. Bremner, 755
 — v. Fowler, 90
 — v. Nicholls, 10
 — v. Sharland, 66
 — v. Sladden, 708
 — v. York, Newcastle and Berwick Rail. Co., 120
 Marson v. Lund, 192
 Martin, in re, 397
 — v. Forster, 335
 — v. Great Northern Rail. Co., 120
 — v. Hadlow, 591
 — v. Hemming, 571
 — v. Hewson, 322
 — v. Pycroft, 676
 — v. Wellstead, 491
 Martyn, ex parte, 82
 — v. Clue, 384
 Marygold, in re, 64
 Marylebone Vestry v. Zoological Society of London, 633
 Mash, re, 57
 Mason v. Clarke, 420
 — v. Harvey, 364
 Masselin's Trusts, in re, 710
 Massey v. Goodall, 386
 Masterman v. Midland Great Western Rail. Co., Ireland, 574
 Masters v. Johnson, 38
 — v. Lowther, (Affidavits), 18; (Sheriff), 656
 Mather v. Norton, 263
 Matheson, ex parte, 83
 Mathew v. Brise, 334
 Mathews v. Gardiner, 248
 — v. Livesay, 217
 Mathison v. Clarke, 489
 Matthew v. Osborne, (Copyhold), 204; (Ejectment), 276
 Matthews, ex parte, 46
 — v. Bagshaw, 608
 — v. Pincomb, 577
 — v. West London Waterworks Co., 468
 Mattison v. Hart, 640
 Maude v. Maude, 581
 Maudslay, ex parte, 183
 Mauser v. Dix, 615
 Mawby, ex parte, 139
 Mawer's case, in re, 762
 Mawhood v. Milbanke, 93
 Mawly, ex parte, 461
 Mawson v. Blane, 333
 Maxwell v. Maxwell, 759
 May v. Biggenden, 589
 Mayer v. Burgess, 345
 Mayhew, ex parte, 185
 — v. Suttle, 405
 Mays v. Cannel, 33
 Mead v. Bashford, 453
 Meadows v. Meadows, 477
 Mears v. Best, 487
 Meddowcroft v. Campbell, 511
 Medlicott v. Williams, 570
 Medwin, ex parte, 368
 Meeds v. Wood, (Devise), 250, 260
 Meek v. Ward, (Practice, in Equity), 582, 586
 Meeus v. Thelluson, (Action), 8; (Foreign Law), 309
 Meggison v. Bowes, (Landlord and Tenant), 388; (Replevin), 643
 Mellerish v. Rippon, 106
 Mellers v. Devonshire, Duke of, 407
 Melling v. Bird, 400
 — v. Leak, 711
 Mellor v. Leather, (Pleading, at Law), 532; (Police), 540
 Melville v. De Wolf, 668
 Menzies v. Connor, 220
 Mercer, ex parte, 191
 Mercers Co. v. Witham Navigation Co. and Great Northern Rail. Co., 585

- Merchant Traders' Ship Loan and Assur. Association, in re, 188
 — (Chapple's case), 182
 Meredith v. Gittens, (Costs, at Law), 214; (Practice, at Law), 570
 — v. Meigh, 316
 — v. Watson, 271
 Mesnard v. Welford, 704
 Messiter v. Rose, 531
 Messon v. Alcard, 80
 Metcalf v. Hetherington, 674
 Metherell, ex parte, 397
 Methold v. Turner, 741
 Metropolitan Carriage Co. (Clarke's case), 190
 Metropolitan Rail. Junction Co., (Markwell's case), 180
 Metzner v. Bolton, 23
 Meux's Executors, ex parte, 181
 Mews v. Mews, 93
 Meyer's case, 185
 — v. Simonson, 742
 Meynell v. Surtees, 682
 Meyrick's Charity, in re, 129
 — Estate, in re, 712
 Michelson v. Nicol, 669
 Mickelthwait v. Winter, 329
 Middleton v. Losh, 691
 — v. Middleton, (Devise), 261; (Will), 758
 — v. Younger, 597
 Midland Great Western Railway of Ireland v. Leech, 159
 Midland Rail. Co. v. Ambergate, Nottingham and Boston and Eastern Junc. Rail. Co., 625
 — v. Brown, 222
 Midland Union, Burton-upon-Trent, &c. Rail. Co., in re, (Company), 176, 180*
 Milcham's Trust, in re, 597
 Mildmay v. Methuen, (Administration of Estate), 15; (Practice, in Equity), 594
 Miles v. Durnford, 297
 Milford v. Perle, 653
 Miller v. Chapman, 412
 — v. Huddleston, 431
 — v. Priddon, 704
 — v. Salomons, 500
 Millican v. Vanderplank, 595
 Mills v. Brown, 428
 — v. Drewitt, 437
 — v. Rydon, 139
 Millward v. Littlewood, 465
 Milne v. Gilbert, (Legacy), 414; (Practice, in Equity), 597
 — v. Marwood, 669
 — v. Milne, 517
 Milner v. Field, (Contract), 199; (Pleading, at Law), 530
 Milnes, in re, 29
 — v. Dawson, 105
 Miner v. Baldwin, 438
 Mines Royal Society v. Magnay, (Lease), 408; (Pleading, at Law), 534
 Minet v. Leman, 294
 Minn v. Stant, (Parties), 508; (Pleading, in Equity), 574
 Minnitt, in re, 73
 Minter, re, 47
 Mitchell v. Crasweller, 467
 — v. Hender, 338
 Moffat v. Burnie, (Parties), 509; (Will), 746
 Moffatt v. Dickson, 460
 — v. Laurie, 198
 Mole, in re, 222
 Moller v. Young, 671
 Monday v. Waghorn, (Baron and Feme), 96; (Practice, in Equity), 600
 Monmouthshire and Glamorgan-shire Banking Co., in re, (Bankruptcy), 70; (Company), 173, 186
 Money, in re, 601
 — v. Jorden, 355
 — v. Money, 335
 Monrow v. Taylor, 676
 Montagu v. Kater, 559
 Montague v. Montague, (Legacy), 432; (Power), 557; (Settlement), 658
 — v. Perkins, (Bills and Notes), 101; (Limitations), 449
 — v. Smith, 373
 Montoya v. London Assurance Co., 660
 Monypenny v. Dering, 245
 Moodie v. Bannister, 511
 Moore, in re, (Administration of Estate), 17; (Lunatic), 458
 — v. Carisbrook, Overseers of, 504
 — v. Darton, 270
 — v. France, 51
 — v. Shepherd, (Limitations), 448; (Harbour), 626*
 — v. Smith, 47
 — v. Woolsey, 364
 Moores v. Whittle, 261
 Moorhouse v. Colvin, 197
 — v. Gilbertson, 505
 More's Trust, in re, 753
 Morewood v. Pollok, 665
 Morgan v. Couchman, (Estoppel), 282; (Principal and Agent), 607
 — v. Hatchell, (Infant), 333; (Practice, in Equity), 594
 — v. Holford, (Devise), 251; (Frauds, Statute of), 316
 — v. Jones, (Interest), 366; (Judgment), 369; (Mortgage), 488
 — v. Marquis, 77
 — v. Milman, 552
 — v. Morgan, (Legacy), 429; (Practice, in Equity), 591, 602; (Thellusson Act), 690*; (Will), 755*
 — v. Pike, (Amendment), 22; (Mortgage), 480
 Morgan v. Thomas, 296
 — v. Whitmore, (Bankruptcy), 77; (Evidence), 290
 Morison v. Moat, 358
 Morland v. Isaacs, 233
 Morley's Will, in re, 251
 Mornington v. Mornington, (Costs, in Equity), 222; (Trust and Trustee), 714
 — v. Keane, 222
 Morrell v. Fisher, 222
 — v. Tinkler, 594
 — v. Wootten, (Assumpsit), 41; (Practice, in Equity), 582
 Morris, in re, (Attachment), 44; (Bankruptcy), 81
 — v. Bosworth, (Costs, at Law), 213; (Practice, at Law), 570
 — v. Islip, 489
 — v. Morris, 256
 Morrison, ex parte, 179
 —, in re, 71
 — v. General Steam Navigation Co., 673
 — v. Hoppe, 752
 — v. Moat, 348
 — v. Morrison, 193
 Morritt v. Walton, 579
 Mortimer v. Hartley, 254
 — v. Watts, 707
 Morton v. Copeland, 207
 Mosley v. Hide, 720
 Moss, in re, (Attorney and Solicitor), 54, 55, 56
 — v. Bainbrigge, (Attorney and Solicitor), 51, 52
 — v. Harter, 558
 — v. London, Commissioners of Sewers of, respondents, 640
 Mossop v. Great Northern Rail. Co., 343
 Mostyn, in re, 67
 — v. Mostyn, 412
 Mount, ex parte, 458
 — v. Mount, 650
 Mountcashel v. Barber, 143
 Mountney v. Collier, (Inferior Court), 339, 346
 Mousley v. Ludlam, 386
 Mowatt, ex parte, 185
 — v. Londesborough, 168
 Moylan, in re, 361
 Moysse v. Dingle, 570
 Mucklow v. Whitehead, 217
 Mudd v. Suckermore, 593
 Muirhead v. Evans, 374
 Mules v. Jennings, 441
 Mullins v. Hart, 519
 Mullock v. Jenkins, 317
 Munday v. Stubbs, 86
 Mungean v. Wheatley, (Certiorari), 127, 129
 Munt v. Shrewsbury and Chester Rail. Co., 622
 Murray's Executors, ex parte, 174
 — v. Bogue, 206

- Murray v. Glasse, (Baron and Feme), 92; (Tenant for Life), 689; (Trust and Trustee), 709
 — v. Parker, (Deed), 243; (Lease), 409
 — v. Wills, 507
 Murrow v. Stuart, 102
 Murton v. Markby, 431
 Musgrove v. Smith, 586
 Myers v. Perigal, (Mortgage), 489; (Mortmain), 490
 — v. Watson, 682
 Napier, ex parte, (Easement), 273; (Mandamus), 461
 Narborough and Watlington Rail. Co., in re, 173
 Nash v. Hodgson, 451
 — v. Miller, 592
 Navulshaw v. Brownrigg, (Principal and Agent), 608; (Inspection), 610
 Naylor v. Palmer, 662
 — v. Robson, 577
 Neale, in re, 333
 — v. Davies, 707
 — v. Ratcliffe, 383
 Neat v. Harding, (Administration), 15; (Money had), 475
 Neatherway v. Fry, 551
 Neathway v. Reed, 425
 Neave v. Avery, (Ejectment), 277; (Pleading, at Law), 534
 Nedby v. Nedby, (Baron and Feme), 89; (Practice, in Equity), 589
 Neilson, ex parte, 172
 — v. Hopkins, 251
 Neve v. Holland, (Baron and Feme), 96; (Limitations), 452
 Newall v. Wilson, 524
 Newberry v. Benson, 293
 Newbould v. Coltman, 627
 Newby v. Paynter, 722
 Newcastle, &c. Banking Co., (Spencer's case), 182
 Newcastle, Shields, and Sutherland Union Bank, in re, 189
 Newcastle-upon-Tyne Marine Insurance Co., in re, 184*
 Newcastle-upon-Tyne, Master Pilots, &c. of, v. Bradley, 672
 Newhouse v. Smith, 484
 Newington, St. Mary, Governors, &c. of Poor of Parish of, v. Hammond, 686
 Newman v. Graham, 374
 — v. Warner, 707
 — v. White, 579
 Newmarket Rail. Co. v. St. Andrew-the-Less, Cambridge, 636
 Newry, Warrenpoint and Rostrevor Rail. Co. v. Moss, 152
 Newton, ex parte, (Estoppel), 282; (Habeas Corpus), 325
 — v. Charlton, 582
 — v. Chorlton, 614*
 Newton v. Ellis, 14
 — v. Farrall, 369
 — v. Grand Junction Rail. Co., 519
 — v. Thompson, 581
 — v. Vaucher, 518
 Nichol v. Godts, 198
 Nicholas, ex parte, 70
 Nicholl v. Chambers, 720
 Nicholls v. Diamond, 101
 — v. Hawkes, 261
 — v. Jones, 32
 Nichols v. Haviland, 415
 — v. Tuck, 647
 Nicholson v. Jeyes, 222
 — v. Sykes, (Arbitration), 33; (Costs, at Law), 216
 Nicklin v. Williams, (Action), 9; (Mine), 473
 Nixon v. Phillips, 718
 Noble, in re, 458
 —'s Patent, in re, 522
 — v. Chapman, 21
 — v. Meymott, 703
 Noden v. Johnson, 304
 Norbury's case, 180
 Norfolk, Duke of, v. Tennant, 396
 Norman's Trust, in re, 650
 — v. Marchant, 212
 — v. Mitchell, 149
 Normantville v. Stanning, 588
 Norris v. Cooper, 182
 — v. Stuart, 729
 — v. Wright, 709
 Northam v. Bowden, 697
 — v. Hurley, 273
 Northampton Charities, in re, 135
 Northampton Gas-light Co. v. Parnell, 229
 North British Insurance Co. v. Lloyd, 324
 Northern and Southern Connecting Rail. Co., in re, 191
 Northern Coal Mining Co., in re, 182, 183
 North of England Joint-Stock Banking Co., in re, 175, 181*, 184*, 185, 186, 189, 190, 191; (Ne exeat regno), 762
 North Staffordshire, Justices of, in re, 639
 North-Western Rail. Co. v. M'Michael, 149
 — v. Sharp, 49
 — v. Whinray, 113
 Norton v. Cooper, 489
 — v. Steinkopf, (Practice, in Equity), 582; (Trust and Trustee), 705
 — v. White, 592
 Norwich, Mayor, &c. of, v. Norfolk Rail. Co., 162
 Norwich Yarn Co., in re, 176
 Nosotti v. Page, 233
 Nottley v. Palmer, 271
 Novello v. James, 207
 — v. Ludlow, 206
 Nowlan v. Walsh, 430
 Nurdin v. Fairbanks, 569
 Nurse v. Seymour, 682
 Nutting v. Hebden, 508
 Nyssen v. Ruysenaers, 60
 Oakes v. Oakes, 418
 Oates v. Hudson, (Money had), 475; (Principal and Agent), 609
 O'Brien v. Kenyon, 718
 — v. Osborne, 236
 O'Connor v. Bradshaw, (Friendly Society), 317; (Lottery), 454
 Oddy v. Secker, 5
 Ogle v. Morgan, (Evidence), 294; (Legacy), 412
 Oldaker v. Hurst, 620
 Oldfield v. Cobbett, (Practice, in Equity), 589, 603
 — v. Dodd, 67
 Old Hutton, Overseers of, ex parte, 456
 Oliver, ex parte, 236
 — v. Wright, 588
 Ollendorff v. Black, 206
 Ollerton, in re, 307
 Olney v. Bates, 413
 O'Neill, ex parte, 343
 Onion's case, 183
 — v. Tyrer, 434
 Onslow v. Londesborough, 729
 Openshaw v. Whitehead, 217
 Oppenheim v. Henry, 427
 Orchard v. Moxsy, 214
 Organ v. Brodie, 667
 Orme v. Galloway, 43
 Orr v. Union Bank of Scotland, 109
 Orrett v. Corser, (Evidence), 286; (Trust and Trustee), 707
 Orton v. Bainbrigge, 589
 Osbaldiston v. Crowther, 578
 Osborn v. Morgan, 89
 Osborne v. London Dock Co., 761
 Ostell v. Le Page, (Foreign Judgment), 308; (Pleading, in Equity), 538
 Ostler v. Cooke, 393
 Oswald v. Berwick-upon-Tweed, Mayor, &c. of, 112
 — v. Grey, (Arbitration), 31, 36; (Landlord and Tenant), 387
 Other v. Iveson, 613
 O'Toole v. Browne, 253
 Oulds v. Harrison, (Bills and Notes), 102; (Gaming), 322
 Oundle Brewery Co., (Croxtton's case), 177, 183
 Outhwaite v. Hudson, (Inferior Court), 343, 346; (Practice, at Law), 567
 Overhill's Trusts, in re, 416
 Overton v. Freeman, 468
 Owen, ex parte, 74
 — v. Bryant, 416
 — v. Homan, (Bond), 110; (Practice, in Equity), 598; (Principal and Surety), 611
 — v. Routh, (Damages), 231; (Stock), 688

- Owen v. Van Uster, (Bills and Notes), 101; (Mine), 473
 Owens v. Breese, (Inferior Court), 336; (Writ of Trial), 762
 Oxenham v. Ellis, 488
 Oxford, ex parte, 317
 Oxford and Worcester Extension, and Chester Junction Rail. Co., in re, 178, 179*, 179
 Oxford, Bletchley Junction and Buckinghamshire Rail. Co.'s Acts, in re, 397
 Oxford, Worcester, &c. Rail. Co., in re, 397
 Oxford, Worcester and Wolverhampton Rail. Co. v. South Staffordshire Rail. Co., 626
 Oyle v. Morgan, 412
- Padwick v. Hurst, 609
 — v. Knight, 230
 — v. Stanley, (Principal and Agent), 608; (Principal and Surety), 612
 Page, ex parte, 85
 — v. Cooper, 699
 — v. Cox, 514
 — v. Page, 601
 — v. Soper, 551
 Painter v. Newby, 724
 Palk v. Skinner, 272
 Palmer, ex parte, 430
 — v. Cooper, 525
 — v. Naylor, 662
 — v. Newell, 734
 — v. Richards, 210
 — v. Simmonds, 421
 — v. Trower, 284
 — v. Wagstaffe, (Patent), 523, 525; (Practice, at Law), 570
 Paramore v. Greenslade, 731
 Paris Chocolate Co. v. Crystal Palace Co., 681
 Parker v. Birks, 260
 — v. Bloxam, (Executor), 297, 302; (Trust and Trustee), 710; (Will), 751
 — v. Bristol and Exeter Rail. Co., (Carrier), 125; (Certiorari), 127; (Money had), 475
 — v. Clark, 247
 — v. Great Northern Rail. Co., 355
 — v. Great Western Rail. Co., 125
 — v. Sowerby, (Devise), 247; (Dower), 271
 — v. Watson, (Bankruptcy), 79; (Bond), 114
 Parkin v. Thorold, (Vendor and Purchaser), 721, 727
 Parkinson's Trust, 415
 — v. Chambers, (Practice, in Equity), 583, 601
 — v. Hanbury, 601
 Parr v. Applebee, 673
 — v. Jewell, 312
- Parrott v. Anderson, 267
 Parsons v. Alexander, 322
 — v. Hardy, 580
 Partridge v. Gardner, 216*
 Patch v. Graves, 759
 Patching v. Dubbins, 227
 Patent Fuel Co. v. Walstab, 355
 Paterson v. Murphy, 733
 — v. Paterson, 268
 — v. Scott, 262
 — v. Wallace, 469
 Patrick v. Andrews, 600
 — v. Shedden, 8
 Pattenden v. Church, 299
 — v. Hobson, 299
 Patterson v. Huddart, 248
 Pattinson, in re, 459
 Pattison's Trusts, in re, 743
 — v. Graham, 77
 — v. Pattison, 427
 Paul v. Roy, 308
 Pauling v. Dover, Mayor, &c. of, 229
 — v. London and North-Western Rail. Co., 161
 Pawsey v. Barnes, (Limitations), 447; (Practice, in Equity), 576
 Pawson v. Pawson, 437
 Paxton v. Newton, 677
 Payne v. Little, 223; (Practice, in Equity), 586, 600, 601
 Paynter v. Carew, (Practice, in Equity), 575, 598
 Peace v. Hains, 235
 Peachey v. Rowland, (Master and Servant), 468; (Nuisance), 500
 Peacock v. Stockford, 416
 Peake v. Ledger, 508
 Pearce v. Gardner, 264
 — v. Watkins, 486
 — v. Wycombe Rail. Co., 625
 Peard v. Kekewich, 554
 Peardon v. Underhill, 145
 Pearse, in re, 76
 Pears v. Wilson, (Inferior Court), 340; (Legacy), 438
 Pearson's Executors' case, 180
 — v. Beck, 692
 — v. Rutter, 260
 — v. Wilcox, 586
 Peatfield v. Benn, 704
 Pedder's Settlement, 202
 Peel v. Thomas, 473
 Peers v. Ceeley, 484
 — v. Needham, 512
 — v. Sneyd, Landlord and Tenant), 388; (Principal and Agent), 611; (Vendor and Purchaser), 731
 Pegg v. Wisden, (Vendor and Purchaser), 723, 726
 Pell v. Daubney, 762
 Pelly v. Wathen, 59
 Pemberton, ex parte, 56
 Penfold, ex parte, 72
 Penhall v. Elwin, 734
 Pennant and Craigwen Consolidated Lead Mining Co., in re, (Company), 183, 185
- Pennell v. Alexander, 720
 — v. Duffell, 705
 — v. Home, 77
 — v. Roy, 351
 — v. Smith, 25
 Penny v. Goode, 615
 — v. Penny, 576
 — v. Pickwick, 173
 Pepper v. Chambers, 616
 Peppercorn v. Wayman, 263
 Percival v. Caney, (Limitations), 453; (Practice, in Equity), 580
 — v. Nanson, 285
 Perkins v. Ede, (Vendor and Purchaser), 726, 731
 Perks's Estate, 399
 Perren v. Monmouthshire Rail. and Canal Co., 527
 Perry v. Turpin, 572
 — v. Walker, 481
 Peters v. Beer, 587
 Peterson v. Ayre, 34
 Peto v. Reynolds, 99
 Petre v. Duncombe, 366
 — v. Petre, (Legacy), 431; (Limitations), 448
 Petty v. Petty, 698
 Phelps v. Prew, 615
 — v. Prothero, (Pleading, at Law), 534; (Principal and Agent), 607
 — v. St. John, 645
 Philipps, ex parte, 174
 Phillips, ex parte, (Bankruptcy), 80; (Insolvent), 357; (Justice of the Peace), 373; (Lands Clauses Act), 394
 —, in re, 176
 — v. Barker, 756
 — v. Higgins, (Arbitration), 32, 33
 — v. Phillips, (Baron and Feme), 90; (Conversion), 201; (Pleading, in Equity), 535
 — v. Pound, 38
 — v. Turner, (Legacy), 417, 432
 Phillpotts v. Phillpotts, (Deed), 239; (Estoppel), 280
 Philpotts, in re, 57
 Philps v. Evans, 415
 Phipps v. Daubney, 52
 Picard v. Mitchell, 261
 Pickanee's Trust, in re, 586
 Pickering, in re, 70
 Pickford v. Brown, 592
 Pidcock v. Boulton, 600
 Piddocke v. Smith, (Lunatic), 459; (Practice, in Equity), 594
 Pidduck v. Boulton, 600
 Pierce v. Williams, 324
 Pigott, in re, 459
 Pillan v. Thompson, 587
 Pimm v. Insall, 586
 Pinchin v. London and Blackwall Rail. Co., 391

- Pindar v. Barr, 143
 Pinfold v. Pinfold, 576
 Pinhorn v. Souster, (Distress), 266;
 (Landlord and Tenant), 382;
 (Mortgage), 480; (Practice, at
 Law), 565
 Pinnington v. Galland, 738
 Pitt v. Pitt, 601
 Place, in re, 618
 — v. Potts, 21; (Evidence), 283;
 (Pleading, at Law), 531;
 (Shipping), 670, 671, 672
 Plasterers Co. v. Parish Clerks
 Co., 444
 Platt v. Bromage, 476
 — v. Elce, 524
 Playfair v. Cooper, (Legacy), 436;
 (Tenant for Life), 689
 Plenty v. West, (Trust and Trus-
 tee), 714; (Will), 742
 Plestow v. Johnson, 223
 Plowden v. Campbell, 215
 — v. Hyde, 757
 Plummer v. Hedge, 565
 Plyer's Trust, in re, 713
 Plymouth Great Western Dock Co.
 v. Inland Revenue, Commis-
 sioners of, 685
 Pocock v. Pickering, (Practice, at
 Law), 570; (Voluntary Convey-
 ance), 734
 Poirier v. Morris, (Bills and Notes),
 107; (Principal and Agent), 607
 Pollard v. Clayton, 680
 — v. Ogden, 63
 Pollock v. Lester, 351
 Pomfret v. Perring, 556
 Poole v. Bott, 744
 Pooley v. Budd, 699
 Pope v. Fleming, 566
 — v. Pope, 741
 — v. Whitcombe, 236
 Popham v. Jones, 27
 Poppel v. Henson, 221
 Porch v. Crësswell, 564
 Porritt v. Baker, 321
 Port of London Shipowners' Loan
 and Assurance Co., ex
 parte, 178
 —, in re, 183
 Porter v. Watts, 704
 Potts v. Levy, 350
 — v. Warwick and Birmingham
 Canal Navigation Co., 153
 Potter v. Baker, 435
 — v. Inland Revenue, Commis-
 sioners of, 685
 — v. Richards, 430
 Powdrell v. Jones, (Administration),
 16; (Copyhold), 202; (Partners),
 515
 Powell's Trust, 25
 — v. Hoyland, 697
 — v. Maret, 435
 — v. Merrett, 435
 Power v. Jones, 214
 Powers v. Fowler, 316
 Powles v. Hargreaves, 106
- Pownall v. Dawson, 503
 — v. Hood, (Parliament), 503,
 505
 Powys v. Blagrave, 733
 Prance v. Sympson, 451
 Pratt v. Walker, 582
 Preece and Evans's case, 186
 Prentice v. Prentice, 591
 Prescott v. Hadow, (Company), 174,
 189
 Preston v. Liverpool, Manchester
 and Newcastle-upon-Tyne
 Junction Rail. Co., (Rail-
 way), 624; (Specific Per-
 formance), 676
 — v. Collett, (Mortgage), 477;
 (Practice, in Equity), 575
 Prew v. Squire, (Costs, at Law),
 211; (Writ of Inquiry), 356
 Price v. Barker, 611
 — v. Berrington, (Fraud), 312;
 (Lunatic), 454
 — v. Griffith, 678
 — v. Hewitt, 338
 — v. Lovett, 40
 — v. Macaulay, 723
 — v. Moulton, 110
 — v. Price, 732
 — v. Thomas, 569
 Prichard, ex parte, (Company), 176,
 191
 — v. London and Birmingham
 Extension, Northampton, &c.
 Rail. Co., 175
 Pridie v. Field, 437
 Prince v. Cooper, (Practice, in
 Equity), 590; (Tenant
 for Life), 689
 — v. Howard, 591
 Prince of Wales, Attorney General
 of, v. Bristol Waterworks, 687
 Pritchard's case, 177
 — Trusts, 413
 — v. Bagshawe, (Evidence), 291;
 (Limitations), 453
 — v. Norris, 594
 Proctor v. Brotherton, 569
 — v. Cooper, 372
 — v. Hodgson, 739
 Prole v. Masterman, 171
 Property's Purchase, in re, 712
 — v. Tregear, 374
 Prudential Mutual Investment and
 Loan Association v. Curzon,
 (Stamp), 684, 686
 Pryce v. Bury, 478
 Pugh, ex parte, 91
 —, in re, (Baron and Feme), 93;
 (Lunatic), 455
 Pulsford v. Richards, 152
 Purchas v. Holy Sepulchre, Cam-
 bridge, 633
 Pyecroft v. Pyecroft, 355
 Pym, ex parte, 401
 Pyrke v. Waddingham, 681
- Quane v. Quane, 97
 Quartermaine v. Bittlestone, 75
- Queen Dowager's Annuity, 25, 26
 Quennell v. Turner, 741
 Quedest v. Michell, 748
 Quilter, ex parte, (Attorney and So-
 licitor), 56; (Company), 175
- Rabbeth v. Squire, (Devise), 258;
 (Practice, in Equity), 579; (Will),
 747
 Raby v. Ridehalgh, 709
 Race v. Ward, (Custom), 230;
 (Easement), 272
 Rackham v. Cooper, 577
 Rackmaboze v. Mottichund, 449
 Radcliffe v. Salmon, 372
 Ralli v. Denistoun, 104
 Ramsden v. Smith, 653
 Ramshay, ex parte, (Inferior Court),
 336; (Quo Warranto), 620
 Randall's Will, in re, 713
 — v. Hall, 724
 — v. Moon, 103
 — v. Stevens, 446
 Ranger v. Great Western Rail. Co.,
 (Company), 153, 200
 Rannie v. Chandler, 17
 Ransom, re, 54
 Raphael v. Boehm, 433
 Rashleigh v. South-Eastern Rail.
 Co., 225
 Rastrick v. Derbyshire, Stafford-
 shire and Worcestershire Junc.
 Rail. Co., 191
 Ratcliffe v. Winch, 302*
 Ratt v. Parkinson, 379
 Rawlings v. Dalgleish, 578
 Rawlins v. M'Mahon, 597
 Rawlinson v. Medwin, 368
 — v. Wass, 249
 Rayner v. Allhusen, 616
 Read v. Coker, (Action), 14; (Arti-
 cles of the Peace), 40
 — v. Fairbanks, (Damages), 231;
 (Deed), 242
 — v. Legard, 88
 — v. Prest, 508
 — v. Strangways, 431
 Reade v. Lambe, 317
 Records and Writs, Clerk of, in re,
 586
 Reddish v. Pinnock, 189
 Reece v. Taylor, 371
 Reed v. Gardner, 213
 — v. Ingham, 737
 — v. Lambe, 317
 — v. Prest, 587
 — v. Shrubsole, (Costs, at Law),
 211; (Writ of Inquiry), 356
 Reddie v. London and North-West-
 ern Rail. Co., 159
 Rees's Devises, in re, 713
 — v. Watts, 302
 — v. Williams, 127
 Reeve v. Hodson, (Practice, in
 Equity), 579, 593, 605
 Reeves v. Baker, (Pleading, in
 Equity), 538; (Practice, in
 Equity), 573; (Will), 746

- Reeves v. White, 320
 Regina v. Abney, 117
 — v. Alford, 279
 — v. Alleyne, 279
 — v. Ambergate, Nottingham and Boston, &c. Rail. Co., (Company), 155; (Estoppel), 281
 — v. Ambergate Rail. Co., 462
 — v. Amos, 39
 — v. Anon., 223
 — v. Archer, 306
 — v. Arnold, 456
 — v. Ashton, (Ale and Beer-houses), 20; (Gaming), 322
 — v. Avery, 495
 — v. Balby and Workop Turnpike Road, Trustees of, (Executor), 296; (Devise), 461
 — v. Baldry, 292
 — v. Bannatyne, 321
 — v. Barues, (False Representation), 305; (Larceny), 404
 — v. Bartholemey, 127
 — v. Beaumont, 278
 — v. Bedford, County of, (Evidence), 289; (Highway), 328
 — v. Bedwell, (Master and Servant), 470; (Sessions), 646
 — v. Beeston, 292
 — v. Bengeworth, Inhabitants of, 545
 — v. Bennett, (Perjury), 528; (Poor), 546
 — v. Bessell, 207
 — v. Bilston, Chapelwardens of, 637
 — v. Binney, (Certiorari), 128; (Sessions), 646
 — v. Biram, 393
 — v. Bird, (Murder), 498; (Pleading, in Criminal Cases), 589
 — v. Birkenhead Docks, 628
 — v. Birmingham and Oxford Junc. Rail. Co., 462
 — v. Blackburn, 606
 — v. Blakeman, 375
 — v. Blakemore, (Arbitration), 29; (Highway), 328
 — v. Boulter, 529
 — v. Bradford, Mayor, &c. of, 494
 — v. Brandt, 632
 — v. Brighelmstone, Parish of, 547
 — v. Bristol, Recorder of, 646
 — v. Brooks, 641
 — v. Buckingham, Justices of, 457
 — v. Buckinghamshire, Justices of, 549
 — v. Bucknell, Inhabitants of, (Poor), 548, 549
- Regina v. Bucks, Justices of, 20
 — v. Burgate, Inhabitants of, 545
 — v. Burton, 404
 — v. Caldecote, 547
 — v. Caledonian Rail. Co., 154
 — v. Carew, 549
 — v. Carlisle, 194
 — v. Carttar, 44
 — v. Caudwell, 605
 — v. Chandler, 502
 — v. Charlesworth, (Ale and Beer-house), 19; (Justice of the Peace), 378
 — v. Cheafor, 404
 — v. Clarke, (Evidence), 292; (Rape), 626
 — v. Claxby, Inhabitants of, 327
 — v. Clements, 292
 — v. Coaks, 494
 — v. Cockburn, 646
 — v. Cohen, 403
 — v. Collins, 378
 — v. Cook, 528
 — v. Cooper, (Larceny), 404; (Poor Rate), 630
 — v. Corbett, 203
 — v. Cornish, 404
 — v. Cottle, 715
 — v. Coward, 494
 — v. Craddock, 641
 — v. Cutler, 522
 — v. Dadson, 674
 — v. Dale, (Ale and Beerhouse), 20; (Scire Facias), 645
 — v. Davis, (Bastardy), 97; (Indictment), 332
 — v. Dawson, (Forgery), 310; (Voluntary Conveyance), 734
 — v. Dendy, (Copyhold), 204; (Mandamus), 463
 — v. Denton, Inhabitants of, 327
 — v. Deny, 377
 — v. Derby, Recorder of, 549
 — v. Derbyshire, Justices of, (Lunatic), 457; (Sessions), 646
 — v. Derbyshire, &c. Rail. Co., (Amendment), 24; (Company), 191
 — v. Deverell, 378
 — v. Dock Co. Kingston-upon-Hull, 635
 — v. Dolan, 641
 — v. Dovey, 641
 — v. Dowling, 358
 — v. Drake, 127
 — v. Drury, 292
 — v. Dulwich, Master, &c. of College in, 144
 — v. Dunboyne, 529
 — v. Durham, Justices of, 378
 — v. Eagleton, 305
 — v. Eardisland, Inhabitants of, 328
 — v. Earnshaw, 620
- Regina v. East Anglian Rail. Co., 464
 — v. East and West India Docks and Birmingham Junc. Rail. Co., 621
 — v. East London Waterworks Co., (Lighting Rate), 639, 640
 — v. East Stonehouse, Inhabitants of, 546*
 — v. Eastern Archipelago Co., 522
 — v. Edwards, 303
 — v. Ellis, 303
 — v. Elsey, 456
 — v. Epsom, Inhabitants of, (Apprentice), 28; (Poor), 546
 — v. Evans, 319
 — v. Everett, 339
 — v. Featherstone, (Crown Cases Reserved), 229; (Larceny), 404
 — v. Ferguson, 331
 — v. Ferrall, 97
 — v. Ford, 292
 — v. Foster, (Coin), 144; (Jury), 375
 — v. Foulkes, 127
 — v. Francis, 493
 — v. Frere, (Company), 158; (Justice of the Peace), 376
 — v. Frost, 24
 — v. Garrett, 305
 — v. Gaskill, 631
 — v. Gibbs, 277
 — v. Gill, 278
 — v. Goodenough, 278
 — v. Great Western Rail. Co., (Company), 155, 156; (Poor-rate), 635
 — v. Green, (Bastardy), 97; (False Pretences), 306; (Forgery), 310; (Justice of the Peace), 378
 — v. Greene, 543
 — v. Greenhalgh, 306
 — v. Greenwood, 144
 — v. Gregory, 495
 — v. Griffiths, 542
 — v. Halifax, Township of, 546
 — v. Hallett, (Oath), 500; (Perjury), 523
 — v. Hammond, 494
 — v. Hancock, 523
 — v. Harden, (Inferior Court), 336, 339; (Mandamus), 463; (Nuisance), 500
 — v. Harris, 278
 — v. Hartfield, Overseers of, 547
 — v. Hartington, Middle Quarter, Township of, (Evidence), 284; (Poor), 548
 — v. Hartlepool, Mayor of, 495
 — v. Harwich, Mayor, &c. of, 495
 — v. Harwood, (Inferior Court), 342; (Jury), 375
 — v. Haughton, 284

- Regina v. Haughton, Inhabitants of, (Estoppel), 282; (Highway), 328
- v. Hellier, 647
- v. Henson, 24
- v. Hewgill, 306
- v. Hickling, 528
- v. Hicks, 694
- v. High and Low Harrogate, Commissioners of, 627
- v. Hill, 760
- v. Hills, (Bankruptcy), 71; (Costs), 224
- v. Hodgson, 224
- v. Hogan, 502
- v. Holbeck, Overseers of, 547
- v. Holmes, 330
- v. Hornsea, Inhabitants of, 327
- v. Huntley, (Master and Servant), 467; (Poor-rate), 637
- v. Hushwaite, Inhabitants of, 545
- v. Hutchinson, 716
- v. Hyde, (Certiorari), 127; (Game), 321; (Justice of the Peace), 379
- v. Ingham, (Justice of the Peace), 378; (Building Act), 471
- v. Ion, 310
- v. Isaacs, 325
- v. Johnson, 402
- v. Kealey, 306
- v. Keith, 309
- v. Kelsey, (Costs, at Law), 215; (Feigned Issue), 307
- v. Kentmere, 628
- v. Key, 374
- v. Kidderminster, Mayor, &c. of, 495*
- v. Kingston - upon - Hull, Guardians of Poor of, 497
- v. Kingston-upon-Hull Dock Co., 635
- v. Kingswinford, Overseers of, 139, 736
- v. Kitson, 39
- v. Knapp, 20
- v. Knaresborough, Inhabitants of, 545
- v. Lancashire and Yorkshire Rail. Co., (Company), 154; (Lands Clauses Act), 389
- v. Lancashire, Justices of, 457
- v. Land Tax Commissioners, 401
- v. Langridge, 463
- v. Larkin, 24
- v. Latimer, 223
- v. Lavey, 528
- v. Lechmere, 224
- v. Leeds and Bradford Rail. Co., (Justice of the Peace), 379; (Lands Clauses Act), 390
- Regina v. Leeds, Recorder of, 98
- v. Leith, 639
- v. Lichfield, Mayor, &c. of, 497
- v. Liverpool, Manchester and Newcastle - upon - Tyne Rail. Co., 150
- v. Liverpool, Recorder of, (Mandamus), 462; (Poor), 549
- v. Llanelly, Inhabitants of, 547
- v. Llanfaethly, Inhabitants of, (Poor), 550; (Witness), 761
- v. Llansaintfrid Glyn Conway, Inhabitants of, 545
- v. London and North-Western Rail. Co., (Company), 154; (Lands Clauses Act), 395
- v. London, Brighton and South-Coast Rail. Co., 634
- v. Longwood, Township of, 636
- v. Lowe, (Libel), 443; (Limitations), 464
- v. Luckhurst, 291
- v. M'Gavaron, 223
- v. Major, 528
- v. Mallinson, (Articles of the Peace), 39, 40
- v. Manchester, (Poor), 548
- v. Manchester, Mayor, &c. of, (Poor-rate), 628
- v. Manchester, Overseers of, (Poor-rate), 631
- v. Manchester, Township of, (Poor-rate), 630
- v. Mankletow, 1
- v. Manktelow, 1
- v. Manning, 402
- v. Marshall, (Inferior Court), 337; (Information), 347
- v. May, 494
- v. Mears, 194
- v. Metropolitan Commissioners of Sewers, 655
- v. Middlesex, Justices of, (Poor), 549; (Lighting-rate), 640
- v. Midland Rail. Co., 634
- v. Mill, (Patent), 520, 522
- v. Millard, 377
- v. Minster, Inhabitants of, 456
- v. Mitchell, 644
- v. Moore, 292
- v. Moorhouse, 331
- v. Morgan, 403
- v. Morrison, 636
- v. Much Hoole, Overseers of, 544
- v. Murdock, 278
- v. Nash, (Company), 149; (Forgery), 310
- v. Newhouse, 223
- v. Newman, (Libel), 443; (Perjury), 529
- v. Norfolk, Commissioners of Sewers, 462
- Regina v. North and South Shields Ferry Co., 629
- v. Oates, 306
- v. Oddy, 641
- v. Ossett, Inhabitants of, 546
- v. Overton, 279
- v. Oxford, (Guardians), 541
- v. Oxley, 528
- v. Percy, 97
- v. Perkins, 641
- v. Perry, 192
- v. Petrie, 326
- v. Pharmaceutical Society, 689
- v. Phillpott, (Parent and Child), 502; (Perjury), 528
- v. Pilkington, 378
- v. Pinder, 458
- v. Pocock, 464
- v. Poor Law Commissioners, 540
- v. Potter, 404
- v. Povey, (Bigamy), 98; (Marriage), 465
- v. Powell, (Larceny), 404; (Municipal Corporation), 497
- v. Poyser, 404
- v. Pratt, (Game), 321; (Larceny), 403
- v. Prest, 497
- v. Priest Hutton, Inhabitants of, 456
- v. Raines, 339
- v. Reason, 405
- v. Reed, 404
- v. Reid, 40
- v. Richards, (Inferior Court), 341; (Mandamus), 462
- v. Riley, (Larceny), 402; (Night Poaching), 499
- v. Robins, 403
- v. Robinson, 541
- v. Rochester, Dean, &c. of, 137
- v. Rose, 128
- v. Rowlands, 194
- v. Russell, 568
- v. Rymes, 24
- v. Sadlers Co., (Amendment), 24; (Mandamus), 463; (Pleading, at Law), 530
- v. Safron Hill, 288
- v. St. Albans, Justices of, (Certiorari), 128; (Turnpike), 715
- v. St. Andrew, Holborn, 547
- v. St. Anne, Blackfriars, 544
- v. St. George, Bloomsbury, (Apprentice), 27, 28; (Justice of the Peace), 375; (Poor), 546
- v. St. Giles, Camberwell, 288
- v. St. Giles Without, Cripple-gate, Inhabitants of, 544
- v. St. James's, Colchester, 128
- v. St. James's, Westminster, 541*

- Regina v. St. Leonard, Shoreditch, Inhabitants of, 457
 — v. St. Martin-in-the-Fields, Guardians of, (Mandamus), 461; (Poor), 542; (Poor-rate), 632
 — v. St. Mary, Castlegate, 545
 — v. St. Marylebone, Inhabitants of, (Poor), 544, 548
 — v. St. Mary Magdalen, Bermondsey, 28
 — v. St. Mary, Warwick, (Evidence), 285; (Poor), 545
 — v. St. Maurice, (Evidence), 283; (Justice of the Peace), 376; (Lunatic), 455
 — v. St. Peter in Barton-on-Humber, (Lunatic), 457; (Poor), 550
 — v. Salford, Overseers, 19
 — v. Salop, Justices of, (Lunatic), 457; (Poor), 549
 — v. Samways, 403
 — v. Sandon, Inhabitants of, 128
 — v. Saunders, (County-rate), 638; (Highway-rate), 639
 — v. Scaife, (Certiorari), 129; (Evidence), 292; (Jurisdiction), 373
 — v. Seale, 279
 — v. Sharman, 310
 — v. Sharp, 331
 — v. Shavington - cum - Gresty, 544
 — v. Shrewsbury, Recorder of, (Poor), 548, 549
 — v. Shrimpton, 292
 — v. Shuttleworth, 292
 — v. Sidney, 494
 — v. Sill, 127
 — v. Simpson, 405
 — v. Skelton, 192
 — v. Slater, 639
 — v. Slawstone, Inhabitants of, 549
 — v. Sleeman, 291
 — v. Smith, (Inquest), 334; (Larceny), 402; (Receiving), 641
 — v. Snelling, 310
 — v. Southampton Dock Co., (Costs, in Criminal Cases), 224; (Poor-rate), 628
 — v. Southampton, Inhabitants of, County of, 116
 — v. South Devon Rail. Co., 393
 — v. South-Eastern Rail. Co., (Mandamus), 462, 463; (Poor-rate), 634
 — v. South Shields Turnpike Roads, Trustees of, 715
 — v. Stapylton, 341
 — v. Stone, (Affidavit), 18; (Nuisance), 500
 — v. Street, 544
 — v. Sturge, 24
 Regina v. Suffolk, Justices of, (Certiorari), 128; (Justices of the Peace), 377
 — v. Surrey, Justices of, (Highway), 327; (Justices of the Peace), 377
 — v. Temple, 630
 — v. Tithe Commissioners for England and Wales, 693
 — v. Thompson, (Conspiracy), 194; (Jurisdiction), 372
 — v. Thwaites, 493
 — v. Tollemache, 40
 — v. Tower Division, Commissioners of Land-tax for, 401
 — v. Treasury, Lords of, (Annuity), 25; (Apportionment), 26
 — v. Turweston, Inhabitants of, 327
 — v. Tyrwhitt, 543
 — v. Uezzell, 499
 — v. Vann, 116
 — v. Vincent, 403
 — v. Waghorn, (Ale and Beerhouse), 19; (Justice of the Peace), 376
 — v. Walker, (Larceny), 403; (Police), 540
 — v. Wanstead, Lord of Manor of, 204
 — v. Watts, 404
 — v. Waverton, Inhabitants of, (Highway), 327; (Indictment), 332
 — v. Welch, (Coin), 144; Master and Servant, 466
 — v. Wellesley, 204
 — v. Welman, 307
 — v. West, 403
 — v. West Riding, Justices of, (Ale and Beerhouse), 19; (Lunatic), 456, 457
 — v. White, 403
 — v. Whitehead, 464
 — v. Whiteman, 694
 — v. Wigton, Overseers of, 456
 — v. Wiley, 641
 — v. Williams, (Forgery), 310; (Justices of the Peace), 379
 — v. Wilson, (Costs, in Criminal Cases), 224; (Highway), 328; (Lunatic), 457
 — v. Wing, 150
 — v. Wodehouse, 547
 — v. Worcestershire, Justices of, 329
 — v. Worthing and Lancing Turnpike Roads, 716
 — v. Wortley, (Embezzlement), 278; (Partners), 513
 — v. York and North Midland Rail. Co. (Company), 155, 156
 — v. York, Mayor, &c. of, 496
 — v. York, Newcastle and Berwick Rail. Co., 389
 Regina v. Young, 292
 — v. Zoological Society, 633
 Reid, ex parte, 85
 — v. Ashby, 211
 — v. Hoskins, 659
 — v. Kenrick, 653
 Reimer v. Ringrose, 660
 Remmett v. Lawrence, 656
 Renaux v. Teakle, 88
 Renshaw v. Bean, 444
 Reynell v. Sprye, (Costs, in Equity), 220; (Fraud), 312; (Practice, in Equity), 582
 Reynolds v. Kortright, 750
 Rhodes v. Buckland, 481
 — v. Ibbetson, (Practice, in Equity), 602; (Vendor and Purchaser), 722
 Riccard v. Inclosure Commissioners, 618
 — v. Prichard, 349
 Rice v. Gordon, 220
 — v. Rice, 478
 Richard's Trust, 714
 Richards, in re, 458
 — v. Curlew, 582
 — v. Lewis, (Deed), 238, 239
 — v. Rose, 272
 — v. Scarborough Market Co., (Attorney and Solicitor), 50; (Company), 147
 Richardson v. Eytton, 677
 — v. Gilbert, 206
 — v. Jenkins, 706
 — v. Rusbridger, 222
 — v. Ward, 603
 Ricketts v. East and West India Docks and Birmingham Junc. Rail. Co., 156
 Rickit's Trust, 744
 Riddle's case, 190
 Rider v. Wood, 249
 Ridgway v. Clare, 515
 — v. Ridgway, 423
 — v. Sneyd, 472
 — v. Stafford, 268
 — v. Wharton, 682
 Ridley v. Tiplady, 49
 Rimell, ex parte, 86
 Rimington v. Cannon, 257
 Ritchie v. Humberstone, 590
 Roberts v. Tucker, 101
 Roberts, ex parte, 180
 — in re, 68
 — v. Aylesbury, 629
 — v. Ball, (Costs, in Equity), 219; (Judgment), 370
 — v. Berry, 721
 — v. Bethell, 102
 — v. Collett, 598
 — v. Eberhardt, (Partners), 513, 517
 — v. Hunt, 326
 — v. Kerslake, (Practice, in Equity), 581, 593
 — v. Phillips, 756
 Robertson v. Gunning, 211
 — v. Shewell, 584

- Robertson v. Wait, 670
 Robins v. Hobbs, 238
 Robinson's Charity, in re, 135
 — Executors, ex parte, 181
 — v. Anderson, 47
 — v. Briggs, (Evidence), 293;
 (Trust and Trustee), 703
 — v. Bristol, Marquis of, 142
 — v. Geldard, 422
 — v. Gell, 344
 — v. Lawrence, (Costs, at Law),
 209; (Inferior Court),
 337, 343, 346
 — v. London Hospital, Governor
 of, (Company), 148; (Will),
 744
 — v. Lowater, 728
 — v. Robinson, (Trust and Trustee),
 708; (Will), 751
 — v. Rutter, 645
 — v. Turner, (Mortgage), 487;
 (Practice, in Equity), 577
 — v. Webb, 749
 — v. Woodward, 371
 Robson v. Doyle, 21
 Rochdale Canal Co. v. King, (Costs,
 in Equity), 219; (Injunction),
 349, 352; (Practice,
 in Equity), 584
 — v. Radcliffe, 273
 Rochester Corporation v. Lee, 603
 Rochford v. Hackman, (Infant),
 334; (Legacy), 419
 Rodgers v. Nowill, 354
 Rodick v. Gandell, 41
 Rodrigues v. Melhuish, 667
 Rodway v. Lucas, (Interest), 366;
 (Practice, at Law), 561
 Roe v. Birkenhead, Lancashire and
 Cheshire Junc. Rail. Co.,
 (Company), 159; (Master
 and Servant), 467
 — v. Fuller, (Bankers), 63;
 (Practice, at Law), 564
 Roebuck, in re, 86
 Roelands v. Harrison, 657
 Rogers v. Acaster, 92
 — v. Driver, 207
 — v. Hooper, (Practice, in
 Equity), 581, 586
 — v. Hunt, 561
 — v. Jones, 604
 — v. Macnamara, (Hackney Car-
 riage), 325; (Malice),
 461
 — v. Mort, 594
 — v. Turner, 616
 Rolfe v. Chester, 483
 Rolin v. Steward, (Bills and Notes),
 109; (Damages), 231
 Rolle's Charity, in re, 135
 Romford Union v. British Guar-
 antee Association, 232
 Room v. Cottam, 214
 Rooper v. Harrison, (Advowson),
 17; (Merger), 470; (Mortgage),
 483
 Rooth v. Tomlinson, 589
 Roper v. Levy, (Arbitration), 36;
 (Inferior Court), 340
 Rose, ex parte, 140
 — v. Gould, 410
 Rosetto v. Gurney, 660
 Roskrige v. Caddy, 643
 Ross's Trust, in re, 92
 — v. Green, (Costs, at Law), 215;
 (Practice, at Law), 563
 — v. Ross, 415
 Rosseter v. Cahlman, 739
 Rotheram v. Battson, 220
 Rouse's Estate, in re, 435
 Rowberry v. Morgan, 562
 Rowe v. May, 481
 — v. Tipper, 106
 Rowland v. Witherden, 588
 Rowley v. Adams, (Costs, in
 Equity), 219; (Trust and
 Trustee), 712
 — v. Rowley, (Evidence), 286;
 (Power), 555
 * Roysds v. Roysds, 221
 Royston and Hitchin Rail. Co., in
 re, 399
 Ruckmaboye v. Mottickund, 273
 Ruffey v. Henderson, 444
 Rufford, ex parte, 84
 — in re, 317
 Rugby, Warwick and Worcester
 Rail. Co., Preece and Evans's
 case, in re, 186
 Rumbelow v. Whalley, 527
 Rump v. Greenhill, 535
 Rumsey v. Rumsey, 222
 Russell, ex parte, 73
 — Institution v. St. Giles-in-the-
 Fields and St. George,
 Bloomsbury, 632
 —'s Estate, 333
 —'s Trust, 713
 — v. Croysdill, 175
 — v. East Anglian Rail. Co., 153
 — v. Jackson, (Evidence), 290;
 (Trust and Trustee), 699
 — v. McCulloch, 372
 — v. Plaiice, 297
 Rust v. Nottidge, 199
 Rutter, in re, (Lunatic), 458, 459
 Ryan v. Shilcock, 268
 Rye's Trust, in re, 410
 Sadd v. Maldon, Witham and
 Braintree Rail. Co., 621
 Sadler v. Henlock, 468
 Sadlier v. Biggs, 287
 Saffron Hill, Overseers of, ex
 parte, 471
 St. Andrew's, Worcester, v. Boden-
 ham, 544
 St. George Steam Packet Co., in
 re, (Company), 177, 180
 St. James's Club, in re, 174*
 St. James's, Westminster, Vestry-
 men, &c. of, in re, 540
 St. John's Hospital, Bath, 135
 St. Mary, Newington v. Hammond,
 686
 St. Paul's, Precentor of, ex parte,
 398
 — v. Birmingham, Wolverhampton
 and Stour Valley Rail. Co.,
 724
 Sale v. Kitson, 510
 Salisbury, Marquis of, v. Great
 Northern Rail. Co., 390
 Salmon v. Webb, 503
 Salmon v. Dean, 484
 — v. Webb, 108
 Salomons v. Miller, 500
 Saloway v. Strawbridge, 484
 Salvidge v. Tutton, 597
 Sanders v. Rodway, 94
 Sanderson v. Proctor, (Affidavit),
 19; (Costs, at Law), 214
 Sandford v. Jodrell, 703
 Sandilands, ex parte, 88
 Saner v. Deaven, (Practice, in
 Equity), 592, 603
 Sanville, in re, v. Inland Revenue,
 Commissioners of, 685
 Saunders, in re, 469
 — v. Druce, (Pleading, in Equity),
 539; (Practice, in Equity),
 602
 — v. Richardson, 536
 — v. Walter, 594
 Savage v. Hutchinson, 586
 Savery, in re, 54*
 Saward v. McDonnell, 594
 Sawrey v. Rumney, 429
 Sawyer v. Mills, 534
 Scales v. Collins, 422
 Scawen v. Nicholson, 486
 Schilizzi v. Derry, 658
 Schmalz v. Avery, 609
 Schofield v. Cahuac, 254
 Schreger v. Carden, 527
 Schroder v. Schroder, (Devise),
 253; (Will), 759
 Schwabacher v. Becker, 598
 Schwing v. London and Blackwall
 Rail. Co., 390
 Scott v. Bentley, 459
 — v. De Richebourg, 571
 — v. Hastings, 577
 — v. Sandeman, 366
 — v. Spashelt, 89
 — v. Walker, 617
 — v. Wheeler, 578
 — v. Zygomalas, 618
 Scotthorn v. South Staffordshire
 Rail. Co., 121
 Scotto v. Stone, 589
 Scrivener v. Smith, 419
 Sea, Fire and Life Insurance Co.,
 in re, (Company), 170, 178, 182
 Seagrave v. Pope, 318
 Seal v. Dent, 108
 Selby v. East Anglian Rail. Co.,
 (Bond), 116; (Judgment), 368
 Sellers v. Dickinson, (Patent), 519,
 520
 Sells v. Bowes, (Landlord and
 Tenant), 388; (Replevin), 643
 Semple v. Steinau, 683

- Senhouse v. Hall, (Practice, in Equity), 602; (Settlement), 650
 Senior v. Pritchard, 355
 Sergison v. Beavan, 573
 Serrell v. Derbyshire, Staffordshire and Worcester Junction Rail. Co., 374
 Severs v. Severs, 428
 Sewell, ex parte, 64
 — v. Moxsy, 733
 Seymour v. Maddox, 18, 500
 — v. Vernon, (Conversion), 202; (Insurance), 365
 Shackell, ex parte, 57
 Shand v. Kidd, (Legacy), 414; (Practice, in Equity), 597
 Shardlow v. Gaze, 293
 Sharman v. Sanders, 466
 Sharp, ex parte, 179
 — v. Cosserat, 651
 — v. Eveleigh, 213
 — v. Shepherd, (Limitations), 448; (Harbour Duties), 626
 Sharpley v. Mablethorpe, 627
 Sharrod v. London and North-Western Rail. Co., (Administration), 15; (Master and Servant), 467
 Sharsbaw v. Gibbs, (Tenant for Life), 689; (Trust and Trustee), 700
 Shattock v. Carden, 656
 Shaw, in re, (Attorney and Solicitor), 58; (Bankrupt), 64
 — v. Bank of England, 525*
 — v. Charritie, 304
 — v. Forrest, 582
 — v. Hughes, 213
 — v. Neale, (Attorney and Solicitor), 59; (Judgment), 372
 — v. Thackray, 677
 Shearman v. McGregor, 353
 Shea v. Boschetti, 757
 Shedden v. Patrick, (Alien), 20; (Bastardy), 96
 Sheddon v. Butt, 505
 Sheehy v. Professional Life Assurance Co., (Action), 7; (Practice, at Law), 562, 565
 Sheffield and Rotherham Rail. Co., in re, 333
 Sheffield Gas Consumers' Co. v. Harrison, 682
 Sheffield v. Coventry, 743
 Shepeler v. Durant, 20
 Shephard's Trusts, in re, 754
 — v. Oxenford, 518
 Shepherd v. Baker, 212
 — v. Hodsman, 715
 — v. Londonderry, Marquis of, 692
 Sherlock, ex parte, 82
 Sherwin v. Shakespeare, (Practice, in Equity), 603; (Specific Performance), 682; (Vendor and Purchaser), 722
 Sherwood Loan Society, in re, 174
 Sherwood v. Vincent, 589
 Shipton v. Rawlins, 93
 Short v. Mercier, 537
 Shortridge v. Bosanquet, 172
 Shrewsbury and Birmingham Rail. Co. v. London and North-Western Rail. Co., 164
 — v. London and North-Western Rail. Co., Shropshire Union Rails. and Canal Co., and Glyn and Cowan, (Company), 162, 166
 — v. Stour Valley Rail. Co., (Company), 159; (Practice, in Equity), 593
 Shrewsbury and Chester Rail. Co. v. Shrewsbury and Birmingham Rail. Co., 351
 Shrewsbury and Hereford Act, in re, 400
 Shrewsbury and Leicester Rail. Co., in re, 56
 Shrewsbury and Leicester Direct Rail. Co., (Riddle's case), 190
 Shrewsbury Hospital, Trustees of, ex parte, 137
 Shrimpton v. Laight, 350
 Shum v. Hobbs, 426
 Sibbald v. Lowrie, 726
 Sichel, ex parte, 178
 Sidebotham v. Watson, (Legacy), 428; (Will), 753
 Siffken v. Davis, 487
 Sill v. Regina, 306
 Sillem v. Thornton, 365
 Sillibourne v. Newport, 708
 Silver v. Stein, (Parties), 510; (Practice, in Equity), 604
 Sim v. Edmonds, 530
 Simmons v. Lillystone, 697
 — v. Rose, 262
 — v. Rudall, (Limitations), 447; (Will), 752, 757
 Simms v. Marryatt, (Copyright), 208; (Evidence), 283
 Simpson's Settlement, 550
 — Trust Estate, 456
 — v. Chapman, (Partners), 517; (Pleading, in Equity), 537
 — v. Denison, (Company), 173; (Railway), 625*
 — v. Eggington, 526
 — v. Sadd, (Affidavit), 19; (Costs, at Law), 209; (Suit at Law and in Equity), 689; (Vendor and Purchaser), 726
 — v. Wood, 109
 Sims v. Brutton, (Limitations), 452; (Partners), 516
 — v. Helling, (Mortgage), 478; (Practice, in Equity), 602
 — v. Marryatt, 283
 Sinclair v. Jackson, 488
 — v. Wilson, 76
 Sinclay, in re, 97
 Sirdefield v. Thackery, 604
 Sivewright v. Archibald, 315
 Skidmore's Estate, in re, 605
 Skingley, in re, 735
 Skinner v. Carter, 501
 — v. London and Brighton Rail. Co., 22
 — v. London, Brighton and South Coast Rail. Co., 120
 Skip v. Eastern Counties Rail. Co., 469
 Skipp v. Ramsden, 731
 Slim v. Great Northern Rail. Co., 123
 Slocombe v. Lyal, 564
 Sloper, in re, 714
 Small v. Batho, 217
 — v. Currie, 612
 Smallwood v. Rutter, 599
 Smart v. Harding, 314
 — v. Morton, 474
 — v. West Ham Union, 542
 Smith, ex parte, (Bankruptcy), 86; (Company), 174
 —, in re, (Attorney and Solicitor), 48, 55
 —'s Will, in re, 422
 — v. Adams, 202
 — v. Bakes, 263
 — v. Boucher, 489
 — v. Braine, 104
 — v. Cannan, 65
 — v. Cartwright, 144
 — v. Constant, (Evidence), 292; (Practice, in Equity), 585
 — v. Corles, 578
 — v. Douglas, 343
 — v. Hartley, (Arbitration), 36; (Costs, at Law), 216; (Interest), 365
 — v. Harwood, 581
 — v. Howell, 331
 — v. Hull Glass Co., 171
 — v. Hunt, 371
 — v. Hurst, 235
 — v. Leathart, 509
 — v. Lloyd, 446
 — v. London and North-Western Rail. Co., 523
 — v. London and South-Western Rail. Co., 524
 — v. Lovell, (Accord), 2; (Insolvent), 359; (Landlord and Tenant), 383; (Pleading, at Law), 533
 — v. Mules, 513
 — v. Parkes, 41
 — v. Peat, 386
 — v. Pincombe, (Costs, in Equity), 220; (Family Compromise), 307; (Parties), 511
 — v. Pococke, 47
 — v. Robinson, 486
 — v. Saltzman, 66
 — v. Sieveking, 672
 — v. Smith, (Pleading, in Equity), 538; (Practice, in Equity), 599; (Trust and Trustee), 714

- Smith v. Stewart, 741
 — v. Telt, 277
 — v. Tett, 277
 — v. Thorne, 450
 — v. Trowsdale, 3
 — v. Winter, (Account stated), 7; (Payment), 527
 Smyth's Settlement, 711
 — v. Carter, 349
 — v. Simpson, 480
 Sneed v. Sneed, 538
 Sneider v. Mangino, 617
 Soar v. Dalby, 481
 Solley v. Wood, 47
 Solomon v. Graham, 642
 — v. Howard, 566
 Soltau v. De Held; 350
 Somers, ex parte, (Inferior Court), 343; (Insolvent), 358
 Somervill v. Hawkins, 675
 Somes v. Currie, 149
 Soudes' Will, in re, 558
 Southall v. Rigg, 104
 Southampton and Dorchester Rail. Co., in re, 400
 South Devon Rail Co., in re, 397
 South-Eastern Rail. Co. v. Brogden, 5
 — v. Dorking, 637
 — v. European and American Electric Printing Telegraph Co., 147
 — v. Knott, 681
 — v. Regina, 621
 — v. Richardson, 396
 — v. South-Western Rail. Co., 279
 — v. Submarine Telegraph Co., 535
 Southern v. Wollaston, 433
 South Leith, Parish of, v. Allen, 503
 Southmolton, Mayor, &c. of, v. Attorney General, (Charity), 130, 135, 138
 Southouse v. Bate, 419
 South Leith Parish v. Allen, 503
 South Staffordshire Rail. Co. v. Burnside, (Bankruptcy), 71, 74
 — v. Hall, (Lands Clauses Act), 395, 396
 South Wales Rail. Co., in re, 400
 — v. Wythes, 679
 South Yorkshire Rail. and River Dun Co. v. Great Northern Rail. Co., (Railway), 622, 623
 Sparrow, ex parte, 73
 — v. Josselyn, 428
 — v. Oxford, Worcester and Wolverhampton Rail. Co., (Lands Clauses Act), 391; (Practice, in Equity), 591
 Spence's case, 182
 Spencer, in re, 711
 Spickernell v. Hotham, (Limitations), 451; (Practice, in Equity), 601
 Spooner's Estate, in re, 400
 — Trust, in re, 554
 — v. Payne, 360
 Sporle v. Whayman, 479
 Spottiswoode's case, 136
 Spradbery v. Gillam, 526
 Sprague, ex parte, 76
 Springfield, ex parte, 612
 Sprye v. Reynell, (Costs, in Equity), 220; (Fraud), 312
 Spurrell v. Spurrell, 744
 Spyer v. Hyatt, 272
 Squire v. Ford, 237
 Stables, in re, 333
 Stacey v. Southey, 604
 Stackle v. Winter, 535
 Staffordshire and Shropshire Rail. Co., in re, 182
 Stahlschmidt v. Lett, (Dower), 272; (Executor), 301
 Stainbank v. Fenning, 666
 — v. Shepard, 667
 Staines v. Giffard, 598
 Stainton v. Carron Co., 535
 — v. Chadwick, (Pleading, in Equity), 538; (Practice, in Equity), 602
 Stancliffe v. Clarke, (Inferior Court), 342, 345
 Standish v. Liverpool, Mayor of, 392
 Staner, ex parte, 84
 Stanger v. Wilkins, 76
 Staniland v. Willott, (Costs, in Equity), 219; (Trust and Trustee), 699
 Stanley v. Wrigley, 511
 Stansfield v. Hellawell, 643
 — v. Hobson, (Mortgage), 484; (Parties), 510
 Stanton, ex parte, 82
 — v. Collier, 361
 — v. Holmes, 537
 — v. Percival, (Evidence), 293; (Pleading, in Equity), 537; (Trust and Trustee), 706
 — v. Tattersall, 724
 Staples, ex parte, 397
 Stapleton v. Croft, 760
 — v. Stapleton, 741
 Stappylton v. Clough, 286
 Star v. Newberry, 601
 Staveley v. Alcock, 266
 Staverton Parish v. Ashburton Parish, 28
 —, Churchwardens, &c. v. Ashburton, Churchwardens, &c., 546
 Stead v. Banks, 486
 — v. Platt, (Curtesy), 229; (Legacy), 426
 Stedman v. Collett, 54
 — v. Hart, 448
 Steel v. Schomberg, 668
 Steele, in re, (Attorney and Solicitor), 55; (Bankruptcy), 64
 — v. Haddock, 534
 Steele v. Williams, 476
 Steiner v. Heald, 518
 Stent v. Wickens, (Judgment), 371; (Practice, in Equity), 595
 Stephens v. Gadsden, 557
 — v. Hotham, 296
 — v. Wanklin, 588
 Stephenson, ex parte, 653
 —, in re, 653
 — v. Higginson, 274
 — v. Raine, 339
 Stevens v. Benning, 206
 — v. Midland Rail. Co., 460
 — v. South Devon Rail. Co., (Company), 166; (Practice, in Equity), 604
 — v. Stevens, 238
 — v. Van Voorst, 653
 — v. Williams, 222
 Stevenson, in re, 58
 — v. Gullan, 414
 — v. Newnham, (Action), 11; (Bankruptcy), 65, 68; (Malice), 460
 Steward's Estate, in re, 398
 Stewart's Trusts, in re, 201
 — v. Anglo-Californian Gold Mining Co., 170
 — v. Collins, 81
 — v. M'Kean, 824
 — v. Stewart, 223
 — v. Jones, 336
 Stilwell v. Mellersh, 296; (Practice, in Equity), 598; (Will), 757
 Stobart v. Todd, 587
 Stocker v. Brockelbank, 512
 — v. Dean, 606
 Stocks, ex parte, 180
 — v. Dobson, 370
 Stockton and Darlington Rail. Co. v. Fox, 565
 Stoessiger v. South-Eastern Rail. Co., 99
 Stokes v. Grissell, (Costs, at Law), 212; (Practice, at Law), 570
 — v. Salomons, 253
 — v. Trumper, 49
 Stone v. Davies, 574
 — v. Godfrey, 501
 — v. Jackson, 326
 — v. Van Heythuysen, 234
 Stones v. Rowton, 704
 Storm v. Stirling, 99
 Storrs v. Benbow, 411
 Storry v. Walsh, 726
 Story, ex parte, 618
 — v. Finnis, (Distress), 268; (Payment), 527
 Strachan's Estate, in re, 219
 — v. Heard, 29
 Straffon's Executors, ex parte, 184
 Strafford, re, 55
 Stratton v. Pettit, 406
 Stretton v. Ashmall, 709
 Strickland v. Turner, 476
 Strong v. Hawkes, 477

- Strong v. Moore, 578
 — v. Strong, (Fraud), 312; (Trust and Trustee), 701
 Stroud v. Norman, 555
 Stroughill v. Anstey, 263
 Strutt v. Braithwaite, 551
 Stuart v. Lloyd, 574
 — v. London and North-Western Rail. Co., 678
 Stultz, in re, 430
 Stump v. Gaby, 240
 Sturgess v. Joy, 360
 Sturgis, ex parte, 79
 — v. Curzon, 569
 — v. Dunn, 258
 Sturt, ex parte, 84
 Sudlow v. Dutch Rhenish Rail. Co., 309
 Sullivan v. Beavan, 220
 Summerfield v. Prichard, 583
 Sunderland, Freeman and Stallingers of, v. Durham, Bishop of, 592
 Sunderland Marine Insurance Co. v. Kearney, 506
 Surcombe v. Pinniger, 314
 Surtees v. Parkin, 262
 Sutcliffe v. Cole, 261
 Sutherland v. Mills, 280
 — v. Sutherland, 584
 — v. Wills, (Error), 280; (Parties), 507
 Suitors of Court of Chancery, in re, 689
 Sutton, in re, 86
 — Harbour Improvement Co. v. Hitchins, (Costs, in Equity), 219; (Lands Clauses Act), 393, 396
 Swallow v. Binns, (Practice, in Equity), 604; (Settlement), 652
 Swan v. Holmes, (Will), 750, 760
 Swann v. Dakins, (Arrest), 39; (Habeas Corpus), 325
 — v. Wortley, 587
 Swansea Dock Co. v. Levien, 151
 Swatman v. Ambler, (Lease), 407; (Revenue), 643
 Sweet v. Benning, (Copyright), 205, 206
 Sweeting v. Darthez, 700
 — v. Sweeting, 441
 Swift v. Grazebrook, 602
 Swinborne v. Nelson, 537
 Swinbourne v. Carter, 215
 Swindell, in re, 458
 Symes v. Magnay, 367
 Symons v. May, 359

 Taff Vale Rail. Co. v. Giles, 160
 Taft v. Harrison, 172
 Talbot, ex parte, 188
 — v. La Roche, 525
 Tallis v. Tallis, 196; (Covenant), 228; (Practice, at Law), 564
 Tambisco v. Pacifico, 215
 Tancred v. Leyland, 268
 Tanner, ex parte, (Company), 179; (Devise), 258
 Tanner v. Christian, 609
 — v. Woolmer, (Guarantee), 324; (Indemnity), 331
 Taplin v. Florence, 444
 Tapp v. Tanner, 219
 Tarleton v. Liddell, (Devise), 239; (Fraud), 312
 Tarrant v. Baker, 13
 Tate v. Leithead, 271
 Tatham v. Parker, 360
 — v. Platt, 681
 Tatlock v. Jenkins, 747
 Tayler v. Taylor, 459
 Taylor, ex parte, 72
 — in re, (Attorney and Solicitor), 54, 55; (Bankruptcy), 68; (Legacy), 440
 —'s Settlement, in re, 201
 — v. Addyman, 244*
 — v. Austen, 754
 — v. Best, 20
 — v. Bullen, 735
 — v. Crowland Gas and Coke Co., 212
 — v. Frobisher, 433
 — v. Gilbertson, 724
 — v. Hawkins, 675
 — v. Loft, (Jury), 373; (Sewers), 656
 — v. Nesfield, (Action), 13; (Judgment), 369
 — v. Richardson, 745
 — v. Taylor, (Conversion), 201*; (Injunction), 350; (Will), 743
 — v. Warrington, 656
 Tempny v. Rigby, 214
 Temple v. Ecclesiastical Commissioners for England, 687
 — v. Pullen, (Bankruptcy), 70; (Bills and Notes), 101
 Templeman, in re, 58
 Tench v. Cheese, (Legacy), 422; (Thellusson Act), 691
 Terrell, ex parte, 177
 — v. Hutton, 177
 Terry's Will, in re, 415
 Tetley v. Easton, 521
 — v. Taylor, 80
 Tetlow v. Ashton, 740
 Teulon v. Teulon, 428
 Thackwell v. Gardiner, (Baron and Feme), 92; (Trust and Trustee), 705
 Tharp, in re, 193
 Tharratt v. Trevor, 210
 Tharrett v. Trevor, 49
 Theobald v. Railway Passengers' Assurance Co., (Damages), 230; (Insurance), 365
 Thicknesse v. Acton, 605
 Thistlethwayte's Trust, 411
 — v. Garner, 601
 Thol v. Leaske, 761
 Thom v. Bigland, (Fraud), 311; (Principal and Agent), 608
 Thomas, in re, (Infant), 333; (Lunatic), 459
 Thomas v. Colworth, 578
 — v. Cross, 527
 — v. Dunning, 510
 — v. Pinnell, 361
 — v. Russell, 303
 — v. Stephenson, 739
 — v. Walker, 572
 — v. Watkins, (Distress), 267; (Pleading, at Law), 533
 Thompson, ex parte, 190
 —'s Trusts, in re, 412
 — v. Beasley, 415
 — v. Bell, (Bankers), 63; (Debtor and Creditor), 234
 — v. Daniel, 496
 — v. Drew, 488
 — v. Falk, 616
 — v. Gillespy, 659
 — v. Harding, 301
 — v. Knowles, 565
 — v. Norris, 176
 — v. Nye, 675
 — v. Partridge, 293
 — v. Sheppard, 527
 — v. Teulon, (Legacy), 428; (Practice, in Equity), 583; (Will), 743
 — v. Whatley, 357
 Thomson, in re, 47
 —'s Trusts, 425
 Thornber v. Wilson, 492
 Thorne v. Smith, (Bills and Notes), 105; (Payment), 527
 Thornhill's Estate Act, in re, 594
 — v. Copleston, 601
 — v. Manning, 485
 — v. Thornhill, (Practice, in Equity), 594, 600
 Thornthwaite, ex parte, 70
 Thornton v. Court, 229
 — v. Ellis, 490
 — v. Kempson, 491
 Thorp v. Owen, (Practice, in Equity), 597; (Devise), 248
 — v. Thorp, 700
 Thoys v. Hobbs, 357
 Thurgood, in re, 58
 Thurston v. Smith, 575
 Tibbits v. Phillips, 514
 Tibble v. Beadon, 737
 Tickner v. Smith, (Executor), 300, 302
 Tidd v. Lister, (Annuity), 25; (Baron and Feme), 90; (Devise), 262
 Tidman v. Ainslie, 443
 Tielens v. Hooper, 225
 Tierney, in re, (Affidavit), 18; (Fine and Recovery), 307, 308
 — v. Wood, 698
 Tiffin v. Longman, 414
 Tillstone's Trust, in re, 711
 Timmis v. Gibbins, (Bankers), 63; (Money lent), 475
 Tindal, ex parte, 85
 —, in re, 85
 Tinkler's Trusts, in re, 436

- Tippins v. Coates, 110
 Tiverton Market Act, in re, 258
 Tobacco-pipe Makers Co. v. Loder, 233, 448
 Todd, ex parte, 71
 —, in re, 597
 — v. Kellage, 466
 — v. Kerich, 466
 Toft v. Stephenson, 450
 — v. Stevenson, 728
 Toller v. Attwood, 256
 Tomson v. Judge, (Attorney and Solicitor), 51; (Practice, in Equity), 574
 Tookey's Trust, in re, 255
 Toplin v. Lomas, 314
 Toplis v. Hurrell, 297
 Topping, in re goods of, 223
 — v. Howard, 652
 Torre v. Brown, 748
 — v. Torre, 655
 Torrington v. Bowman, 255
 Toulmin v. Reid, 366
 Tournay v. White, 503
 Towne v. D'Heinrich, 717
 Townes v. Mead, 449
 Townley v. Bedwell, 602
 Townsend, in re, 459
 Tozer v. Mashford, 674
 Tracey v. Lawrence, 484
 Trail v. Bull, 433
 Tratt, in re, 86
 Travis v. Milne, (Partners), 512, 517
 Treegard v. Barnes, 540
 Trent v. Hunt, (Distress), 266; (Mortgage), 480
 Tress v. Savage, (Landlord and Tenant), 382, 383; (Lease), 406
 Trevillian v. Exeter, Mayor of, 479
 Trevor v. Blucke, 689
 Tribe v. Newland, 422
 Trilley v. Keefe, 574
 Trimmel v. Fell, 555
 Trimmer v. Danby, 26
 Trinity College, Cambridge, in re, 717
 Triston v. Hardey, (Evidence), 294; (Insurance), 363
 Troughton v. Hunter, 517
 Truscott v. Lantour, 369
 Trutch v. Lamprell, 701
 Tryddyn, Surveyors of Highways of, in re, 328
 Trye v. Gloucester, Corporation of, 490
 — v. Trye, 598
 Tucker v. Hernaman, (Bankruptcy), 72; (Practice, in Equity), 581
 Tudor v. Morris, 510
 Tudway v. Jones, 361
 Tuer v. Turner, (Baron and Feme), 91; (Will), 750
 Tulk v. Hart, 743
 Tunstall, ex parte, 714
 —'s Will, in re, 714
 Tupper v. Tupper, 434
 Turnbull, in re, 293
 — v. Warne, 578
 Turner, ex parte, (Attorney and Solicitor), 57; (Bankruptcy), 72, 86
 — v. Berry, 212
 — v. Blamire, 352
 — v. Cameron's Coalbrook Steam Coal, and Swansea, and Laughor Rail Co., (Mortgage), 480; (Trespass), 694
 — v. Collins, (Evidence), 283; (Payment), 526; (Practice, at Law), 563
 — v. Evans, (Contract), 196; (Covenant), 228
 — v. Letts, 59
 — v. Liverpool Docks, Trustees of, 688
 — v. Sargent, 750
 — v. Turner, (Baron and Feme), 95; (Power), 554
 Turney v. Dodwell, 453
 Two Sicilies, King of, v. Peninsular and Oriental Steam Packet Co., (Foreign Law), 309; (Shipping), 669
 — v. Wilcox, (Foreign Law), 309; (Practice, in Equity), 588; (Inspection), 615
 Twyman v. Knowles, 231
 Tylee v. Tylee, 599
 — v. Webb, 48
 Tyler's Trusts, in re, 712
 Tynte v. Buller, 286
 Tyrrell v. Clark, 432
 Tyther, in re, 56
 Udney v. East India Co., 568
 Udny v. East India Co., 643
 Underwood, ex parte, 190
 — v. Wing, 291
 Universal Salvage Co., in re, 171
 Uphill, ex parte, 185
 Upfull's Trust, in re, 455
 Vale of Neath and South Wales Brewery Joint-Stock Co., in re, (Company), 181, 182
 Valpy v. Oakeley, (Bankruptcy), 77; (Damages), 231
 Van Baggen v. Baines, 658
 Vansittart v. Taylor, 567
 Vardy, in re, 56
 Varney v. Forward, 577
 Varteg Ironworks Wesleyan Chapel, in re, 137
 Vaughan v. Buck, 89
 — v. Vanderstegen, (Attorney and Solicitor), 59; (Baron and Feme), 93*; (Mortgage), 479
 Vauxhall Bridge Co. v. Sawyer, 401
 Vavasour, in re, 455
 Versturme v. Gardiner, 651
 Vick v. Sueter, 258
 Vidi v. Smith, 524
 Viner v. Hawkins, 359
 Vines, in re, 57
 Vincent v. Godson, 16
 — v. Sodor and Man, Bishop of, 552
 — v. Watts, 573
 Violet, ex parte, 359
 Volant v. Soyer, 288
 Voller v. Carter, 247
 Von Dadelzen v. Swann, 686
 Voyle v. Hughes, 733
 Wace v. Mallard, 420
 Wade v. Dowling, 34
 — v. Hopkinson, (Infant), 335; (Settlement), 651
 Wadsworth v. Bentley, 533
 — v. Spain, Queen of, 44
 Wagner v. Imbrie, (Bankruptcy), 83; (Practice, at Law), 565
 Wainman v. Field, 265
 Waite v. Combes, 418
 Wakefield, ex parte, 84
 Walbrook, St. John's, Rector, &c. of, v. Parishioners of, 138
 Walcot v. Botfield, 754
 Waldron v. Frances, 220
 — v. Sloper, 483
 Waley's Trust, in re, 433
 Walker, ex parte, 67
 — in re, (Attorney and Solicitor), 55; (Lands Clauses Act), 399
 —'s Estate, in re, (Conversion), 201; (Devise), 252
 — v. Bentley, 693
 — v. British Guarantee Association, 321
 — v. Broadhurst, 331
 — v. Drury, 90
 — v. Edmondson, (Bankruptcy), 64, 67, 80; (Insolvent), 360
 — v. Mower, 749
 — v. Simpson, 428
 — v. Tipping, (Legacy), 438; (Will), 752
 — v. York and North Midland Rail Co., 122
 Wallace v. Anderson, 651
 Waller v. Drakeford, (Estoppel), 231; (Principal and Agent), 607
 Wallington v. Dale, (Patent), 518; 521*
 Wallis v. Bastard, 730
 — v. Sarel, 729
 Walmsley v. Jowett, 559
 Walsh v. Ionides, 338
 — v. Southwell, 640
 — v. Walsh, 334
 Walshe v. Provan, 670
 Walstab, ex parte, 183
 Walter v. Selve, 350
 Walters v. Howells, 374
 Waltham v. Goodier, 373
 Walthev v. Crofts, 143
 Warburgh v. Tucker, 71
 Warburton v. Hill, 371

- Warbuton v. Warbuton, 271
 Ward v. Bromhead, 569
 — v. Burbury, 256
 — v. Cartwright, 579
 — v. Dickin, 287
 — v. Homfray, 293
 — v. Oxford, Worcester and Wolverhampton Rail. Co., 676
 — v. Ward, (Easement), 273;
 (Trust and Trustee), 703
 Warde v. Warde, (Baron and Feme),
 95; (Settlement), 655
 Ware v. Cumberlege, 492
 — v. Egmont, 728
 — v. Polhill, 402
 — v. Regent's Canal Co., (Lands
 Clauses Act), 393; (Way), 738
 Waring, in re, 89
 Warkworth Dock Co., ex parte,
 176
 Warne, in re, 308
 Warner v. Warner, 416
 Warrington, ex parte, 719
 — v. Early, 100
 Washbourne, ex parte, 68
 Wason v. Wareing, 613
 Wass, in re, 70
 Warter v. Anderson, 704
 Warwick, ex parte, 83
 — in re, 83
 — and Worcester Rail. Co., in
 re, 191
 — v. Cox, 576
 — v. Hawkins, 421
 — v. Hooper, 523
 Waterfall, ex parte, 71
 Waterford, Wexford, Wicklow and
 Dublin Rail. Co. v. Pid-
 cock, 151
 — v. Dalbiac, 152
 Waterhouse v. Stansfield, (Conflict
 of Laws), 193; (Foreign Law),
 309
 Waters v. Howells, 374
 — v. Towers, 231
 — v. Wood, 756
 Watkins v. Atchison, 588
 — v. Great Northern Rail. Co.,
 10
 — v. Williams, (Devise), 246;
 (Partition), 511
 Watlington v. Waldron, 746
 Watson, ex parte, 67
 — in re, 67
 — v. Alcock, 612
 — v. Humphrey, (Bankruptcy),
 67; (Insolvent), 359
 — v. Humphries, 762
 — v. Knight, 236
 — v. Lyon, 59
 — v. Marshall, 90
 — v. Marston, 723
 — v. Spratley, 314
 — v. Ward, (Distress), 266;
 (Landlord and Tenant),
 388
 — v. Watson, 272
 — v. Waud, 266
 Watson v. Young, 509
 Watts, in re, (Trust and Trustee),
 703, 713
 — v. Jefferyes, 371*
 — v. Porter, 688
 — v. Rees, 302
 — v. Salter, 167
 — v. Shrimpton, (Baron and
 Feme), 92; (Power), 557
 — v. Symes, (Mortgage), 485;
 (Practice, in Equity), 602
 Wauda, ex parte, 744
 Waugh, in re, 55
 —'s Trust, in re, 713
 — v. Middleton, 81
 — v. Waddell, (Attorney and
 Solicitor), 54, 55
 — v. Wyche, 706
 Way v. East, 491
 Wayn v. Lewis, 486
 Wayne v. Hanham, 485
 Weale v. Ollive, 734
 Weaver v. Floyd, 466
 Webb, ex parte, 71
 — v. Adkins, 569
 — v. Atkins, (Executor), 302;
 (Pleading, at Law), 530
 — v. Byng, 756
 — v. Direct London and Ports-
 mouth Rail. Co., (Rail-
 way), 623; (Specific Per-
 formance), 678
 — v. Haycock, 289
 — v. Hewlett, 86
 — v. Ledsam, 703
 — v. Woolls, 421
 Webster, Settled Estates of, in re,
 400
 — v. Emery, (Amendment),
 22; (Practice, at Law),
 570
 — v. Kirk, 448
 — v. South-Eastern Rail. Co.,
 351
 — v. Webster, 94
 Weddall v. Nixon, 725
 Wedderburn v. Wedderburn, (Prac-
 tice, in Equity), 589, 594
 Wegener v. Smith, 672
 Weiss, in re, 175
 Welch, in re, 332
 Welland, ex parte, 44
 Wellesley v. Mornington, 41
 — v. Wellesley, (Costs, in
 Equity), 222; (Trust and
 Trustee), 714
 — v. Withers, 204
 Wells v. Wales, 599
 — v. Wells, 434
 Wendron, Churchwardens, &c. of
 v. Stithians, Churchwardens, &c.
 of, 545
 Wenman v. Ash, 442
 Were, in re, 714
 Wesson v. Alcard or Allcard, 80
 West, ex parte, 69
 — v. Jackson, 42
 — v. Jones, 483
 Westbrook v. Australian Royal
 Mail Steam Navigation
 Co., 569*
 — v. Blythe, 370
 Westbury-upon-Severn Union case,
 542
 Westby v. Westby, 605
 Westoby v. Day, 44
 Weston v. Filer, 713
 West London Rail. Co. v. London
 and North-Western Rail. Co. 165
 Westwood v. Southey, 424
 Wetherell, ex parte, (Attorney and
 Solicitor), 56, 58
 Wetherill v. Garbutt, 489
 Whalley, in re, 55
 — v. Bramwell, 493
 — v. Whalley, 50
 Wharton, in re, 455
 Wheatley v. Bastow, (Attorney and
 Solicitor), 48; (Principal
 and Surety), 613
 — v. Boyd, (Landlord and Ten-
 ant), 388; (Parties), 507
 Wheeler, in re, 488
 — v. Addams, 651
 — v. Bavidge, 531
 — v. Claydon, 261
 Whicker v. Hume, (Charity), 130;
 (Costs, in Equity), 221; (Dom-
 cil), 270
 Whieldon v. Spode, 421
 Whitaker, ex parte, 85
 — v. Wisbey, 41
 Whitbread v. Smith, 477
 White v. Barker, 580
 — v. Barton, 596
 — v. Binstead, 657
 — v. Bluet, 42
 — v. Cohen, 351
 — v. Crisp, 666
 — v. Eastern Union Rail. Co.,
 374
 — v. Garden, 644
 — v. Grane, 555
 — v. Jackson, 299
 — v. Morris, (Action), 13; (In-
 ferior Court), 337; (Tres-
 pass), 695
 — v. Mullett, 75
 — v. Wilson, 555
 Whitehead v. Lord, (Attorney and
 Solicitor), 48; (Death),
 232; (Limitations), 448
 — v. Rennett, 264
 Whitfield v. Parfitt, 673
 Whitlow v. Dilworth, 91
 Whitmore v. Mackeson, 47
 Whittington v. Gooding, 509
 Whitwick, Churchwardens of, v.
 Stinson, 117
 Whitworth v. Rhodes, 485
 Whyman v. Garth, 284
 — v. Gath, 284
 Wickens v. Goatley, (Evidence),
 283; (Insolvent), 360
 Wickham v. Gattrell, 233
 — v. Nicholson, 486

- Widdicombe v. Miller, 425
 Wigan v. Rowland, (Legacy), 411;
 (Practice, in Equity), 583
 Wiggins v. Wiggins, 424
 Wigglesworth v. Wigglesworth, 701
 Wilbraham v. Livesey, 726
 Wilde v. Sheridan, 340
 — v. Waters, 697
 Wildes v. Davies, (Legacy), 410,
 435; (Thellusson Act),
 691
 — v. Morris, 657
 Wiles v. Gresham, 701
 — v. Woodward, 242
 Wilkes, ex parte, 80
 —'s Charity, in re, 134
 Wilkin v. Manning, 357
 — v. Reed, 22
 Wilkinson, in re, 69
 — v. Anglo-Californian Gold
 Mining Co., 172
 — v. Bewicke, 744
 — v. Fowkes, (Parties), 508;
 (Practice, in Equity), 573
 — v. Hartley, 722
 — v. Kirby, 277
 — v. Sharland, 531
 — v. Stringer, 587
 — v. Wilkinson, 446
 Willetts v. Green, 467
 Williams, ex parte, (Company),
 173; (Poor), 550
 —, in re, 56; (Bankruptcy), 74;
 (Justice of the Peace),
 377; (Trust and Trustee),
 712
 — v. Admiralty Commissioners,
 561
 — v. Chard, 573
 — v. Clark, 427
 — v. Dormer, 269
 — v. Evans, 252
 — v. Great Western Rail. Co.,
 121
 — v. Holmes, 266*
 — v. Lomas, 701
 — v. London Commercial Ex-
 change Co., 3
 — v. Powell, 299
 — v. Richards, 499
 — v. Roberts, 267
 — v. Smith, 450
 — v. Trye, 572
 — v. Williams, (Evidence), 293;
 (Legacy), 420; (Vendor
 and Purchaser), 723
 — v. Wilson, 32
 Williamson, in re, 71
 — v. Parker, 573
 — v. Wootton, 681
 Willins v. Smith, 450
 Willis v. Childe, (Charity), 134;
 (Practice, in Equity), 595
 Willoughby v. Horridge, 499
 Wilmot v. Rose, 644
 Wilson's Will, in re, 129
 — v. Bennett, (Devise), 251;
 (Trust and Trustee), 707
 Wilson v. Birkenhead, Lancashire
 and Cheshire Junction
 Rail. Co., 152
 — v. Braddyll, (Pleading, at
 Law), 529; (Release), 642
 — v. Caledonian Rail. Co., 562
 — v. Dunsany, 16
 — v. Eden, 219; (Injunction),
 251*; (Practice, in Equity),
 593; (Will), 745
 — v. Emmett, (Attorney and
 Solicitor), 50, 55
 — v. Liverpool, Overseers of,
 457
 — v. Mount, 426
 — v. Robertson, 672
 — v. Wilson, (Account stated),
 6; (Power), 557; (Specific Per-
 formance), 676; (Thellusson Act),
 690; (Vendor and Purchaser),
 725
 Wilton v. Dunn, 480
 — v. Hill, (Practice, in Equity),
 597, 601
 Wiltshier v. Cottrell, (Deed), 241;
 (Practice, in Equity), 697
 Wilts, Somerset and Weymouth
 Rail. Co., in re, 260
 Winch v. Birkenhead, Lancashire
 and Cheshire Junction
 Rail. Co., 163
 — v. Williams, (Affidavit), 18;
 (Practice, at Law), 570
 — v. Winch, (Executor), 302;
 (Inferior Court), 340
 Winchester, Bishop of, ex parte, 398
 Windsor v. Cross, 597
 Wing v. Harvey, (Insurance), 364;
 (Practice, in Equity), 584
 Winship v. Hudspeth, 738
 Winterbottom, re, 55
 — v. Tayloe, 539
 Winthrop v. Elderton, 538
 Wisden v. Wisden, (Devise), 249,
 256, 262
 Wise, ex parte, (Company), 173;
 (Trust and Trustee), 714
 Wisewold, in re, 58
 Witham v. Salvin, 573
 Witte, ex parte, 334
 Wolton v. Gavin, (Evidence), 290;
 (Mutiny), 498; (Enlistment),
 675
 Wolverhampton, Chester and Bir-
 kenhead Junction Rail. Co., in
 re, 180
 Wolverhampton, Chester and Bir-
 kenhead Rail. Co., in re, 188
 Wombwell v. Hanrott, 554
 Wood v. Adcock, 31
 — v. Beetlestone, 203
 — v. Copper Miners Co., (Arbi-
 tration), 36; (Covenant),
 226; (Statute), 687
 — v. Cox, 19
 —, ex parte, (Bankers), 62;
 (Bankruptcy), 67, 86; (Com-
 pany), 181
 Wood v. Finnis, (Administration),
 15; (Sheriff), 657
 — v. Homfray, 589
 — v. Logsden, 600
 — v. Ordish, 262
 — v. Scarth, 293
 — v. Sutcliffe, 352
 Woodburne v. Woodburne, 746
 Woodcock v. Oxford and Worcester
 Rail. Co., 614
 Woodhead v. Turner, 438
 Woodhouse v. Herrick, 247
 Woodman v. Robinson, (Injunc-
 tion), 351, 353
 Woods, ex parte, (Bankruptcy),
 81, 83
 — v. Finnis, 15
 — v. Lyne, 367
 — v. Midgley, 536
 — v. Rowcliffe, 109
 — v. Surr, 510
 — v. Townley, 745
 Woodward v. Watts, 375
 Wooldridge, ex parte, 84
 Woolmer, ex parte, (Company),
 175, 189
 Worcester Corn Exchange, in re,
 187
 Worley v. Worley, 750
 Worsley v. South Devon Rail. Co.,
 393
 Worth v. Mackenzie, 579
 — v. Newton, 113
 Worthington v. Wigington, 760
 Wortham, ex parte, 48
 Worts v. Cubitt, 417
 Wragge, ex parte, 84
 Wright's Settlement, in re, 711
 — Trusts, re, (Assignment),
 41; (Trust and Trustee),
 711
 — v. Barlow, 576
 — v. Bigg, 608
 — v. Callender, 436
 — v. Holdgate, 97
 — v. King, 335
 — v. Lukes, 596
 — v. Maidstone, 107
 — v. Morrey, 618
 — v. Vanderplank, 501
 — v. Vernon, (Devise), 257;
 (Pleading, in Equity),
 536; (Practice, in Equity),
 599; (Inspection), 615
 — v. Warren, 418
 — v. Wright, 430
 Wryghte, ex parte, (Company),
 176, 178
 Wyersdale School, in re, 133
 Wyke v. Rogers, 611
 Wylam Steam Fuel Co. v. Street,
 85
 Wylde, in re, 459
 —'s Estate, 410
 Wynch's Trust, 747
 — v. Grant, (Executor), 301;
 (Trust and Trustee), 701
 Wyndham v. Fane, 753

- Yalden, in re, 419
 Yate v. Lighthead, 591
 Yates, ex parte, 705
 —'s Trust, in re, 423
 — v. Dunster, (Damages), 231;
 (Landlord and Tenant),
 386
 — v. Eastwood, 475
 — v. Gardiner, 6
 — v. Maddan, 435
 — v. Plumbe, 485
 Yearsley v. Yearsley, 581
 Yeates v. Roberts, 321
 Yeatman v. Mousley, 572
 Yeats v. Yeats, 437
 Yelland, ex parte, 183
- Yellowly v. Gower, 560
 Yonge v. Furze, 26
 — v. Reynell, 613
 York and North Midland Rail. Co.
 v. Hudson, (Company),
 167; (Practice, in Equity),
 602
 — v. Regina, 156
 Yorke v. Smith, (Inferior Court),
 344; (Sale), 344
 York, Newcastle and Berwick Rail-
 way v. Crisp, 123
 Young, ex parte, 86
 — in re, 33
 —'s Settlement, in re, 426
- Young v. Clare Hall, Masters, &c.
 of, 692
 — v. Cooper, (Bankruptcy), 77;
 (Trover), 698
 — v. Cuthbertson, 326
 — v. Hodges, 509
 — v. Roberts, 484
 — v. Ward, 510
 — v. Waud, 66
 — v. White, 525
 Zulueta v. Tyrie, 659
 — v. Vinent, (Injunction), 355;
 (Practice, in Equity), 574, 579*,
 605; (Principal and Agent), 610
 Zwilchenbart v. Henderson, 670

